BUSINESS LAW

UNIT 1

THE CONCEPT OF LAW

Nature of Law

1.1 The Concept of Law

Assume that you lend money to your neighbor. He/she agrees to pay you back within one month. Your neighbor does not pay you on the agreed date. You ask him/her to pay you the money. Yet he/she refuses to pay the money. You ask for your money through other persons. Still he/she is not willing to pay it. You want to get your money back. What do you do then? You take your case to a court. You state your case against your neighbor on the basis of law. The court decides the case on the basis of law. Law helps you to protect your interests. You have an interest in your property. You have an interest in your life. You have an interest in your body. You have an interest in the agreement you make with others. You have an interest in your family. You use the law to protect these interests.

Law, therefore, is a collection of binding rules made to protect the interests of persons. In addition to protecting the interests of persons, law also creates institutions. For example, you establish ministries, commissions and authorities by law. Law, further, facilitates transactions between persons. You have, for instance, made a loan agreement and the agreement does not include the date of payment. The law will fix the date of payment for you. So law serves to fill a gap in private agreements.

1.2 Features of Legal Rules

Generality is one of the key elements of legal rules. Legal rules address persons generally and refer to human behaviors regulated in the general manner.

Addressee: Legal rules are general statements. Legal rules are not written for a single person. Legal rules address persons generally. Legal rules are written for all or certain category of persons.

Illustration

1. For example, suppose there is a legal rule that states that: the debtor shall compensate the creditor. This rule is not addressed to any one particular person. The rule does not specify the address and the name of any person. The rule addresses all debtors that have to compensate creditors. The rule, likewise, addresses all creditors that deserve to get compensation. This rule is just a form.

2. Take another example. Take the legal rule: the manager shall lead the general meeting. This rule seems to be directed to a particular

person. But it is not. It is there to send the message that any person who may become the manager of a given institution is to lead the general meeting of that institution.

Behavior: Legal rules are general in the sense that they describe any possible human behavior in a general and abstract manner.

Illustration

The same initial salary shall be paid for similar jobs in a business organization. This legal rule is general in the sense that it does not specify what classes of jobs are similar and does not state how much any initial wage is to be.

Permissive: Legal rule may permit the described behavior. They are called permissive legal rules. They state what the person may do or is allowed to do.

Illustration

Every person has the freedom to enter into contract. This legal rule states that any person is within his/her right to enter into an agreement. A holder of land may fence his/her land. Again it is allowed to a holder of land to fence his/her land.

Prohibitive: Legal rules may prohibit the described behavior. Legal rules of this nature state that the person must not do or is not allowed to do it. You find these sort of legal rules in the criminal law. The message of these legal rules is: do not do it, if you do it, you will be sanctioned. Do you know the meaning of the term ``sanction``?

Illustration

For example, any person who kills another person shall be punished. Another Example. Any person who steals property shall be punished.

Legal rules, especially prohibitive legal rules, are accompanied by sanction. These type of legal rules are also referred to as mandatory legal rules. Sanction is the tooth of legal rules. Legal rules bite. Legal rules in general state that you must not behave in this or that manner, and if you do so, you will be punished or ordered to pay compensation.

Illustration

1. If you fail to pay the debt on the agreed date, you shall pay compensation in addition to the principal. The sanction here is payment of compensation.
2. A contract made by a minor shall be of no effect. The sanction in this example is giving no effect to a contract concluded by a minor.
3. If you steal property, you shall be imprisoned. Here, punishment is the sanction.

Reward Giving: Some legal rules give incentives. The message of reward giving legal rules is: if you do this, you will get this incentive.

For example, If you invest 100,000 Birr in agriculture, you will be exempted from income tax for three years.

Binding Nature: Legal rules are binding. You cannot disregard legal rules at will, especially mandatory legal rules. Whether you like the effects of complying with the legal rule or not, you must observe them. Failure to observe legal rules will lead to a sanction. Sanction can be a penal measure such as fines or death punishment or imprisonment. Sanction can be a civil measure such as payment of compensation.

Enforcement Institutions: If legal rules are violated, who enforces them into action? Who applies legal rules?

There are institutions that make and amend laws. These institutions are called lawmaking agencies. There are institutions that interpret the law. Generally law-interpreting organs are called courts and administrative tribunals. There is an institution that implements laws. This institution is known as the executive organ of the state. The executive organ of the state, created to implement legal rules, is composed of ministries, agencies and commission. Behind legal rules, thus, there are law enforcement institutions.

Illustration.

1. The Ministry of Trade and Industry is created to implement laws.
2. The Investment Commission is established to implement laws relating to investment.
3. The Ethiopian Environmental Authority is established to implement environmental laws and policies of the country.

Section 2: Sources and Division of Law

2.1 Sources of Law

The term ``source of law`` refers to the authority making and modifying binding legal rules. Who makes binding legal rules currently in Ethiopia? There are two types of authorities: federal and state.

At the federal level, the House of Peoples` Representatives makes and amends laws. The legal rules made by the House of Peoples` Representatives are called proclamations. The Council of Ministers makes legal rules in order to implement the Proclamations. The laws made by the Council of Ministers are called Regulations. Finally, the various ministries, commissions, and authorities can also make legal rule for the purpose of implementing the Regulations. These laws are called Directives. So, at the federal level, laws appear in three forms namely in the form of Proclamations, Regulations and Directives.

At the state level, there is a regional constitution. Next, there are legal rules made by each state. They are called Proclamations. Next to proclamations come Regulations. The various bureau make Regulations. You should not also forget about the FDRE Constitution. This constitution was issued in 1995. Proclamations, Regulations and Directives drive their force from the FDRE Constitution; which means

if they are inconsistent with it, they will be disregarded. The constitution is the mother of all laws in Ethiopia. The FDRE Constitution allocates power to the federal and state institutions. So the federal and state institutions know on which areas they are competent to make laws by reference to the FDRE Constitution. The constitution gives you the list of the rights of individuals with their limitations. The Constitution includes the major state guiding policies.

2.2 Division of Law

Law can be divided into several categories. You have three divisions of law: procedural, adjective and substantive.

Procedural Law

First, procedural law is an area that tells you how to enforce your right. It guides you how to write your case. It tells you what to include and what not to include in the document stating your case. It tells you where to file your case. Procedural rules enable you to identify the steps you need to take in enforcing your right. Second, in addition, procedural laws guide the courts how to process cases filed to them. In both cases, procedural laws tell you how to process cases. Procedural laws tell you the various stages in the settlement of cases. In Ethiopia, you find the procedural laws in two main documents. These are the Ethiopian Civil Procedure and the Ethiopian Criminal Procedure.

Adjective Law

Do you know the meaning of evidence? Has any body asked you to prove your allegations?

An adjective law is about evidence. Some body thinks that his/her rights are violated. This person uses, in addition to procedural law, evidence law to prove the existence of the violation.

Suppose your friend says he/she has lent you money where you do not think so. Then you will ask him/her to prove it. Your friend may produce documents or witnesses to prove that he/she has lent you money. Evidence law is a set to rules dealing with the methods of proving facts.

Illustration

Your friend has lent you money. He/She thinks that you have not paid him/her back. You think that you have paid him/her back. The issue here is whether you have paid the money back or not. In this case, witness or documents may be helpful in settling the case between you and your friend.

Substantive Law

Substantive law is a field of law that deals with the determination of the rights and obligations of persons. As you noted in the previous discussion, the violation of these rights bring the application of procedural and adjective law into play. Substantive laws rights also tell you the limits of your rights.

What are rights?

Rights legally protected interests given to persons. The decisive criterion in the definition of rights is: if violated, would the state give remedy to the holder of the interest? Duties are what a person must do or must not do. Non-compliance with your duties will lead to sanctions. Do you recall the meaning of the term ``sanction``? Generally, rights and duties are correlative. This means when you talk about rights, you are talking about duties. Substantive laws describe the interests of a person in his/her life, bodily integrity, property, name, family, etc.

Division of Substantive Law

Substantive laws are divided into three. These are: public law, private law and commercial law. Next, you will discuss the three components of substantive law.

Public Law

Public law is a portion of substantive law focusing on the relation between the state and individuals. The overriding interest balanced, in this portion of substantive law, is societal interest. Constitution law, Penal law, Administrative law and Tax law are examples of public law. The key relationship governed here is between the state and individuals and institutions.

Private Law

Would you define private law?

Private law is another segment of substantive law. Private law is also called civil law. Private law focuses on private interactions. The overriding interest is a private affair. Examples of private law are family law, property law and succession law.

Commercial Law

Would you describe a commercial law?

Commercial law is the third part of substantive law. Commercial law, as its name indicates, concentrates on the relation between businesspersons. What is a businessperson? You will learn about businesspersons later in this course. As its title suggests, the present course concentrates on the study of the legal rules and principles governing the interactions of businesspersons. Instances of commercial laws are the law of agency, the law of business organization, the law of negotiable instruments and the law of sales. You will learn about the nature of each of these topics in the various units of the present course.

UNIT 2:
THE CONCEPT OF PERSONALITY

Section 1:
Defining Personality
1.1 Definition of Personality

Can you tell the feature of legal personality?

Personality is an attribute of persons in law. Personality refers to those persons bound by law. Personality refers to right bearing entities in law. Personality also relates to those entities shouldering duties in law.

1.2 Type of Persons

Do you think that there is a difference between a human person and a company in law? Are both taken as persons in law?

Persons in law are classified into two. These are natural persons and juristic persons. You will study about juristic persons below. Now you should consider the natural persons.

Natural Persons

Can you define natural persons?

Natural persons are human beings. At the present, all human beings are persons in law. They are right bearing entities. They can shoulder duties. Historically, some human beings, for example, slaves were not persons in law. Natural persons are also known as real or physical persons.

Commencement and End of personality of Natural Persons

Can you tell the beginning of the personality of natural persons? What about its termination?

In most cases, natural persons begin to hold rights and have obligations at birth. Birth is the beginning of personality in law for natural persons. As birth marks the commencement of personality, death marks the end of personality. At the moment of death, a natural person ceases to hold rights and have obligations. In some cases, a natural person can get personality even before birth. In these exceptional cases, the conception of a child itself can give personality.

Can you explain Article 2 of the Ethiopian Civil Code?

This article states that: A child merely conceived shall be considered born whenever his interest so demands provided he is born alive and viable.

Do you see the three conditions in this article? These conditions are the interest of the child, viability and ``born alive``. A conceived child will be taken as a person in law only if that is beneficial to him/her. If person dies leaving property and a conceived child, the law gives personality to the child. The child will inherit his/her father`s property. This child should be born alive and after birth he/she should survive for 48 hours after birth. You see thus giving personality to an unborn child is for the purpose of inheritance.

Juristic Persons

Can you tell the meaning of juristic persons?

The second kind of persons is juristic persons. Juristic persons are also called artificial or fictitious persons. Juristic persons are entirely the creation of the law. Juristic persons do not exist in reality. They do not have mind. They cannot move around. But the law attaches rights and obligations to these entities. Thus juristic persons hold rights. Juristic persons also bear obligations.

Like natural persons, juristic persons have names and addresses. Like natural persons juristic persons have rights and obligations. Like natural persons, juristic persons negotiate with other persons. Like natural person, juristic persons may sue and be sued. The different business associations, ministries, commissions and authorities are juristic persons. You will learn about business associations in the later part of this course.

Commencement and End of Personality of Juristic Persons

When do you think is the beginning of the personality of juristic persons? What about the end of juristic persons?

Like natural persons, there must be time for the beginning and termination of the personality of juristic persons. The completion of certain formalities marks the beginning of the personality of juristic persons. The cancellation of the registration leads to the end of the personality of juristic persons. You will learn about these formalities in this course in discussing business associations. For the moment, you keep the following in mind. In the case of government institutions such as ministries, commissions and authorities, the publication of the establishing law in the official gazette gives personality to those institutions. These institutions should be established by a proclamation. Do you recall as to who makes proclamations in Ethiopia at present? On the other hand, the repeal of the establishing law leads to the termination of the personality of government institutions.

In the case of business associations, the registration and publication of the memorandum of association leads to the beginning of the personality of that association. And the cancellation of the memorandum of association from the register marks the end of the

personality of a business association. What is a memorandum of association? You will study about memorandum of association later in this course.

Section 2:
The Concept of Capacity of Persons

2.1 Definition

Capacity in law means the ability of persons, natural or juristic persons, to exercise rights. Capacity specifically means the ability to sue, be sued and enter into transactions. In principle, all persons possess the ability to enjoy their rights. But there are persons the law incapacitates. The law deprives certain persons of the ability to exercise their rights.

2.2 The Capacity of Juristic Persons

All juristic persons, business associations and other entities, have capacity. The capacity of juristic persons is limited by the activities mentioned in a memorandum of association in the case of business associations and in the establishing instrument in the case of other institutions.

Since juristic persons cannot think and move around, natural persons act as agents. Who are agents? There is a unit in this course allocated to the discussion of agency law. Juristic persons use the tool of agency to carry out their objectives. The natural persons hired to realize the objectives of the juristic persons act on behalf of the latter.

Illustration

1. A share company cannot decide by itself. It achieves its objective, for example, by engaging in commercial activities to obtain profit, through its board of directors, managers and employees.

2.A ministry tries to realize its objective through its various officers and employees.

2.3 The Capacity of Natural Persons

Personality is the potential to bear rights and obligations. Capacity is the ability to exercise such rights. The law gives the ability to exercise rights to natural persons. The law does not give such ability to some natural persons.

Can you identify persons who cannot exercise their rights?

Natural persons are divided into two for the purpose of determining their capacity. These are those natural persons with the age of majority and those with the age of minority. Natural persons who attain the age of 18 years are called majors or adults. In principles, this class of persons does have the capacity to exercise their rights.

The Age of Minority

Can you explain the meaning of minority?

Those natural persons below 18 are called minors or children. Like adults, minors can hold rights and bear duties. But minors cannot exercise rights themselves. There are other persons who exercise rights for the benefit of and in the name of minors. These persons are called organs of protections. The organs of protection are of two types. These are guardians and tutors. Tutors protect the property of minors. Tutors are usually adult family members. Tutors should enter into contract, for example, to but or sell property, in the name and for the interest of a minor. The guardians protect the person of minors. Guardians are responsible for upbringing and educating minors. However, minors are allowed to make small transactions, especially those transactions that are necessary for their survival. For example, a minor can buy candies or food.

The law does not allow minors to exercise their rights. They should use the organs of protection to exercise these rights. The reason is that minors are inexperienced. They cannot understand the nature of transactions and their legal effects. Adults can take advantage of this lack of experience and immaturity. They need to be protected against.

Incapable Persons

The law incapacitates certain adult persons. There are persons the court declares incapable as a result of mental problem. You take an insane person. The person cannot understand the nature of transactions. But this person has rights and duties. When a court declares this person incapable, he/she cannot exercise his/her rights. Rather a tutor will be appointed for him/her. The tutor will exercise the rights of the insane person. Adults, whose power to exercise rights withdrawn, are called judicially incapable persons.

UNIT 3: LAW OF CONTRACTS

Section 1:

Conditions for a Valid Contract

1.1 Definition

A contract is defined as: an agreement in which two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.

What are the elements of this definition?

Agreement: A contract is an agreement. But all agreements are not contracts. All contracts are agreements. For example, you agree to help your friend; you agree to attend a dinner; you agree to attend a wedding. These are promises; but they are not contracts. You can break these promises. Your friends may criticize you; but they cannot sue for not attending dinner or wedding, or for not helping your friend.

Two or More Persons: A contract must involve at least two persons. A person cannot conclude a contract with himself/herself. The persons involved may be natural persons or juristic persons.

As Between Themselves: In principle, only persons involved in an agreement may bind themselves. In principle, persons who have not involved in an agreement may not be bound by a contract. You, for example, agree to sell your cow to your friend. In this case, only you and your friend may be bound by the contract of sale of the cow. This means rights and obligations are created by the sale contract as between you and your friend. In some cases, third parties not involved in a contract may be benefited by such contract. For example, in the sale contract relating to the cow, assume you say to your friend that the price should be paid to your relative. Your relative has not participated in a contract; he/she is not a party to a contract; but he/she gets benefits from such contract, which is the right to collect the price of the cow.

Obligations: Contracts are made to create or vary or extinguish obligations. Contracts are not mere promises. Contracts are serious engagements. Contracts produce obligations. Such obligations may be modified. Such obligations may be terminated. If you bear an obligation towards another person such person may require you to perform it; if you fail to perform it, the person may sue you for damages or some other remedies.

What is variation of a contract? What is termination of a contract? To vary a contract is to modify its terms.

For example, you agree to sell a table to your friend. You agree in the contract to deliver the table a week after the date of the conclusion of the contract. Suppose later on, you agree to deliver the table to your friend two months after the date of the conclusion of the contract. You say here, the contract is varied as to the date of delivery. Suppose you agree to sell the table at Birr 200.00. Later on, you agree to make a fifty birr discount. Here, too, the contract is varied as to the amount of payment.

To extinguish a contract is to bring the obligations to an end. There are many ways of terminating a contract. For example, when you deliver the table, in the above example, to your friend and when your friend pays you the price, you say the contract is brought to an end.

Proprietary Nature: The obligation created, varied or terminated must have a proprietary nature. What is it?

1.2 Requirements for a Valid Contract

Can you identify the elements of a valid contract?

For a valid contract to exist, there must be free consent, the object of the contract is sufficiently defined and is possible and lawful, and the contract is made in the required form. You can mark three key

requirements: consent, object and form. We will explain each of them next.

Object

The object of a contract must be sufficiently defined. For example, X agrees to sell to Y his goat. If X has many goats and the goat he/she agrees to sell is not described. The contract can be invalidated for lack of sufficient description. Another example, X agrees to donate to Y his/her house. If X has many houses, if the house donated is not described, the contract may be invalidated. The object is not sufficiently clear.

The object must be possible. For example, one cannot sell the moon or the sun or the atmospheric air. Simply because no single individual can own these resources and no single individual can deliver these objects. You cannot, in addition, sell a thing that does not exist. For example, you agree to sell a table; just before the conclusion of the contract of sale relating to the table, the table is destroyed by fire or accident. The contract must be invalid.

The object must be lawful. You cannot conclude a contract to commit a crime; or you cannot agree to do or not to do what is prohibited by the law. For example, X agree to receive 1,000.00 Birr for the purpose of killing Y for B. In this case, B agrees to pay 1,000.00 Birr. The obligation of B is to pay the money. The obligation of X is to murder Y. This contract is not valid. A contract concluded to undertake theft is also illegal.

Form

Form is one of the requirements for the validity of a contract. No special form shall be required and a contract shall be valid where the parties agree. Where a special form is expressly prescribed by law, such form shall be observed. The parties may stipulate that the contract shall be made in a special form.

The principle: The principle is that a contract can be made in any form. A contract can be made by conduct. A contract can be made orally. The agreement of the parties is sufficient to form a contract.

Illustration

Ato Birru asks Ato Birratu to sell him the latter`s watch. Ato Birratu agrees to sell the watch to Ato Birru. Their agreement is not written. They do it orally. Is there a contract between Ato Birru and Ato Birratu? Yes, there is.

The Exceptions: The rule that there is no formal requirement for the conclusion of a contract has a couple of exceptions. These exceptions are the cases where the law states that a given contract must be made in writing and the cases where the parties to a given contract

agree to make in a written form. Next, the two exceptions will be explained

The law may require that the conclusion of some contracts be made in writing. This is the first exception. The following types of contracts are required to be in writing.

- Contracts creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable,
- Contracts by which an immovable is divided and any compromise relating to an immovable,
- Contracts of guarantee,
- Insurance contracts,
- Contracts binding the Government or a public administration, and
- Other contracts the Code or other laws require them to be made in writing.

Illustration

W/ro Halima agrees, orally, to sell her house to Ato Gutema. Ato Gutem pays the price to W/ro Halima. W/ro Halima delivers the house to Ato Gutema. Is there a valid contract? There is no valid contract because the contract should have been made in writing.

Why do you think the law requires the above types of contracts to be made in a written form?

In the case of contract relating to immovable things, the law appears to attach greater weight to immovable property. Thus, the law seeks to bring the importance of these assets to their attention by requiring a written document. In the case of long-term contracts, such as insurance contracts, the law requires form since it seeks to establish the provisions precisely. Generally, making contracts in writing serves two important purposes: validity requirement and evidentiary value.

The second exception to the rule that contract can be made in any form comes from the requirements of the parties to it. The parties might agree to make their contract in a written form.

Illustration

Ato Lemessa plans to sell a cow to Ato Habtamu. The two agree to make the contract in a written form. But, later, they make the contract orally. There is no valid contract between the two relating to the sale of the cow.

Now, I hope, you understand these two points: first, as a rule, contracts can be made in any form. Second, where the law or the parties require, contracts must be made in a written form. You may

rightly ask the question: what is the meaning of the term ``written form``?

Consequences of Non-Compliance with Form

If an agreement is required by law or the parties to be made in writing and such contract is made orally, then the law says that such contract is invalid. The contract would not bring the intended effect. The contract will not create rights or obligations. The parties would be put in their previous positions, which means, the parties will be reinstated in the position they would have had if the contract had not been made.

1.3 Consent and its Elements

Consent is one of the most important requirements in the law of contracts. In contracts, one can be bound only by what he/she consented to; consented should be given freely. A contract shall depend on the consent of the parties who define the object of their undertakings and agreed to be bound thereby. The scope of the contract, the kind and extent of obligations of contracting parties should be determined on the basis of agreement of the parties, which is made with intention of producing legal effect. A contract is said to be entered into when parties express their consent to each other and agreement is reached into. we will also discuss factors that destroy the free consent of the parties to a contract.

Capacity

Do you recall the meaning of capacity from the second unit of this module?

The parties to a contract should be capable. They should be in a position to give a free consent. Only contracts concluded on the basis of a free consent bind the parties. In general, a contract signed by a minor does not bind him/her. A tutor or a guardian should conclude a contract for the benefit of a minor. Generally, a judicially interdicted person cannot be bound by a contract; a tutor can sign a contract for the benefit of a judicially interdicted person.

1.4 Analysis of Offer and Acceptance

Agreements may be reached only when one party expresses his/her intention to enter into contractual bond and his/her proposal is accepted by the other party and this fact is communicated to the offeror. This process is called offer and acceptance. In this topic, you will examine the elements of consent.

Offer

Offer is a proposal that is expressed by the proposer (offeror) showing his/her willingness to do or not to do an act. Thus, when one signifies to another his/her willingness to do or not to do certain act or abstinence with a view to obtaining the assent of that other to such act or abstinence, he/she is said to be making an offer.

Can you identify the parties to offer and acceptance?

The person who makes a proposal is called offeror (proposer). The person to whom an offer is made is called offeree (proposee).

Requirements of Valid Offer

In order to have valid offer, the offer should be communicated to the targeted party. It should be expressed through physical manifestation that may be perceived through our sense. So mere mental state or non-communicated offer does not amount to offer. If there is reservation or restriction of some sort that is not expressly declared and communicated at the time of making an offer, it cannot affect position of the other contracting party for it does not be regarded as an offer.

1.5 Modes of Communication

Communication of offer may be made by any method. The end result is communication but not the instrument in which communication passes through. The mechanism of communication should be to convey the intention of the proposer to the person to whom it is directed. The usual methods of communication are communication through words (orally face to face or through communication machines etc.) written documents (e.g., letter through post office, fax or even through latest machines like internet, etc) or even through conduct (e.g, stepping into bus, taxi, taking cigarette from display of a shop, etc). Thus, a proposal (offer) may be communicated in any way, which has the effect of laying before the offeree the willingness to do or to abstain.

Offer or acceptance may be made orally or in writing or by signs normally in use or by a conduct such that in the circumstances of the case, there is no doubt as to parties agreement. The requirement is that the channel used for communication should perform the purpose and there should be no doubt for communication. Thus, communication through words to deaf person is not a communication for it does not communicate the beneficiary or writing to illiterate people.

As words or writing are not the only medium of expression, and conduct may convey as clearly as words, a promise or a consent to the proposed promise; offer and acceptance need not be formal, nor does the law of contract or sale of goods require that consent to a contract to be in writing. It can informally be made through conduct of parties, which covers not only their acts but also omission. An offer, which is expressed by conduct, is called implied offer whereas the one, which is expressed by words written or spoken, is called express offer.

Offer should be Made with a View of Obtaining the Consent of the other

Offer should be uttered, in usual case, to particular person or persons, with a view of obtaining his assent. One should propose declaring his/her intention in order to be tied with the "chain of contract"; there should not be any other motive behind.

The communication of an offer may, therefore, be complete when it comes to the knowledge of the person to whom it is made. Until offeree discovers the fact of the proposal, he/she cannot react on the basis of the offer. The Ethiopian contract law allows to collect a reward where a promise made to public to do certain act. The person who does an act is permitted to collect a reward.

1.6 Acceptance

Can you define an acceptance?

When the proposal comes to the knowledge of the person to whom it is made and the offree signifies his/her consent, the proposal is taken as accepted. An accepted proposal blinds both of the parties, the offeror and the offeree.

Requirements of Valid Offer

Communication of Acceptance

If one intends to accept the proposal (offer), he/she should express his/her intention to accept the offer to the party who offered it. The intention may be expressed through an act or omission by which the party accepting intends commutate his/her consent or which has the effect of communicating it. The principle is that there should be some external manifestation (overt act) of acceptance.

A mere mental determination to accept unaccompanied by any external manifestation will not be sufficient to form a contract. An agreement does not result from a mere state of mind: intent to accept an offer does not give rise to a contract. There must be some external manifestation of that intent by speech, writing or other acts. Manifestation of acceptance may be in the form of expressed words, written or spoken or may also be signified through conduct. Through words is the usual one; one can also communicate doing some positive action.

The only legal requirement for communication is that, the method used for communication should communicate. Words may sometimes be ineffective for communication, if communicated for example, to persons who do not hear or if that is through writing to persons who cannot read. In such cases, the only effective way may be communicating by conduct. In addition in situations where offer made to general public (general offer), it would be impossible to communicate acceptance of offer other than accepting through conduct. Because the nature of offer itself in this instance requires

mere action on the part of the offeree. Thus, performance of the conditions of the proposal is an acceptance of the proposal, for such offer demands acceptance by performance.

Unless different mode of acceptance indicated in all other cases, an acceptance or an offer ought to be notified to the person who makes the offer in order that the two minds come together. Unless this is done, the two minds may be apart and there will be no *consensus, which* is necessary to make a contract. Similarly, non-communicated reservations and restrictions will not affect the validity of the contract. If one, for instance, intended to purchase the other's white horse and this fact was not intimated, take for example, simply stating "your horse", he/she cannot later on refuse to perform a contract claiming his/her intention was to purchase not black horse.
Thus, silence as, a general rule, does not amount to acceptance for the law requires signification, as reaction for offer, if one wishes to accept. The problem, however, is silence itself sometimes may communicate and may be considered as acceptance through conduct.

Acceptance of general offer may be of this sort; or one when offering may dictate to respond simply by doing some sort of act. In such cases, compliance to the direction of offer may clinch contract. Obviously, the law requires signification of consent for purpose of protecting the offerer; he/she can dispense it and requires acceptance to be made in some other mode.
As silence is not acceptance, an offeror cannot dictate the offeree to consider his/her silence as acceptance. He/she cannot say, if you do not respond to the offer within certain time, I will consider your silence as acceptance.
Communication of Acceptance: Acceptance must be communicated to the offeror himself. A communication to any other person is as in effectual as if no communication has been made. The communication of the acceptance should be from a person who has the authority to accept.
Modes of Communicating Acceptance: Acceptance has to be made in the manner prescribed or indicated by the offeror. An acceptance given in any other manner may not be effective, particularly where the offeror clealy insists that the acceptance shall be made in the prescribed manner. Ethiopian Civil Code shares this concept. Saying, "The party who makes an offer may stipulate a special form of acceptance" thus, an acceptance to be valied, in addition to the fulfillment of other elements should be made in a way prescribed by the offeror to be accepted or acceptance to be sent.
Acceptance Must be Absolute and Unqualified: The acceptance to produce contract should be absolute and unqualified. Any

departure from the terms of the offer or any qualification vitiates the acceptance unless the person from whom the offer comes agrees it to. In other words, an acceptance with vitiation is no acceptance; it is simply a counter offer, which must be accepted by the original promisor before a contract is made.

Thus partial acceptance is also no acceptance; acceptance should be the whole of the offer. The offeree, therefore, cannot accept a part of its terms, which are favorable to him and reject the rest. Such an acceptance is another kind of counter offer and does not bind the offeror unless he agrees to the qualified acceptance.

Place and Time of the Formation of Contract: When offer is uttered and comes to the knowledge of the offeree, he may communicate to the offeror where he accepts the offer or expressly refuse the offer or keep silent where he intends to reject the offer. The issue that may be usually raised with regard to formation of contract is where and when the contract concluded. Where the parties communicating face-to-face there to form a contract may be no issue in this regard. The place where the parties communicated is taken as place of the formation of the contract and the time of the communication is also regarded as time of formation of the contract. This cannot be the only way of communication. Communication may be validly effected by the parties far apart.

Communication by Post: Where parties communicate at different places, it may not be easy to understand the place where the contract was entered into. Where two parties, for example, communicate through post, does the contract arise where the acceptance is posted or when it is received? A complete contract, thus, arises on the date when the letter of acceptance is posted in due course. But this conception may be unfair to the innocent offeror who does not know whether his offer is accepted or not for mere posting may not necessarily inform conclusion of the contract to the offeror.

An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror is no binding acceptance... but if the post be treated as the agent of both parties, then as soon as the acceptance of the latter is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into hands of a messenger sent by the offeror himself as his agent to deliver the offer and to receive his acceptance...the acceptor is posting the letter has put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound.

An offer is made and accepted by letters sent through the post, the contract is completed from the moment the letter accepting the offer is posted even though it never reaches its destination. A contract made between absent parties shall be made as the place where and time when the acceptance were sent to the offeror."

Acceptance letter sent through post, when the letter of acceptance is posted. The place where the letter of acceptance posted, therefore, is the place in which the contract is concluded. The time for the formation of the contract is also the time where the letter of acceptance is posted. The letter is said to be posted when it is put into the box or given to the past officer the final requirement is that the offeree should not be able to take the letter of acceptance back. That is to say, the letter of acceptance should be put in course of transmission so as to be out of the power of the acceptor.

A Contract Through Telephone: A contract is only complete when the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received but distinguishing the place of formation of contract may not be easy. The place where the contract clinches is the place where the party called. Caller is offeror and the party being called is offerree. Where the offer is accepted, and offered the place where the person first called by telephone and offered becomes always the place where the contract is made. A contract made by telephone shall be deemed to be made at the place where the party was called.
But to avoid all such confusion the safest way as given in art 1692(3) is to make clear stipulation as to place and time of formation of the contract. This is another problematic area where our law tries to tackle.

Declaration of Intention: An offer is the final expression of willingness by the offeror to be bound by his offer should the offerree chooses to accept it. In other words, in order to be bound by his utterance, an offeror should have expressed his willingness to a contract in terms of his offer with such finality that the only thing to be waited for is the acceptance of the other party. By implication where a party without expressing his final willingness proposes certain terms on which he is willing to negotiate he doesn't make an offer, but only invites the other party to make an offer on those terms. This is merely declaration of an intention that is made solely for the purpose of capturing the attention of the person to make an offer. Hence, declaration of intention (invitation to thereat) is an "offer" to make an offer. A party who intimates invitation to threat therefore, cannot be bound by his act for such act doesn't produce any legal effect. This is a basic difference between offer and an invitation to make an offer.

Further a shopkeeper's catalogue of price is not an offer, it is an invitation to the intending customer to offer to buy at the indicated price. For the same reason, the display of goods in a shop with price attached is not an offer even if there is self-service system in the shop Picking up articles displayed in the shop simply, thus, is an offer to purchase at the price mentioned therein. This act unless the shop keeper agrees to, does not result in contract, for the shop keepers can say "I am sorry I cannot let you have that article" or he can say that "It is the only copy I have got, I have already promised it to someone else". Therefore, mere picking up an item from the display of a shop is an offer by the customer to buy and no sale effected until the buyer's offer to buy is accepted by the acceptance of price. Moreover, an auctioneer's announcement that specified goods will be sold by auction on certain day is not an offer to hold the auction and he will not be liable to persons traveling up to the place if he changes his mind and does not hold the auction. The bid is an offer and even the highest bid may be ignored for it also requires acceptance to result in obligation of some sort through knocking a thing or any other mode of acceptance pursuant to nature of the transaction or custom of the place (Art.1688).

The Ethiopian Law, in respect of offer to make an offer is different from that of English or Indian Law. In latter system, whether intention inviting offer uttered to the person planned to enter a contract, or generally to any one who may offer attracted by the invitation, there is no difference. However, articulates where a declaration of intention is intimated to a person targeted to enter into contractual obligation (to particular person) the declaration of intention if accepted generates contract. Declaration of intention

produces the same effect to the Anglo-American system of invitation to threat only where it is made generally to any one wishing to offer. With regard to direct communication to particular person, hence, there is no difference between declaration of intention and offer.

Catalogue, list price, display of goods or auction is always considered as an invitation to make an offer. In these situations, the person declaring intention cannot be bound unless he accepts what was uttered to him on the basis of his declaration.

1.7 Withdrawal of Offer and Acceptance

An offeror or acceptor, after communicating his/her intention to enter into contractual bond, may change his mind and revoke it. If the intention to revoke or withdraw an offer or acceptance communicated according to the requirement of law, a contract cannot be entered into on the basis of such offer or acceptance.

In Ethiopia, an offer may be withdrawn at any time before it is communicated to the offeree, but not afterwards. It means, therefore, communication of withdrawal (revocation) must be effective on or before the offeree learns the facts of offer. Art.1693 states, “An offer shall be deemed not to have been made where the offeree knows that it is withdrawn before he knew or at the time when he knows of the offer.”

Thus, revocation should be brought to the knowledge before, the offeree learns the fact that he is asked to enter into contractual relationship. In Ethiopia, after the offeree discovers the facts of offer as rule, no valid revocation may be made. The reason for this requirement is not clear; no contract yet emerges at this state. As that of the Anglo-American system, revocation should have been possible before formation of a contract.

Art.1693(1) – authorizes in real sense withdrawal of not an offer for no offer yet required to be learned by the targeted person at this time unless both offer and revocation received simultaneously by revocation we understand, however, informing a letter of revocation having no idea of offer. Art. 1693(1) to some extent reasonably, seems applicable with regard to postal revocation. However, revocation should have been allowed in the case of face-t- face or communication of offer through instantaneous machines. In these cases, since offeree learns the fact of offer always before the offeror changes his mind or discovers better opportunity, in usual course of things, unless offered by mistake, one cannot immediately communicate withdrawal.

But what if a person communicates to the other his intention to enter into a contract in physical presence and while the other thinking to respond his acceptance, says “no I have changed my mind” or says “sorry I remembered that I promised to some one else”. It appears to be a valid withdrawal even if uttered shortly after the offeree was being informed the offer. With regard to telephone communication, it seems very difficult to talk about revocation in Ethiopia unless offer or acceptance made and communicated because of mistake as that of the face-to face communication.

The other anomaly in respect to withdrawal in Ethiopia is in the case of revocation of acceptance. In reverse to withdrawal of an offer, which is required to be communicated before the discovery of offer, withdrawal of acceptance is allowed after legal bond is created through formation of the contract. A contract is created when letter of acceptance is posted. But after this time revocation is allowed killing the born contract unilaterally. This makes the position of innocent offeror very miserable. A contract offered after yielding binding law governing contractants cannot reasonably be destroyed by one party while the other intends to be bound. The only possible instance in which valid contract may be destroyed by the option of one party is through process of invalidation that is only allowed where there is defect in consent or where one of the contracting parties is competent by law to enter into valid contract.

Where the letter of acceptance and revocation of an acceptance received at the same time, whether he reads any of them, first revocation becomes effective. Similarly, where the offeror receives both letters of offer and withdrawal of offer, at the same time, reading one of them first or second does not change his position. Who should communicate revocation? The communication of revocation of an offer or acceptance should be communicated from the offeror or from duly authorized agent.

Firm Offer: A firm offer lapses on the expiry of the time, fixed for acceptance. Where an offer says that it shall remain open for acceptance up to a certain date it has to be accepted within that date. Where no time for acceptance is prescribed, the offer has to be accepted within a reasonable time. What is reasonable time depends upon the facts and circumstances of each case. Where the subject matter of the contract is an article like gold, the price of which rapidly fluctuates in the market every short periods, will be regard as reasonable.

UNIT 4:-AGENCY

Section 1:

Nature and Sources of Agency

1.1 Definition of Agency

Agency may be defined as: a fiduciary relationship created when one person, called the agent, is considered in law to represent another person, called the principal, and has the power to affect the principal's legal position with regard to third parties.

Representation: The aim of agency is to get someone who represents another. The agent and the principal are the two parties who are directly connected by the agency. The agent is the one who acts for the principal whereas principal is the one for whom action is taken by the agent. Principal needs agent because he/she wants to deal with third persons through the agent. When the agent acts as an intermediary between the principal and third parties, there are

certain complications, which possibly have effects on the principal, on the agent and on the third party. The representation is a triangular relationship. Agency creates a triangular relationship because rights and obligations are created among three persons: *the agent, the principal and the third party with whom the agent has dealt with for the benefit of the latter.*

Fiduciary Relationship: Second, agency is a relationship in which the principal trusts the agent that the latter will act for his/her benefit. The agent should, as required by honesty, act for the sole benefit of the principal. The agent should not spend a penny of the principal for his/her own benefit.

Economic or Commercial Activities: Thirdly, agency relates to economic or commercial activities. Agency is a legal relationship where the action of the agent affects the principal's legal position towards third parties. Although there may be many situations in which one person represents or acts on behalf of another person, it is only when such representation or action on another's behalf affects the latter's (rights and obligations) that the law of agency applies. This means, law of agency has no relevance to representation for social or non-legal purposes. For example, law of agency is not applicable to situation where a wife asks her husband to represent her at wedding ceremony and congratulates the bride in her behalf.

1.2 The Need for Agency

Impossibility: Can you carry on two or more activities in different places at the same time? It is physical impossible to be in more than one place or to do more than one thing simultaneously. A person can do only one thing and be in one place at a time. But you want to carry on several things at a time all over the world or a country. How can you achieve this plan? Agency gives the way to do legally what cannot be done physically. By using an agent, a person can legally be in more than one place or do more than one thing simultaneously, at least legally.

Using Specialist Knowledge and Experience: One person may not be qualified for and experienced enough to perform certain things. Being an attorney needs specialist knowledge. A shipping or forwarding agent has special experience of the problems in the export trade and of the regulations relating to customs, which constantly change. Arranging export orders or securing goods from certain seller in oversees market requires a person having a special knowledge and experience of that oversees market.

Keeping Secrete the Principal's Identity: There are certain situations in which owners of a business may not want to disclose their identity by directly engaging themselves in the business relationship. If, for example, the other party to a contract knows that

he/she is dealing with a prosperous person, he/she may inflate the price. Where the subject matter of a contract is also controversial, like purchase or sale of arms, governments do not disclose themselves.

Emergency: An emergency situation may arise. Transport may be delayed, perishable goods may start to go bad, things may be left uncollected where the owner is ill or where war breaks out. The person in possessions of the goods may be unable to inform the owner of such problems. Thus, tool of agency allows such persons to sell or dispose of the goods on behalf of the owner. The purpose is to protect the principal's interest.

1.3 Sources of Agency

The term ``sources of agency`` means the manner by which the authority to act on behalf of another person is created. The question is: how does a person become the agent of another person? Agency may be obtained from the law itself or from the agreement of the person to be represented and the person to act on behalf of another person. The following are the sources of agency. Basically the-agent principal relationship is created by the agreement of the two parties in the form of a contract. However, there are various instances in which the power to act on behalf of another person may come from the law.

The law: Agency comes from the law in many ways. Next, you will explain these methods.

Court Appointment: A court may appoint one person to act on behalf of another person. The person appointed by court is known as curator. In legal language, a curator is a person appointed by court to represent the interests of young person, incapacitated person or an absent person. This actually means that guardians and tutors are also curators when appointed by court. Guardians and tutors of a judicially interdicted person will always be appointed by court. Courts may appoint the guardian/tutor for a child (minor) who does not have parents or a guardian/tutor appointed by serving parent or relatives who have power to be guardian/tutor by operation of law. Courts may also give the guardian/tutorship to an institution of care.

Managers, commercial employers, commission agents, commercial agents, commercial travelers and representatives have power to act on behalf of a trader because of their position.

Agency by Necessity: Agency by necessity is another case where agency comes from the law. The notion of necessity links certain circumstances in which, although principal - agent relationship does not exist or does not cover the exact situation which has arisen, the law regards what has been done by someone as done with the power

of agency. Agency of necessity means that unforeseen situation has arisen with a sudden danger to the property or similar interests of the person on whose behalf certain acts are performed by another person.

Illustration

You have lost a perishable thing. Ato Bezuneh finds those goods. The finder cannot find you, as he does not know you or your address. In this case, the law takes the finder as your agent. He can sell the perishable items for your benefit.

Agency of necessity takes place in the following situations. One situation is necessity of a certain action. It refers to the existence of a problem, which requires action. Another case that justifies agency of necessity is impossibility of communication between the owner of the interest in danger and the person who is to act (agent).

Agency created by contract: In addition to the law, agency also emerges from contract. An agent- principal relationship is mostly created by the contract of agency concluded between the principal and the agent. In this sense, agency is defined as a contract whereby the agent agrees with the principal to represent him and perform legally binding acts in his behalf.

As a contract, a contract of agency has to fulfill the following elements of a valid contract**.**

Consent: the principal and the agent must have agreed freely to the contract of agency. There must be a meeting of mind between the principal and the agent. There should be no duress, no fraud, no misrepresentation, and no mistake of identity of the parties.

The consent may be express or implied. The consent of the agent will be implied from the fact that he/she has intentionally acted on behalf of another person. Generally, however, it is the consent of the principal, which is more likely to be implied where circumstances clearly indicate that he/she has given authority to another to act on his/her behalf. Mere silence, however, is not sufficient. There must be some conduct to indicate the acceptance of the agency relationship.

Form: The law does not require a special form for a contract of employment. Only the consent of the two parties creates the agency relationship. However, where the contract to be entered by the agent requires a special form, the contract of agency must be in a similar form. For example, if the agent is to enter into a contract of sale of immovable, the contract of agency must be in a written form. If the contract to be concluded by the agent with a third party, on behalf of the principal, must be made in writing under the law, the contract of agency must also be made in writing.

Illustrations

1. Ato Biratu is an agent. He is authorized to sell an immovable property. The contract of agency empowering him to sell such immovable must be made in writing.
2. Ato Biratu is an agent. He is authorized to mortgage a business. The contract of agency empowering him to mortgage such business must be made in writing.

Capacity: As a contract, the general rule is that both the principal and the agent must have the capacity to enter into a contract. If capacity of either party is missing, the contract of agency will not bring the desired effect. Do you recall from the previous unit the message of the words the ``contract does not have legal effect``? As you may recall, these words mean that the parties will be put in the position they would have if the had not entered into the contract.

Object: the object of the agency contract should also be lawful, possible, and not immoral.

Section 2:-Types, Effects and Termination of Agency

2.1 Actual Authority

Actual authority comes from two directions. The first case is the situation where the principal has actually given to the agent certain powers in the contract of agency. The other case is the situation where action taken without authority is endorsed by the principal. Actual authority may be given either express or implied.

Express Authority: Express authority is given in express words. The principal tells the agent that the agent has authority to engage in a specific act or to do a particular task. It is specifically created and limited by the terms of the contract which gives rise to the agency relationship. The scope of agency power created by agreement must be fixed by the contract.

Implied Authority: An implied authority is the authority of an agent, which he/she possesses in the light of business efficacy or usages of profession. Implied agency is an authority inferred from the contract of agency in light of business efficacy. It is an authority that is reasonably necessary to effectively accomplish the business to be transacted by the agent.

Illustrations

1. Ato Ataklti is an agent. He is authorized to sell a house. The contract of agency does not say anything about the payment of transfer charges. The contract of agency does not also say any thing about getting the title deed authenticated. Payment of transfer charges and getting the title deed authenticated are necessary to complete the agency contract.
2. Ato Ataklti is an agent. He is authorized to import a car. He can pay shipping costs. He can pay transfer charges. He can complete the administrative processes. These are necessary to discharge the agency assignment.

2.2 Apparent Authority

This is the case where the authority is not real or actual at all. The authority does not result from the consent of the principal, whether express or implied. Apparent authority occurs when the principal creates the appearance that an agency exists or that the agent has broader powers than he or she actually has. Apparent authority here is the result of the principal's conduct that causes a reasonable third party to believe that a particular person has authority to act as the principal's agent. Apparent authority may be created by intentional or careless acts of the principal and reasonable reliance by the third

party. The person acting in the agent's role may be no longer an agent and sometimes the person was never an agent.

Illustrations

1. Ato Dibaba is attending a meeting. He tells to four persons attending the meeting that Ato Birratu is his agent. Relying on this stament, one of the four persons concludes a contract with Ato Birratu. Is there authority? Yes, but the authority is not a real one. It is an apparent one.

2. Ato Birratu says in the presence of several people that he is a manger of Ato Birru`s business. Ato Birru does not object to this statement of Ato Birratu. One of those persons concludes a contract with Ato Birratu thinking that he is an agent of Ato Birratu. There is an apparent authority.

Disclosed and Undisclosed Agency: The agent may enter into a contract on behalf of the principal in either of the following modes: disclosed, undisclosed and partially disclosed agency. A disclosed agency is the relationship, which the agent has entered on behalf of the principal by disclosing the principal's name and identity. In partially disclosed agency, the agent does not disclose the principal's identity but discloses that he/she is acting as an agent of someone. If the agent does not disclose the principal's identify as well as his/her capacity as an agent, the situation constitutes an undisclosed agency.

2.3 Effects of Agency

If the agent enters into a contract on behalf of the principal and in the name of the principal within the scope of the authority given to him, the law assumes that the principal concludes that contract. That means the agent disappears from the relationship after he/she acts as an intermediary. The idea is that the principal acts in the person of the agent and for all purposes of the contract, the agent is the principal. That is why the principal may avail himself of any defects in the consent of the agent. Duress or fraud committed on the agent is deemed to have been committed on the principal.

Illustrations

1. W/ro Mulunesh is an agent of W/rt Nebiyat, the principal. W/ro Mulunesh buys a radio for W/rt Nebiyat as instructed by her principal. In this case, the contract relating to the purchase of the radio is assumed to take place between the principal and the seller of the radio.

2. Your friend has assigned you to sell a cow for him. You sell the cow to another person. The law assumes that the contract of sale

relating to the cow is assumed to exist between your friend and the buyer of the cow. You as an agent disappears from the picture.

2.4 Agent Acting without Authority

A person may act in a certain ways on behalf of another person without having the authority to represent that person. There are three situations where:

- an agent exceeding his/her powers;
- an agent acting under lapsed authority;
- a person who was never an agent.

In Excess of His/Her Power: When an agent is appointed to perform some thing, there are limits for his/her powers. The scope of his/her powers will be determined by considering the express words used or by interpreting the agency contract according to the nature of the transaction to which the action relates. If the action the agent has taken is found to be outside the scope of power of the agent, the agent is said to have exceeded his/her power.

Illustration

Ato Mulu appoints Ato Lema as his agent, to lease his house for three years. Ato Lema sells the house or leases it for ten years. Ato Lema has acted beyond his power.

Under Lapsed Authority: The agent's powers may also be lapsed power. The actor used to have that power, but for some season he did not have it at the time of the action. This will be the case where the powers of the agent are either partially or totally terminated by the principal. The agent's authority may also lapse when the period fixed for agency expires or the purpose of agency is achieved or is found to be impossible. The authority of the agent might have extinguished because he/she is declared incapable.

Illustration

Ato Mulu appoints Ato Lema as his agent, to take care of some specified affairs for six months. In October 23, 2004, the duration for the agency contract has expired. If Ato Lema acts in the name of Ato Mulu after October 23, 2004 without obtaining another power of agency, you say that Ato Lema has acted under lapsed power.

No Authority: A person may also act on behalf of another person while he/she is never appointed as an agent. There is no actual agent principal relationship. While there is no meeting of mind between the person represented and the person acting on his behalf, one may take action on behalf of another person.

Illustration

Ato Mulu has never appointed Ato Lema as his agent. Ato Lema has sold Ato Mulu`s cow claiming to the buyer that he has a power of

attorney. This is the case of a person acting on behalf of another without any power.

2.5 Ratification and Repudiation

Ratification: While a contract entered into in the name of the principal within the scope of authority has an immediate effect of binding the principal and the third party, a contract entered into in the name of another person without authority to do so will not have a similar effect. Any such action will not have an immediate effect of binding the person on whose behalf it is taken.

A contract a person makes on behalf of another without authority is dependent on ratification. Ratification means endorsement of the action of the person without authority. The principal can make ratification expressly or impliedly. It cannot, however, be implied from silence of the principal. As long as the action is taken without authority, the principal is not bound to declare his/her intention to ratify. If the action is ratified, the agent is deemed to have acted with actual authority to do so.

Repudiation: Repudiation is the principal's refusal to endorse the action taken by a person without authority. The principal can make repudiation expressly or impliedly. Repudiation can be implied from the silence of the principal. If the action is repudiated, it binds neither the principal nor the agent. Silence or failure to repudiate or ratify is considered as repudiation. It does not bind the principal because there is no authority to act on his/her behalf.

2.6 Obligations of the Principal and the Agent

Agency gives to rights and obligations for the parties in the relationship. Rights for one party is an obligation for the other party and vise versa. Do you recall the existence of a positive relationship between rights and obligations from the first unit of this course? Next, you will discuss the obligations of the principal and the agent.

Obligations of the Principal

The key obligation of the principal is to pay the appropriate remuneration to the agent when the agency if for consideration. The payment should be made timely. The principal has also an obligation to provide the agent with the necessary resources.

Obligations of the Agent

The agent, regardless of the sources of his/her authority, has several obligations. Can you list the obligations of an agent?

Obligation to Discharge the Agency: The agent's first and foremost obligation is to perform the activities entrusted to him/her

by the agency. The main reason why anybody needs to have an agent is to use the latter's effort to perform certain activities. Failing to perform the activities will make him/her liable to pay compensation. Default means failing to perform.

Obligation to Care: The agent has to perform the activities with the due care, skill and diligence. The standard of care, skill and diligence is put in terms of what a reasonable agent in his/her positions would usually possess and exercise. The ordinary skill, care and diligence of persons performing similar work in the locality will be taken into consideration. However, if the agent has a special education or training, the standard of care, skill and diligence will be according to that level.

Obligation to act Personally: Do you think that an agent is supposed to act personally and always?

Every principal chooses his/her agent because he/she has trust and confidence in the agent's competence and integrity. The agent should carry out the activities by himself/herself. However, the agent may appoint a sub-agent and delegate his/her powers in the case where it is immaterial whether the agent himself/herself performs it or a substitute performs it or the principal has given implied authorization to do so. Under sub-agency of necessity by law, the law authorizes an agent to substitute another agent where he/she cannot personally perform it, and is unable to inform this to the principal. Appointment of a sub-agent is also possible if the agent is prevented by unforeseen circumstance from performing the necessary action, and he/she cannot also inform the principal of this situation. The permission by law here is bared on the assumption that the principal would have authorized the agent to delegate his/her powers had been known.

Obligation to Account: This obligation is essentially the duty to give appropriate and timely information to the principal. The agent comes to possess certain things while he/she acts as an agent. The principal trusts the agent that he/she will handle the money or property on his/her behalf. He/she thus deserves an explanation about the existence, location and status of assets, monies received in the course of the agency. The agent should also account for expenses and outlays made and the management undertaken by the agent. If the agent fails to segregate the funds for principal and make use of them, he/she will be liable to pay interest as from the day of the use.

Loyalty: The agent must always be loyal to the principal. The agent must act for the benefit of the principal. The agent should not divert resources or information obtained in the course of agency for his/her own or for the benefit of a third party.

2.7 Termination of Agency

As agency is brought to existence, it is also brought to an end. There are a lot of grounds for the termination of agency. Can you identify some of the grounds for the termination of agency?

The power of the agent is time-bound. This means the principal appointed the agent for a limited period of time. The time fixed expires. The agency is, thus, terminated. Second, the agent refuses to carry out the task. This also brings the agency contract to an end. Third the principal terminates the power of the agent any time. If for example the agent dies, the agency relationship terminates.

UNIT 5

LAW OF TRADERS, BUSINESS AND UNFAIR COMMERCIAL COMPETITION

Section 1:Traders

1.1 The Concept of a Trader

A trader is a person who professionally and for gain carries on activities mentioned under Article 5 of the Ethiopian Commercial Code.

This definition has many elements. First, a trader can be any person, physical or juristic. Do you remember the difference between physical and juristic persons from the first unit of this module? In the second place, this person should engage in the commercial activities mentioned under Article 5 of the Commercial Code. Article 5 of the Code lists 21 commercial activities. Purchase of movables or immovables with a view to re-selling them and purchase of movables with a view to letting them for hire are examples of commercial activities. Third, the person is conducting commercial activities in order to get gain. You can take the term `gain` to mean profit. The person may not actually get profit. The important point is the goal of getting profit. Finally, the person should carry on commercial activities for gain and professionally. The term professionally can mean regularity, not on-and-off basis. The term professional does not mean the person should be an expert; it should mean continuity.

1.2 Capacity to Act as a Trader

Generally, persons considered incapable under the law are forbidden to carry on commercial activities. Do you remember, form unit 2 of this module, persons considered incapable under the law? What is incapacity? As you recall, minors are incapable persons under the law. In addition, persons, for mental or other reasons, declared incapable under the law are also incapable persons. So in principle, minors and judicially incapable persons may not undertake commercial activities. In principle, even the tutors of minors and judicially incapacitated persons may not carry on commercial activities on behalf of the latter. Can you tell the reason for such prohibition?

Married Persons

Marriage is not a bar to undertake commercial activities. Married persons can, a husband and a wife, together or individually, engage in commercial activities. A husband and a wife can undertake commercial activities either jointly or independently. In the case

where the spouses engage in commercial activities jointly, there is no much difficulty. The problem is the situation where one of the spouses wishes to carry on commercial activities while the other does not accept it. Yet, if one of the spouses seeks to engage in trade activities, and the other spouse does not endorse such activities, the latter can object those activities. Even in the case where the objection is accepted by the relevant bodies, for example a court, the other spouse can continue to engage in the commercial activities. The effect of a valid objection is that, debts contracted by the trading spouse may be recovered on his/her personal property only. In family law, note that property owned by a spouse only is called personal property while property of the family is called common or marital property.

1.3 The Right to Act as a Trader

Yes, it is a constitutional right of every one, either alone or together with others, to undertake economic activities. This right can suffer from certain prohibitions or restrictions. For example, those associations established for purposes other than profit cannot undertake commercial activities. Non-governmental, be it religious or humanitarian, associations are not permitted to engage in profit-making activities. Another restriction is that certain economic activities demand special authorization or license or special qualification. Persons cannot engage, for example, in insurance or banking or health services without obtaining the necessary license. Generally, construction activities may not be undertaken without a license from the relevant governmental organs persons.

Exclusion

There are categories of persons not treated as a trader even if they carry on trade activities in the sense of Article 5 of the Code. Who are they? For example, handicraftsmen are exempted under certain conditions. Handicraftsmen are not treated as traders if:

- They carry on an independent activity,
- They live mainly on their own manual work or mechanical power or
- They carry on their activity with the assistance of members of their family and of not more than three employees or apprentices and
- They buy such necessary materials only as is necessary for carrying out their activities, without setting up stocks.

Moreover, under certain conditions, those who engage in agricultural or forestry undertakings and fishermen are also not taken as traders.

The main purpose of the exemption is that the law wants to encourage traditional commercial activities. Thus, the law does not seek to burden them with the conditions attached to a trader.

Effects

If a person is a trader in the sense of Article 5 of the Code, there are certain obligations. You can call these requirements obligations of a trader. First there is the obligation to register in the appropriate government organs. The trader should register certain details. These details include: his/her name, date and place of birth, nationality, the purpose of the trade, the trade name, the address of the business and the name of the manger. These pieces of information must be accurate and true. Second, there is the obligation to publicize these pieces of information, for example, by publishing them in newspapers. Third, there is the obligation to keep book and accounts.

Those persons who carry on commercial activities within the meaning of Article 5 of the Code, that is, professionally and for gain, but not treated as traders are expected to comply with the registration, publication and the obligation to keep books and accounts.

Sanctions

Suppose a trader fails to register and publish the information mentioned above. Suppose a trader fails to keep books and accounts. In these cases, the law imposes penal and civil sanctions. The penal sanction can be fines or imprisonment according to the Ethiopian Penal Law. The civil sanction can be to prevent the trader from benefiting from his/her status as a trader.

1.4 Managers

A manager is one of the key actors in the creation and operation of business. There is a need for a manager whether the business is owned by a single person or organized in the form of an association.

Under the Ethiopian Commercial Code, a manager is a person who has been authorized, expressly or tacitly, to carry out acts of management and to sign in the name of the trader. A manager is not a trader. A manager is a special type of agent.

Acts of Management

What are acts of management?

The key task of a manager is to make decisions relating to acts of management. Acts of management include: acts done for the preservation or maintenance of property, leases for terms not exceeding three years, the collections of debts, the investment of income, the discharge of debts, the sale of crops and goods intended to be sold or perishable commodities. The manager has the power to sign negotiable instruments. You will learn about negotiable instruments in the final unit of this module. The mere fact that you have appointed a person as a manager has these powers.

Special Acts

Special acts include: alienating or mortgaging of real estate, investing capital, effecting a settlement, consenting to arbitration, making donations, brining or defending an action. Without a special authority, a manager cannot also sell, lease or mortgage business. In order to perform these special acts, the principal should give express authorization to the manager. Without such explicit authorization, the manager is not competent to perform these acts.

Section 2:-Business and Unfair Commercial Competition

2.1 Business

The Commercial Code defines a business as an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities mentioned in Article 5 of the same Code. (Note: Here the term `incorporeal` means that which cannot be touched or without material existence.) Business is created when one person or two or more persons contribute movable resources; organize these movable things professionally and for the objective of making profits. Do you remember the discussion in connection with trader in the previous section of this unit? Business is more than the resources brought together; human skill and effort is needed for its creation. There are organizations of persons and things involved in its creation.

Every trader operates business. A trader may operate several businesses for the purpose of carrying out various commercial activities. A trader may operate a business in the capacity of an owner or lessee. Only a person who operates the business is a trader. A person who leases his/her business in the course of the lease is not a trader. A business may consist of one principal business or of a principal business with branches or agencies. The place where the trader operates his/her principal business is called the head office of the business.

2.2 Elements of Business

Good Will: Good will is the central element of business. Good is the result of the creation and operation of business. Good will is a value that varies according to the probable or possible relations between a trader and third parties who may require from him/her goods or services. Good will is the favorable attitude of the clients of a given business. Without this type of positive outlook, a business will soon die. People will not frequent a given business or will not consume its goods or services.

Other Elements of a Business: There are elements other than good will. A business, in addition to good will, includes: trade name, trademark, the right to lease the premises in which the trade is carried on, intellectual property, equipment or goods. A given business may or may not contain all these elements. For example, you can have a business without owning intellectual property. Yet, in any viable business, there must be good will. Trade name is the name under which a person operates his/her business and which clearly designates the business. A trademark is any sign or combination of signs capable of distinguishing goods or services from similar goods or services. Such signs include letters, words, numerals and combination of colors.

2.3 Dealing with Business

Business can be sold. The contract relating to the sale of a business must be made in writing. If it is made orally, it will not have the intended effect; it will be invalidated. The seller of a business has an obligation to hand over the business. The seller is under an obligation to enable the buyer to take over the good will by handing to his/her all necessary documents and information. The seller must hand to the buyer all correspondences relating the business. The seller may not carry on, in the vicinity of the business he/she sold, a trade similar to the trade carried on by the buyer. The buyer of a business, on the other hand, is obliged to pay the price.

A business may be mortgaged. Business can be leased. If you have a business and seek to join a business organization, you can contribute such business.

2.4 Unfair Commercial Competition

Commercial competition is based several assumptions. In the first place, it is based on the assumption that there are several persons operating identical or similar activities in the same geographical area and same time. The several persons, thus, compete with one another for market. The second assumption is that there is the rule of the game. The competitors follow this rule.

One business can take away the customers of a competitor using honest methods. Such honest methods include: quality goods, lower prices and good customer handling. This type of customer diversion is allowed and even encouraged. Here the diversion of customer is based on efficiency.

Unfair commercial competition relates to the use of improper methods to out compete a competing business. The law calls these unacceptable methods unfair commercial competition. The following are examples of unfair commercial competition.

- Acts likely to mislead customers regarding the business, products or commercial activities of a competitor, for instance imitation of the trademark or trade name of a competitor in such a way that customers would be confused.
- False statements made in the course of business with the view to discrediting the business, products or commercial activities of a competitor.

Persons who behave in one or more of this way are called unfair competitors. Unfair competitors may be ordered to pay compensation to the victim of such conduct. In addition, penal liability may be imposed on unfair competitors.

These acts are condemned because they are contrary to honest commercial practice. These methods are designed by a trader to take away the good will of another trader. These acts are not accepted because they are designed to the property of another business. These acts are regarded as unfair because they have the effect of harming consumers by lowering the quality of products or services.

UNIT 6:-BUSINESS ORGANIZATIONS

Section 1:-Common Features of Business Organizations

1.1 Associations

Association: An association is a group of persons for lawful purposes. People in Ethiopia have a constitutional right to form an association for any lawful cause. Such associations of persons may carry out any legitimate activities. The purpose of the activity can be social, economic, political, religious or professional. The only key limitation is that the purpose promoted or method used to promote such purposes must not be contrary to law. For example, if two or more persons come together for the aim of committing a crime, it is unlawful. If two or more persons come together to smuggle drugs, it is unlawful.

If on the other hand, people from an association are to compete for a political position, in a multi-party system, it is permissible. Again, if persons associate to engage in humanitarian services, it is lawful. If persons form an association to carry on commercial activities and drive profit, that is also lawful, and even encouraged. In this unit, you will learn about business organizations, that is, the case where people establish association for the purpose of getting profit.

Based on the above discussion, associations can be divided into two: non-profit oriented and profit-oriented associations. Business organizations are profit-oriented associations.

Business Organizations: A business organization is a type of association. A business organization comes from a contract. The contract creating a business organization involves two or more persons who intend to join together and to cooperate undertake to bring contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof. Can you explain this definition? In any business organization, there must be at least two persons. These persons may be called partners (members) or shareholders. These persons should contribute resources either in cash or in kind or both. These persons

should engage in economic activities. And these persons aim at profit making.

Forms of Doing Business

A person can do business in many forms. He/she may do business individually. This form is called sole proprietorship. You have considered the case of trader or sole proprietorship in the previous unit of this module. Several persons may undertake economic activity in the form of a cooperative society. The state may undertake business in the form of a public enterprise. The most common forms of doing business are called business organizations.

1.2 Types of Business Associations

The Ethiopian Commercial Code recognizes six forms of business organizations. They are:

- Ordinary partnership,
- Joint venture,
- General partnership,
- Limited partnership,
- Share company, and
- Private limited company.

1.3 Common Features of the Six Business Associations

Do you recall the definition of business organization above? Can you tell one of the elements of such definition? In general, all business organizations show the following shared features.

Contract: Business organizations come from contract. Two or more persons come together and agree to form a business organization. The source of a business organization is the consent of each and every member. Since contract is the initial reason for the existence of a business organization. Do you recall from your study of contract law in this module the elements necessary for the existence of a valid contract? Those elements are capacity, consent, object and form. These elements should exist in the case of contract concluded to create business organizations.

Plurality of Persons: A person cannot conclude a contract with himself/herself. For a contract to exist, there must be at least two persons. Likewise, there must be at least two persons to create a business organization.

Common Interest: The several persons agreeing to create a business association must have the intention to promote a common purpose. They should have a common interest.

Collaboration: In order to achieve the common interest, the persons should also intend and agree to collaborate.

Contributions: The parties cannot realize the common interest by mere agreement to collaborate. The parties must concretize their agreement to collaborate by making contributions. Contributions are generally resources necessary to realize the common interest. Contributions may be made in kind or in cash or both. In kind contribution may be a movable or immovable property. In kind contribution may be tangible or intangible property. In kind contribution may experience and expertise in creating or managing business. As you will learn latter in this unit, in some business organizations such share companies contribution in the form of labor may be discouraged or even prohibited.

Purpose: There are two purposes in forming a business organization, namely immediate and ultimate. The immediate purpose is to carry out one or more of the activities mentioned under Article 5 of the Commercial Code or any other economic activities. Do you recall that there are about 21 commercial activities mentioned under Article 5 of the Code? Article 5 of the Commercial Code does not list all economic activities. For example, auditing and accounting services are not mentioned under that Article. Persons can establish a business organization to carry of such type of services. The ultimate purpose of forming a business organization is to make profit.

Formality: With the exception of a joint venture, an agreement creating a business organization must be made in a written form. If the agreement is made orally, it will not be given any legal effect; it will be invalid. Do you remember the term `invalid contract` form your study of contract in this module? Since the law requires an agreement creating business organizations other than a joint venture, the agreement must be signed by the parties and attested by witnesses.

The document expressing the agreements of the prospective members of a business association must be registered with the appropriate governmental institutions. These governmental institutions can be the Ministry of Trade and Industry or regional trade bureau. The agreement and other particulars should also be published in newspapers. The agreement should also be deposited with the appropriate government institutions.

The agreement creating a business association is called a memorandum of association. Memorandum of association is a creative document. The contents of a memorandum of association include:

- The name, address and nationality of each member,
- The firm-name,
- The head office and branches, if any,
- The business purpose of the firm,
- The contribution of each member,
- The share of each member in the profits and in the losses,
- The manger, and
- The period of time for which the business association has been established.

This list is not a closed listing. There are other particulars. Depending on the form of business organization, the addition to the list can vary. There may be also another document describing the internal operation of a business association. This document is known as articles of association.

Legal personality: Registration, publication and deposit of the necessary documents such as a memorandum of association in respect to a business association confers legal personality on such business association. A joint venture is a type of business association that does not have legal personality. Legal personality is given to such association as of the day after the act of registration**,** publication and deposit of the necessary documents. Legal personality ends when the registration is stricken off the registers of business association.

When a business association acquires legal personality, it becomes a unit capable of bearing rights and shouldering obligations. The association has the capacity to perform all lawful acts and related activities under its memorandum and articles of association. The business association cannot not exercise its rights by itself; it exercises its rights and performs its obligations through agents specially managers. As you know managers are agents. The business association with legal personality may have name, head office, nationality and separate existence.

1.4 Classification of Business Associations

Business associations can be classified on many bases such as the type of activity, liability and the role of members. Next, you will discuss each of these bases.

Type of Activity: Share companies and private limited companies are always commercial in nature. They are commercial business associations. Ordinary partnership is a non-commercial business association. Ordinary partnership is a civil business association. It is used to carry on economic activities not listed under Article 5 of the Commercial Code. Joint venture, general partnership and limited partnership may be used to carry on commercial or non-commercial activities.

Liability: All members of a share company and all members of a private limited company enjoy limited liability. Do you know the concept of limited liability?

Limited liability implies that creditors of a company cannot seize the personal assets of the members where such company loses money. The members will be held liable only to the extent of their contribution once. Limited liability is a risk reducing mechanism.

Illustration

If you join a private limited company by contributing Birr 10,000 and the company loses the money. As a result, the assets of the company cannot satisfy the claims of the creditors of such company. The creditors cannot require you to pay another 10,000 if you have already paid your contribution. Partners in an ordinary partnership and general partnership have unlimited liability. The creditors of an ordinary partnership or general partnership or a joint venture may require the partners of such business organization to pay them out of their personal assets.

Illustration

You join a general partnership by contributing Birr 10,000 and the partnership loses money. As a result, the assets of the partnership cannot satisfy the claims of the creditors of such partnership. The creditors can require you to pay another 10,000 or more even if you have already paid your contribution.

A limited partnership is a mixture in that some members enjoy limited liability while others have unlimited liability. Those partners of a limited partnership who enjoy limited liability are called limited partners whereas those members of a limited partnership who possess unlimited liability are called general partners.

The Role of Members: The role of partners, that is, their personal involvement, is expected to be greater in the case of ordinary partnership, joint venture, general partnership and limited partnership. These four forms of business associations are also called partnerships. The involvement of shareholders is not so much critical in the case of a share company and private limited company. Especially in the case of a share company the critical factor is capital; it is not the personal involvement of shareholders that matter. Share companies and private limited companies are called capital associations.

6. Do you think that members of a business organization must have a common purpose?
_____
_____
_____

7. Business organizations have legal personality from_____to_____
__

8. _____is a type of business association without legal personality.

9._____is the ultimate goal of forming and operating a business association.

Section 2:-Features of Each of the Six Business Associations

2.1 Ordinary Partnerships

Ordinary partnership is a type of business association used to carry on economic activities such as accounting, auditing and educational services. It is a form of business association used to undertake any economic activity not mentioned under Article 5 of the Commercial Code. There must be two members to form an ordinary partnership. There is no upper limit for the number of members. There is no minimum capital in the case of this types of business organization. The members of ordinary partnership are called ordinary partners or simply partners. The partners may act as managers. The personal involvement of the partners is highly regarded. A member cannot transfer his/her share without the consent to the other partners. A partner may contribute in cash or in kind or both.

Rights of Ordinary Partners

Partners have the right to share profits to the extent of their contribution. Partners are entitled to know the activities of the partnership. Partners have the right to vote for or against a decision concerning the partnership. Partners are entitled to act as a manager where a manger is not appointed. Partners are entitled receive reports on the operation of the ordinary partnership. Partners are entitled to check books and papers of the partnership. Partners have the right to get interests on loans they give to the partnership. Partners are entitled to use the partnership property.

Obligations of the Partners

Ordinary partners do have the obligation to participate in the partnership activity with diligence and skill. Partners must not make self-dealing. Partners must use the partnership property for the benefit of the partnership. Partners have the obligation not to introduce a member. The partners must pay interests on loans from the partnership. Partners must make their contribution within the time agreed. Partners must make any damage they have caused to the partnership good.

2.2 Joint Venture

People who do not want others to know the fact that they are doing business may establish a joint venture. A joint venture, like any other business association, is a result of an agreement. A joint venture is a secret business organization. Its existence is unknown by the public. The members of the public do not know particulars such as the identity of the parties and their contribution about a joint venture. A joint venture agreement is not required to be made in writing; the agreement is not required to be registered and published. A joint

venture does not have legal existence. A joint venture is managed by a manger. Third parties know the manager. You can call members of a joint venture partners or joint venturers. Generally, it is the manger who is liable to third parties without limitation. In general, a joint venturere who discloses his/her identify to third parties is also fully liable. Joint ventureres who are not managers and whose identity is not disclosed will be liable to the extent disclosed in the memorandum of association.

2.3 General Partnership

Members of a general partnership are called general partners. General partners are fully and personally liable to the debts of the partnership. If the partnership fails, the creditors of such partnership can satisfy their claims from the personal assets of general partners. The general partners cannot avoid this type of liability among themselves. A general partnership may carry on a commercial activity; a general partnership may also carry on non-commercial activities.

Generally, the rights and obligations of an ordinary partner are the same as the right and obligations of a general partner. If there is no contrary agreement in the memorandum of association, a general partner cannot assign his/her share without the consent of the other general partners. The memorandum of association can provide that a general partner may assign his/her share by majority vote. A manager of a general partnership must act within his/her power as defined by the law or memorandum of association for the benefit of and in the name of the general partnership.

2.4 Limited Partnership

In a limited partnership, there are two types of partners in terms of liability. They are limited partners and general partners. The limited partners are liable to the extent of their contribution while general partners are liable fully and personally. The extent of liability of general partners in a limited partnership is the same as the extent of liability of general partners in a general partnership.

A general partnership should be managed by general partners. The limited partners should not act as managers of the limited partnership. If limited partners act as a manager, they may be held fully and personally liable to the debts of the partnership. Limited partners may, however, consult the partnership and exercise the rights of a partner.

2.5 A Private Limited Company

A private limited company may have at least two members and a maximum of fifty members. As a single person cannot form a private limited company, and more than fifty persons cannot form a private

limited company. In the case of the four partnerships, only the minimum number is fixed, which is two, the upper floor is open.

The liability of all the members of a private limited company is limited. A private limited company is always a commercial business association. The minimum capital is 15, 000 Eth. Birr. A private limited company may not be used to carry out financial business such insurance and banking services.

The capital should be fully paid. Contribution can be made in kind or in cash or both. In case where there is in kind contribution and the property is overvalued, the members are fully liable. Transfer of a share between members is not limited. However, such transfer should be made in writing. Transfer of a share to a third party must get the approval of members having ¾ of the capital of the company. Again such transfer should be made in writing and registered in the share register.
A private limited company may have a management organ. A private limited company may have an auditor. Meetings of members are the supreme management organs of a private limited company. Auditors are there to maintain the integrity of the company.

Each member is entitled to get information about the operation of the company. Each member is entitled to participate in a meeting, vote in a meeting and participate in profit sharing proportionate to his/her share.

Where there are twenty or less than twenty members in a private limited company, conducting a meeting is not mandatory. In such case, appointing an auditor is also not mandatory.

Some decisions such as change of the nationality of the company require unanimous voting. Some decisions such as increase in capital require the vote of members holding ¾ of the capital of the company. Some decisions can be validly made by simple majority.

2.6 Share Company

A share company may be established with five or more than five individuals. A share company is always a commercial business association. Members of a share company are called shareholders. Shareholders enjoy limited liability. A share company is a capital association. What matters in a share company is the contribution of a shareholder, not the quality of the shareholder. In share a company, skill cannot be contributed; you can contribute cash or property. Where property is contributed, the valuation procedure is much more stringent than a private limited company.

A share company is the only form of business organization used to carry out banking and insurance business. A share company is more complex than the other business organization in terms of organization. The following organs participate in the management of a share company. These are general and special meetings of shareholders, board of directors, managers and auditors. Each organ of management has its own powers and responsibilities. For example, meetings of shareholders have the power to:

- Increase and reduce the capital of the company,
- Modify the memorandum and articles of association,
- Decide on the approval of the balance sheets of the company,
- Decide on the allocation and distribution of profit,
- Appoint or remove directors and auditors,
- Dissolve the company, and
- Change the nationality or business purpose of the company.

Shares confer a set of rights on a shareholder. For instance, a shareholder has the right to:

- Participate in the annual net profits,
- Participate the net proceeds on liquidation,
- Vote and
- Obtain information about the operation of the company.

As compare to other business organizations, there is little limitation imposed on a transfer of share in a share company. Free transfer of shares in a share company suggests that it is a capital business association, as well as the existence of marketability of shares.

2.7 Dissolution and Liquidation

Dissolution is an event that leads to the cessation of the life span of a business association.

Dissolution may be initiated by one of the following reasons:

- Expiry of the life of the business association,
- Completion of the venture for the business associations,
- Failure of the purpose or impossibility of performance,
- Voluntary dissolution,
- Dissolution by order of the court for good cause,
- Acquisition of all the shares by a member,
- Bankruptcy and
- Loss of three-quarters of the capital.

Liquidation is also called winding-up. Liquidation suggests the series of steps taken in ending the life of a business association. Liquidation is a process. Generally, the following steps must be followed in liquidation.

- Appointment of liquidators,
- Taking over the business of the dissolved business association,
- Identifying the creditors of the business association,
- Paying out the creditors of the business association and
- Paying out the residual asset, if any, to the members.

UNIT 7

SALES, SECURITY DEVICES AND INSURANCE

Section 1:-Law of Sales

1.1 Definition

A contract of sale is:

- A contract
- One of the parties, the seller
- Undertake to deliver
- A thing,
- And transfer its ownership,
- To another party, the buyer
- In consideration of a price expressed in money
- Which the buyer undertakes to pay him.

Contract: A contract of sale is a type of contract. As such all the elements of a valid contract must be there. Do you recall those elements from your study of contract law in this module? Do you recall the requirement of consent? What about the requirements that the object of the contract must be definable, possible moral and lawful?

Parties: Two parties involve in a sale contract. They are the buyer and the seller. The two parties may act personally or they may act through their agents.

A Thing: According to the above definition, a thing is involved in a sale contract. The thing should be a movable thing. The thing may be an existing movable the seller owns. Or the thing may relate to a future thing the seller intends to make for delivery to the buyer. The thing may belong to another person.

Price: Price is another element of the above definition of sale contract. Price is the consideration or the give-and-take relationship in a sale contract. Price shows that benefits flow from the seller to the buyer and from the buyer to the seller. The seller gives a movable thing while the buyer pays the price.

1.2 Obligations of the Seller

In this topic, you will study two obligations of a seller. These are the obligation to transfer ownership and the obligation to give warranty against defects in the thing.

The Obligation to Transfer Ownership

The main obligation of the seller is to transfer ownership over the thing he/she has agreed to sell to the buyer. There are, in general, two types of getting ownership. The first one is transfer of ownership and the other method is acquisition of ownership. You will discuss the two methods below. You will also learn about the concept of delivery. Delivery is an important obligation of the seller because the seller effects transfer of ownership by delivery.

1.3 Transfer of Ownership

The method of transfer of ownership depends on the type of object transferred to. Transfer of ownership over immovable things is

different from the transfer of ownership over movable things. Even the transfer of ownership over movable things shows difference. You will discuss those requirements next.

Transfer of Ordinary Movables: Ordinary movables are all things that can move by themselves or be moved by human force other than special movables. For transfer to take place in relation to ordinary movables, there are requirements. These are:

- Juridical act or law; a juridical act means either a testament or an agreement.
- A delivery, which leads to possession. Delivery has several meanings. Delivery can take place directly or indirectly. But the most common meaning of delivery is the actual handing over of a thing and its accessories to the buyer. The seller must deliver the thing to the buyer at the agreed time and place.

Special Movables: Special movables are fixed in number: motor vehicles, construction machinery, ships, aircrafts, business, TV sets, etc.

Thus, in the case of transfer of special movables, a delivery does not lead to ownership. In fact, a certain person may be a possessor of, for example a car, after the conclusion of a contract of sale, he/she will not get ownership. You can say that the following conditions are necessary for ownership to validly pass from one person to another in the case special movables:

- A valid contract or testament or the order of a court of law,
- Registration at the appropriate authority to cancel the name of the person who transfers the special movable and replace it by the name of the person whom the movable is to pass, and
- Obtaining a certificate of title.

Transfer of Immovable Things: For a transfer of ownership over an immovable object to take place there is a need to observe the following criteria.

- There must be a cause (e.g., testament or contract of sale or donation or court order).
- In the case of a juridical act, the act should be made in writing signed by the parties and attested by witnesses.
- There should be registration.
- There is a need to obtain a title certificate.

When these four requirements are observed, ownership over an immovable flows from a transferor to a transferee.

1.4 Possession in Good-Faith

Possession in good-faith is another method of getting ownership in relation to a movable thing. This is the case where the seller does not have the right to transfer ownership to the buyer. You will study this method below.

Intention to Become an Owner: There are certain conditions you need to show in order to get ownership in connection with movable things via possession in good faith. You will discuss these legal conditions below. These requirements are cumulative. If any one of them is lacking, the person cannot acquire ownership. If they exist together, he/she acquires ownership even though the one with whom he/she has concluded the agreement does not have the power to transfer ownership.

You should realize that possession in good faith involves in at least three persons. First, you have the true owner of a movable thing. Second, you have a person who has control over such movable thing. Third, you have a person who enters into a contract for consideration in good faith with the second person in respect to the movable thing.

An Ordinary movable Thing: There must be a movable thing. Possession in good faith does not apply to immovable things. Possession in good faith does not apply to all types of movable things. Possession in good faith applies only to ordinary movables. It does not cover special movables. You will discuss the difference between special and ordinary movables later in the present module. For the moment, you can keep in mind a contract and delivery are the two requirements necessary to transfer title over ordinary movables. On the other hand, in addition to contract, registration is necessary to effect transfer of ownership over special movables. You can take motor vehicles, ships and business as examples of special movables. Possession in good-faith does not apply to movable things in the public domain. Do you remember the distinction between things in the private domain and things in public domain from your study of the first module? What about the legal effects of such division? As you will realize soon, you cannot be the owner of stolen things through possession in good faith. Can you get ownership over lost things through possession in good-faith?

Contract for Consideration: There must be a contract relating to the ordinary movable. Should the contract be valid? Do you recall the definition of a contract from your study of Contract Law? The contract concerning the ordinary movable must be for consideration. So, the transaction cannot be a contract of donation. You can take the term ``consideration`` to mean that the parties to a given contract have expressed a give-and-take relationship in the contract. Consideration implies one of the parties to a given contract has agreed to give something to the other in return for something else. It seems that the amount and the type of the consideration do not matter.

Possession: The person who concludes a contract for consideration relating to an ordinary movable has entered into possession of such a movable thing. The term possession is used here in the sense of Articles 1140 and 1141 of the Code. As you remember from the first module, you become a possessor of an ordinary movable when the

thing is delivered to you following a contract. You may go back to the first module and read the discussion on the concept of possession.

Intention to Become an Owner: The person enters into possession of the ordinary movable with the intention to become the owner of such thing. If the person enters into possession of the movable thing to be a lessee or usufructuray or hiree or depositee, then he/she does not have the intention to get ownership. The intention to become owner should come at the relevant time. The relevant time for having intention to become an owner is the time of delivery.

Good Faith: The person who enters into possession of an ordinary movable, based on a contract for consideration for the purpose of getting ownership, must be in good- faith. Good-faith is the belief that the person with whom he/she is concluding the contract has a valid title over the thing. He/she must act believing that he/she is contracting with the person entitled to transfer the thing to him/her. This good faith must exist at the relevant time. The relevant time is the time of entering into possession of a movable thing pursuant to a contract for consideration. Good-faith is a state of mind. As you understand, state of mind of a person is difficult to prove. As a result, the law presumes the existence of good-faith. Any party challenging the transaction on the basis of the issue of good faith must prove the existence of bad- faith.

Voluntary Surrender: The true owner of the ordinary movable surrenders it voluntarily or as a result of deception. You deposit your watch with your friend for a while. Your friend sells the watch. You give a table to your agent to use in the course of discharging his/her agency. The agent sells the table. You lend your book to your friend. Your friend sells it. In these cases, you surrendered your watch, table and book willfully. On the other hand, the watch, table and book, stolen from you were sold to another person. Or you lost these things. The law of possession in good faith does not address lost and stolen things, as you have not surrendered them voluntarily.

Absence of Title: The person who enters into possession of an ordinary movable based on a contract for consideration and to be the owner believes that the other contract party has the power to transfer ownership to him/her. But actually, the other contracting party does not have the power to transfer ownership. The other contracting party simply attempts to transfer an ordinary movable over which he does not have ownership right. So, in the law of possession it is not the owner or authorized person who is making you the owner; it is rather the law that is giving you ownership over ordinary movables when you meet the criteria.

Illustration

W/rt Lulit owns a watch. She lends the watch to her friend Ato Haile. Ato Haile sells the watch to Ato Kebede. Ato Kebede received the watch. Ato Kebede believes, at the time of delivery of the watch, that

Ato Haile owns it. In this case W/rt Lulit cannot recover the watch from Ato Kebede. The law makes Ato Kebede the owner of the watch via possession in good faith.

1.5 Justifying Possession in Good-Faith

The law desires to facilitate commercial transactions by making the person who has secured possession over an ordinary movable in good-faith. If the law has imposed an obligation on the new acquirer of an ordinary movable to return it to the true owner, it would have a bad consequence on modern commerce where sometimes, in the absence of register, it is difficult to ascertain ownership, other than by possession of the thing, which the law recognizes is a valid proof. Ordinary movables are immense in quantity. Ordinary movables exchange hands faster and speedier than both special movables and immovable things. By conferring ownership on the new acquirer, the law seeks to make commercial transaction smoother and speedier. As to the interest of the true owner of the ordinary movable, he/she should seek remedy from the person who has betrayed his/her trust.

Stolen Things

A person from whom a movable thing is stolen may recover it from the person who has become owner in good faith.

Illustration

You own a computer. Ato Jemal steals the computer and he sells it to W/ro Mulu. W/ro Mulu buys the computer thinking that your friend is the owner of such item. W/ro Mulu is in control of the computer. She buys the computer with the view to obtaining ownership over it. The true owner, you, can recover the computer provided that you institute a legal action for recovery within five years from the date of the theft.

Currency and securities to bearer may in no case be claimed from persons who acquired them in good-faith. They may not even be claimed from persons who acquired them from a third party in good-faith. This is because money does not have identity and currency is a universal means of exchange. The law is trying to maintain the free circulation of currencies and securities to bearer. What is a security to bearer? As you will learn about this concept in the last unit of this module, securities to bearer are types of commercial papers that are transferable by mere delivery of the instrument. It is unreasonable to demand that persons check the sources of securities to bearer and currencies. Such demand would retard the progress of commerce.

Illustration

You own a bill of lading. (A bill of lading is a type of commercial paper that can be transferred by delivery.) Your friend steals it from you. Your friend sells it to W/ro Chaltu. W/ro Chaltu takes delivery of the bill of lading. She believes, at the time taking delivery that your

friend has the power to transfer the document. You, as the owner of the bill of lading, cannot get it back from W/ro Chaltu.

Warranty Against Defects in the Thing

You have seen above that transfer of ownership is one of the main obligations of the seller. The seller should transfer to the buyer a title not subject to attack. The second key obligation of the seller is to give warranty against defect in the thing and the thing should also conform to the contract.

The thing is not in conformity to the contract of sale if:

- The seller delivered to the buyer only part of the thing sold or lesser quantity than he had undertaken in the contract to deliver,
- The seller delivered to the buyer a thing different to that provided in the contract or a thing of a different species.
- The thing is defective if:
- The thing does not possess the quality required for its normal use or commercial exploitation or
- The thing does not possess the quality required for its particular use as is provided in the contract,

Latent and Hidden Defects

The seller is not liable for obvious defects. Obvious defects are defects that can be detected easily and just by looking at the thing. The law says to the buyer: be ware for obvious defects in the thing! The buyer, upon receiving the thing, must examine for obvious defects. Jut look at the thing, you will, without any expertise, identify defects if any. The seller is liable for latent defects. Latent defects are hidden defects. Latent defects cannot be detected easily; to detect latent defect, an expertise is needed and latent defects might surface later when the thing is put to use.

1.6 Obligations of the Buyer

The two main obligations of the buyer: The buyer must pay the price. The buyer shall pay the price at the place fixed in the contract. If the contract does not specify the place of payment, the buyer shall pay the price at the address of the seller. The buyer shall pay on the date agreed. The payment of price be made at once or installment or on credit. The buyer shall take delivery of the thing at the place and date agreed.

Remedies

The seller may fail to discharge his/her obligations. For example, the seller has not delivered on the date agreed. Or the seller has not delivered at the place agreed. The seller has delivered a defective thing. The buyer may also fail to observe his/her obligations towards the buyer. For instance, the buyer fails to pay the price. Or the buyer fails to pay at the agreed date and place. Or the buyer fails to take

delivery. The party who fails to discharge his/her obligations may be held liable. The remedies available to the victim of breach of a contract of sale may be:

- Cancellation of the contract,
- Compensation, and
- Forced performance.

Section 2:-Contract of Lease

2.1 The Nature of Lease

Definition

The lease of an immovable is a contract whereby one of the parties, the lessor, undertakes to ensure to the other party, the lessee, the use and enjoyment of an immovable, for a specified time and for a consideration fixed in kind or otherwise.

Lease is a special contract. Since lease is a type of contract, the elements necessary for the validity of a contract such as lawful, definable, possible object, free consent, and capacity have to be there. The concept lease can apply movable and immovable property. Lease implies use of property by a person called a lessee for a specified period of time for consideration while another person called a lessor retains the ownership of such property. Hence, the ultimate object of the contract is sale of the use right of an object for sometime (not perpetual) while retaining the right of ownership. The lessee is expected to return the property to the owner when the period expires. Even if lease applies to both movable and immovable property, it mainly refers to immovable property.

Lease is essentially sale of the use right of the lessor over an immovable property to the lessee. What the lessor promises (guarantees) to the lessee is the use and enjoyment of the immovable. The term use implies that some sort of fruits is to be collected from the immovable without diminution of the essential nature of the immovable. Lease contract lasts for a specified period of time; and lease contract is not perpetual.

The lease must make payment in return to the use of the immovable. When there is no payment then, there is no lease. Instead, the contract is a gratuitous use of the immovable. The payment can either be in kind or in cash.

2.2 The Rights and Duties of a Lessee and Lessor

As you saw in the previous topic, a lease is a contract. Lease, like any other contract, assumes two parties. The two parties have obligation under their agreement and under the law. In this topic, you are going to discuss the obligations of the lessor and lessee. In addition, you will examine the legal consequences of the failure of the lessee and the lessor to discharge their respective obligations.

2.2.1 Duties of the Lessor

Possession: The "the right of use" is the right to avail oneself physically of a thing for one's pleasure or personal profit according to the agreement or the nature of the thing. This right cannot be exercised without possession of the thing. The lessor has the obligation to deliver things under the lease agreement. Delivery means handing over of the thing and its accessories in accordance with the contract. What does the term ``accessories`` mean? The delivery of the thing should be made in accordance with the inventory made during the conclusion of the lease contract for it also assists the lessee to discharge his/her obligation to *res*tore the object at the end of the lease.

Delivery: The lessor has to deliver the immovable in a condition to serve for the intended purpose, which is intended either in the

terms of the contract or according to the nature of the thing. The parties can agree to make use of a dwelling house for business purpose; if they do so, at the time of delivery, the lessor has to make all the required modifications to make dwelling house fit to serve for its intended purpose, as a business house, provided there is no agreement shifting the obligation to make such modification to the lessee. If there is no exp*ress* agreement, however, the nature of the thing dictates that a dwelling house is to be used for dwelling purpose and a business house for business and it must be in a condition to serve the purpose that its nature dictates.

Warranty: The second obligation of the lessor is to warranty peaceful use and enjoyment of the immovable. The lessor himself should abstain from interfering in the use and enjoyment of the immovable by the lessee. This is either by dispossession or by hampering the use and enjoyment of an immovable or by disturbing essential services of a dwelling house such as electric, water or, by harassing the lessee or violating his privacy. The lessor is precluded even from making any alterations without the consent of the lessee. The lessor has the right to control the lessee to satisfy himself that the latter fulfills his obligations; the lessor should exercise such control reasonably, without causing excessive inconvenience and without assuming a vexation character. Secondly, the lessor should warranty that third parties do not interfere or hamper the use and enjoyment of the immovable. Hence, if third parties claim right over the immovable, the lessee informs the lessor immediately that the latter be a party to the suit. If the use and enjoyment is interrupted in consequence of such proceeding, the lessee is entitled to a proportional reduction of the rent provided that he/she is informed of the molestation or hindrance to the lessor.

Maintenance: The third major obligation of the lessor is to conduct maintenance of the immovable that is necessary and not incumbent upon the lessee, to make it in good condition at the commencement and during the currency of the lease. Those kinds of repairs incumbent upon the lessee are: repairs necessary to the doors, windows, floor boards, tiling, taps and water drains have to be undertaken by the lessee; works of cleaning and maintenance which became necessary by the enjoyment of the thing are also deemed to be repairs on the lessee. If the expense of maintenance exceeds the rent, which the lessor receives from the lessee in the course of three years, the lessor is not bound to make it.

2.2.2 Obligations of a Lessee

Payment of Rent: The fundamental obligation of the lessee is paying the rent, which is a sort of compensation or price for the

use right. This obligation is also a requirement for the validity of the agreements. What do you think is the time for paying a rent? Monthly or as agreed? The rate is to be fixed freely by the contract.

Due Care: The other obligation of the lessee is to use the immovable with due care and in accordance with the purpose. Essentially the obligation is twofold. According to the urban land lease-holding proclamation, the lessee is required to start to utilize the land in the period specified by the appropriate national/regional council. Failure to utilize the land within the specified period entails termination of the lease agreement. The second aspect of the obligation is that the lessor has to use the immovable for its intended use. The lessee has an obligation to *res*tore the object at the end of the lease. Whether it is lease of a building or a land, unless the parties agree to continue in the same relationship or the lessee wants to renew the contract terminates. When the contract terminates at the end of the term of the lease agreement, the lessee shall return the object (the principal and the accessory) to the lessor. The delivery is to be made in accordance with the inventory that has been made during the conclusion of the lease agreement or when the lessee enters possession of the thing. In the absence of such inventory or statement, the lessee is deemed to have received in good condition and without any accessory unless the lessor has any evidence to rebut such presumption.

2.3 Remedies

Where during the currency of the lease, the immovable let is totally destroyed by fortuitous event, the lease shall terminate as of right. Where the immovable is only partly destroyed, the lessee may, according to circumstances, require a reduction of the rent or the termination of the lease. The lessee may require the termination of the lease, where the lessor fails to fulfil his obligations in such a manner that the use or enjoyment of the immovable is thereby notably diminished. The lessor may require the termination of the lease where the lessee fails to fulfil his obligations so that the rights of the lessor are endangered.

There are instances when the lessee and lessor may fail to perform their obligation. If the lessee fails to carry out his/her obligation towards the lessor what are the remedies available to the lessor and vise versa? If the lessor fails to fulfil his/her obligation which notably diminish the use and enjoyment of the immovable by the lessee or where the lessee fails to fulfil his obligations the rights of the lessor are endangered, the lessee and the lessor respectively may require the termination of the lease. Both the lessee and the lessor may, independently of the termination, claim damage if the failure of the other party has caused him loss. If the thing has

defects of the nature that its normal use is appreciably diminished, whether it has been discovered during delivery or after delivery when the defect is latent, the lessee may demand the cancellation of the contract. Whether the lessor knew or should have known of the defects, or any damage caused to the lessee during the currency of the lease, the lessor shall make it good. This damage is an independent one that it may be ordered irrespective of the cancellation of the contract. The defect in fact should not be apparent which the lessee knew or should have known at the making of the contract.

The lessee may have the same right where the thing leased does not have or cease to have a quality the existence of which has expressly been warranted by the lessor. Once the lessee has taken possession of the thing (immovable), if it is an urban land, he has the obligation to utilize it within a specific period that is fixed by the regional state council. Once he/she starts utilizing it, whether it is land or building, he/she has to utilize it for the purpose that has been agreed to in the contract or when there is no agreement, as the nature of the object dictates. In the exploitation of the thing for its purpose, reasonable care is required. If the lessee, however, fails to utilize the land in the specified time or to observe the purpose to which the immovable is destined (by the agreement or the nature of the object) or does not take the necessary care required of him, the lessor may terminate the contract. For the use of the land, the lessee is supposed to pay the rent. When the lessor fails to undertake the repairs without delay that are incumbent upon him and necessary for the exploitation of the immovable after having been duly informed by the lessee, the latter may have them executed at his expense and retains their cost, with legal interests thereon, from the rent payable by him/her if he/she deems it appropriate, depending on the circumstances. But, the lessee also has the obligation to conduct certain repairs whether contractual or legal.

When the lease agreement is terminated for whatever reason, the lessee has the obligation to return. When the thing is lost or deteriorated after he/she has received it, the lessee is liable, particularly where such loss or deterioration is caused by a person of his/her household or by a person he/she has admitted to the immovable. However, he/she is not liable if it is because of the fault of the lessor or a fortuitous event. However, if the immovable is lost or deteriorated by whatever cause while the lessee is in possession of the thing in default, he/she remains always liable.

Lease is a type of contract. Thus it assumes two or more individuals. One agrees to surrender his/her property, movable or immovable, so that the other party will possess, use and enjoy that property. The party who uses and enjoys the property needs to make a payment called the rent. The agreement should have a time framework. The party who surrenders the possession of his/her property is called the lessor. The party who uses and enjoys the property is called the lessee. Since the lessor and lessee are bound together by an agreement, both parties enjoy rights and bear duties arising out of the contract of lessee. Thus, the lessor is obliged to deliver the thing subject to the lease contract to the lessee at the agreed time. The lessor has to deliver the thing in the condition fit to serve the agreed purpose. The lessor must give guarantee to the peaceful use and enjoyment of the thing. Moreover, the lessor has to undertake certain types of repairs. The lessee has to pay the rent, has to use the thing under lease in due care and in accordance with the purpose, and undertake certain kinds of repairs. In cases, where the lessor infringes the rights of the lessee, the latter has certain remedies. The lessor has also remedies if the lessee infringes his/her rights under the lease contract. Both may require, for example, the termination of the lease contract. The lessee may sue the lessor for the latent defects, which may lead to the cancellation of the contract. However, the lessee may not sue the lessor for apparent defect. The lessee is obliged to return the thing under the lease contract upon the termination of the contract.

Section 3:-Security Device

3.1 Pledge

What is pledge? Who are the parties to a contract of pledge? In this topic, you will answer these questions.

A pledge is:

- A contract,
- A debtor agrees to deliver a thing,
- The debtor is called a pledgor,
- To his/her creditor called the pledgee,
- As a security for the performance of an obligation.

Pledge is a type of contract. All the requirements of contract must be satisfied. A pledge contract implies the existence of a principal contract. The principal contract may be a loan contract. In a pledge contract, there are two parties; they are the pledgee and the pledger. Pledge involves movable things. Immovable things are not covered.

Illustration

W/t Lemelem borrows 200 Birr from W/ro Kedeja. This is a loan contract. W/rt Kedeja demands a security for the payment of the money on the agreed date. W/rt Lemelem gives, as a security for the performance of the obligation, her table to Kedeja. In this case the main obligation of W/ro Lemelem is to pay the money she borrows from W/rt Kedeja on the date and place agreed. In this case there are two contracts, the loan contract and the pledge contract. The loan contract is the principal contract while the pledge contract is called secondary contract. The pledge contract does not stand by itself. In this case, W/rt Lemelem is called the pledger (debtor) while W/rt Kedgeja (creditor) is called the pledgee.

3.2 Obligations of the Pledger and Pledgee

The pledger is obliged to deliver the thing at the time and place agreed in the contract of pledge. The pledger is obliged to reimburse the costs of maintenance and preservation to the pledgee. The pledgee must take delivery of the thing pledged. The pledgee can bring action for the purpose of brining the thing under his/her control. The pledgee has the obligation to preserve the thing. The pledgee has the obligation to return the thing to the pledger when the contract of pledge is terminated. The pledgee has the right to retain the thing until the pledger pays him/her all the monies; this right of the pledgee is called a lien right.

3.3 Mortgage

Like the case of pledge, mortgage implies the existence of a principal contract. Like the case of pledge, mortgage cannot exist alone. Like the case of pledge, mortgage is a real security. Pledge and mortgage are called real securities since they involve property. You will study, under this topic, some of the key aspects of mortgage.

A mortgage is:

- A contract,
- A debtor agrees to deliver a thing,
- The debtor is called a mortgager,
- To his/her creditor called the mortgagee,
- As a security for the performance of an obligation.

Mortgage is a contract. Mortgage is created in respect of immovable things and some special movables. Mortgage is a real security. Mortgage involves two contracts. The first contract is the principal contract; then the secondary contract is called mortgage follows.

Additional Points on Mortgage

Mortgage secures the payment to the mortgagee in priority to the other creditors. The mortgager has the right to transfer, subject to the mortgage, the property mortgaged. When the mortgager fails to pay the debt secured by the mortgage, the mortgagee can sue and have the property attached to satisfy his/her claim. The contract of mortgage is valid only when it is made in writing and registered. The mortgager retains the ownership of the property he/she mortgages. The mortgager should cover the cost of registration.

Section 4:-Insurance

4.1 Definition

Insurance is:

- A contract,
- In which a person called the insurer,
- Agrees against payment of a premium,
- To pay a person called the beneficiary,
- A sum of money,
- Where a specified risk materializes.

Insurance is a type of contract. All the requirements of a valid contract must be there. The parties to an insurance contract are the insurer and the insured or the beneficiary. The insurer is an insurance company. Do you recall from your study of business associations in this module that only a share company or a public enterprise can engage insurance business? The insured can be a physical person or a juristic person. The obligation of the insurer is to pay compensation when a specified risk occurs. Risk is an unforeseeable event. The risk can harm property or the body or the life of the insured. The obligation of the insured is to pay one more payments called

premium. Insurance can cover risks affecting property or arising out of the insured person's liability or the death, life or risks arising out of injury to the person or illness.

4.2 Formalities and Content

Insurance contract must be made in writing. The document supporting insurance contract is called insurance policy. Insurance policy must show:

- The place and date of the contract,
- The name and address of the parties
- The item, liability of insured person,
- The nature of the risk insured,
- The amount of the guarantee,
- The amount of the premium, and
- The term for which the contract is made.

Insurance policy may contain particulars other than those mentioned above.

4.3 Types of Insurance

In terms of objects insured, there are several types of insurance. One case is insurance against damages. This kind of insurance is divided into two: insurance against objects and insurance of liability for damages. In the first case, you enter into insurance contract if you wish to preserve an object, be it movable or immovable. In the latter case, you enter into insurance contract if you want the insurer to pay to a third party to whom you have caused damages; the insurer will pay compensation when a claim is made against, you, the insured person.

Another type of insurance is insurance of persons. Insurance of persons is sub-divided into two: life insurance and insurance against accident and illness. Life insurance is defined as:

- A contract in which the insurer agrees against the payment of one or more premiums to pay to the beneficiary a specified sum on certain conditions dependent on the life or death of the third party insured.

Insurance against accident is defined as:

- A contract in which the insurer agrees to pay a specified sum to the insured person where the insured person is the victim of an accident during the period specified in the policy or to the beneficiary named in the policy, where the insured person dies.

4.4 Obligations of the Insurer

The insurer is obliged to:

- Guarantee the beneficiary against the risks specified in the policy.
- Compensate the beneficiary for risks arising out of unforeseen events or the negligence of the beneficiary.
- Guarantee the beneficiary against losses or damages due to the fault of persons (i.e., children and employees) for whom the beneficiary is responsible.
- Pay the agreed sum within the time specified in the policy or when risk insured against occurs.

4.5 Obligations of the Insured

The insured is obliged to:

- Pay the agreed premium at the time specified in the policy.
- State exactly all the circumstances within his/her knowledge and which are likely to assist the insurer to appreciate fully the risks he/she agrees to insure.
- Inform the insurer of any occurrence likely to render the insurer liable as soon as he/she knows of such occurrence or within not more than five days.

Principles of Insurance

There are certain principles of insurance. One principle is that the insured must act with the utmost good faith. For example, the insured must disclose all material facts to the insurer. Another principle is the insurer should get to the extent of the loss or less than the loss; there should not be overcompensation. Insurance is not to enrich the insurer or a beneficiary. The third principle is that there must be an insurable interest. A person cannot insure what he/she does not have; an insurer must stand to lose if risk materializes.

UNIT 8
NEGOTIABLE INSTRUMENTS

Section 1:-Features, Defenses and Endorsement

1.1 Definition

A negotiable instrument is any document incorporating a right to an entitlement in such a manner that it may not be possible to enforce or to transfer a right separately from such instrument.

Illustration

Examples of negotiable instruments are: bills of exchange (drafts), promissory notes, cheques, traveler's cheques, transferable securities, documents of title to goods.

The possessor of a negotiable instrument has a right to the entitlement as expressed in the instrument against presentment of the instrument to the debtor. A person to be entitled the rights expressed in a negotiable instrument, he/she must show that:

- The possessor must show that he/she is the lawful possessor.
- The debtor pays only against the delivery of the instrument.
- Except in cases of fraud or gross negligence on his/her part, the debtor is released by payment at maturity to the person to whom the instrument gives the capacity of creditor. It does not matter that the said person is not the holder of the right.

1.2 Defenses

The debtor may only set up against the holder of the instrument defenses based on their personal relations, defense of form and those based on the text of the instrument.

- Defenses based on their personal relation: means defenses based on the failure of considerations, defect in consent, set-off, breach of conditions, non-delivery, non-payment, illegality of the considerations etc.
- Defenses of form: depending on the type of negotiable instrument under consideration, these include forms indicated.
- Defenses of text: these include defenses based on changes of date, time and place of payment.

The debtor may also set up defenses based on falsification of signature, lack of capacity or power of representation at the time of issue of the instrument, or on the absence of the necessary conditions for bringing the proceedings. The debtor may not set up against the holder of the instrument defenses based on his/her personal relations with preceding holders, unless the holder, in acquiring the instrument, has knowingly acted to the detriment of the debtor.

1.3 Holder in Due Course

No claim for recovery may be made against a person who has acquired a negotiable instrument in due course. An ordinary holder of a commercial paper may: (a) assign it, (b) negotiate it, (c) enforce payment of it, or (d) discharge it with or with receipt of payment or satisfaction. In seeking to collect, the ordinary holder faces all the defenses, which confront any assignee seeking to enforce an ordinary contract.

Holders who take commercial papers under certain conditions obtain rights superior to those of their transferors. Such privileged holders are known as holders in due course. To qualify as a holder in due course, a person must first be holder, that is, in possession of a bearer paper, or of order paper issued or properly endorsed to such person or order. In addition, the commercial paper must be taken:

a) In good faith and for value.
b) Without knowledge of defense against, dishonor of, or claims to the paper.
c) Without knowledge that the paper is overdue.

1.4 Forms of Transfer of Negotiable Instruments

In this topic, you will study the different modes of transfer of negotiable instruments. According to forms provided for their transfer, negotiable instruments may be to bearer, in a specified name or to order. The only way negotiable instrument payable “to order” may be negotiated is by endorsement and delivery.

Bearer Instruments

Negotiable instrument which is payable to bearer may be negotiated by delivery alone; the bearer simply hands to another party. The holder of an instrument to bearer establishes his/her right to the entitlement as expressed in the instrument by the sole fact of presentment of the said instrument.

Named Instruments: The holder of an instrument in a specified name establishes his/her right to the entitlement as expressed in the instrument by the fact of his/her designation as beneficiary therein and in the register held by the person issuing the said instrument. Instrument in a specified name may be transferred by the entry of the name of the transferee in the instrument and in the register held

by the person issuing it. They may also be transferred by delivery of a new instrument in the name of a new holder.

Conversion: Do you agree that it is possible to convert a bearer instrument to named instrument and vise versa?

Negotiable instrument to bearer may be converted into instrument in a specified name by the person issuing them on the request and at the expense of the possessor. Except where conversion is forbidden by law, or by a person issuing them, negotiable instruments in a specified name may be converted into instrument to bearer on the request and the expenses of the holder.

Instruments to Order

Instruments to order may be transferred by endorsement, followed by delivery of the instrument to the beneficiary under the transfer. The holder of an instrument to order establishes his/her right to entitlement by uninterrupted series of endorsements, even if the last endorsement is in blank. Cancelled endorsements shall be deemed not to be written.

1.5 Forms of Endorsements

Take the following observations in respect to forms of endorsement.

- An endorsement shall be written and signed by the endorser
- An endorsement, not containing the name of the endorsee shall be valid; such endorsement is considered as blank endorsement.
- Endorsement "to bearer" shall be equivalent to an endorsement in blank.
- Endorsement must be unconditional. Any condition to which it is made subject shall be of no effect.
- Partial endorsement shall be null and void since partial endorsement interferes with the free circulation of the instrument.

Effect of Endorsement

Endorsement transfers all the rights arising out of the instrument. If the endorsement is in blank:

- The holder may fill up the blank either with is own name or that of another person.
- The holder may re-endorse the instrument in blank or to another person, or
- The holder may transfer the instrument to a third person without filling up the blank and without endorsing it.

Unless otherwise provided by the instrument, the endorser shall not be liable where the person issuing the instrument fails to carry out his obligations.

Section 2:-Commercial Instruments

2.1 Common Features of Commercial Papers

Commercial instrument also called a commercial paper is a name given to certain properly written orders or promises to pay money and which can be passed freely from one person to another such documents are widely used in personal and business transactions. Some Commercial papers, for examples, cheques and drafts serve as convenient substitutes for money. Others such as promissory notes may create creditor for the maker. For example, if the seller is willing, a buyer may give a written promise to pay at a future time rather than paying in cash. All commercial papers contain a promise to pay money. Much of the value of commercial paper lies in the fact that it is more easily transferred than ordinary rights. Moreover, a party to whom commercial paper is transferred may acquire rights greater than those of an ordinary assignee. Commercial paper can be used with great convenience and safety. The Commercial Code of Ethiopia defines commercial instruments are as instruments setting out an entitlement consisting in the payment of money.

Commercial instruments are contracts. As a result, a (person binding himself/herself by a commercial instrument must be a capable person. Any person having contractual capacity may bind himself/herself by commercial instrument.

Examples of Commercial Instruments

In this topic, you will learn about three types of commercial instruments, namely bill of exchange, cheque and promissory note. You will appreciate the difference and similarity among these instruments.

2.2 Bill of Exchange

Bills of exchange, also known as drafts, is a written order by which one party directs a second party to pay a certain sum of money to the order of a third person or to a bearer at a definite time. In bills of exchange, three parties are involved. They are: the drawer, the drawee and the payee. The drawer is the one who executes or draws the bill and orders that payment be made. The drawee is the party directed to pay. The payee is the party to whose order the bill is made payable.

A bill of exchange shall contain:

- A term “bill of exchange” inserted in the body of the instrument.
- Unconditional order to pay a sum certain in money.
- The name of the person who is to pay (drawee).
- The time of payment

- The place of payment
- The name of the person to whom or to whose order payment is to be made or an indication that it shall be payable to bearer.
- The date when and the place where the bill is issued
- The signature of the person who issues the bill (drawer)

If any of the above requirements are missing, the instrument shall not be valid as a bill of exchange. There are, however, certain exceptions.

a) A bill of exchange in which the time of payment is not specified shall be deemed to be payable at sight.
b) Unless otherwise expressly specified, the place mentioned beside the name of the drawer shall be deemed to be the place of payment and at the same time the place of the domicile of the drawee.
c) A bill that does not mention the place of its issue shall be deemed to have been drawn in the place mentioned beside the name of the drawee.

A bill of exchange:

- May be drawn payable to the drawer's order.
- May be drawn on the drawer himself.
- May be drawn for account of a third person.

Where the sum payable by a bill of exchange is expressed both in words and figures and there is a discrepancy between the two, the sum expressed in words shall prevail. Regarding the liability of the drawer, the drawer guarantees both acceptance and payment. He/she may release himself/herself from guaranteeing acceptance.

Negotiation of Bills of Exchange

A bill of exchange "to bearer" may be transferred by simple delivery of the instrument. Any other bill of exchange, even if not expressly drawn to order, may be transferred by endorsement. An endorsement of a bill of exchange shall be unconditional. Any condition to which it is made subject shall be of no effect. In the same way, partial endorsement shall be null and void. An endorsement "to bearer" is equivalent to an endorsement in blank. As regards with the formal requirement of endorsement; endorsement shall be written on the bill of exchange or on a slip affixed thereto and it shall be signed by the endorser. Endorsement may leave the beneficiary unspecified or may consist simply of the signature of the endorser. In the latter case, the endorsement to be valid shall be written on the back of the bill of exchange or on the slip affixed there-to.

Endorsement transfers all the rights arising out of bill of exchange. If the endorsement is in blank:

- The holder may fill up the blank either with his own name or with the name of some other person,
- The holder may re-endorse the bill in blank, or to some other person.
- The holder may transfer the bill to a third person without filling up the blank and without endorsing it.

Maturity

A bill of exchange may be drawn payable:

- At sight
- At a fixed period after sight
- At a fixed period after date
- At a fixed date

Bills of exchange at other maturities or payable by installment shall be null and void. In case of alterations of the text of the bill of exchange, parties who have signed subsequent to the alteration shall be bound by the terms of the altered text; parties who have signed before the alteration shall be bound by the terms of the original text.

2.3 Promissory Notes

A promissory note is a written promise by one person to pay to order or to bearer a certain sum of money at a definite time. Promissory notes involve only two parties: the maker and the payee. The maker is one who executes or makes a promissory note and promises to pay. The payee is the one to whose order the promissory note is payable.

Requirements

A promissory note shall contain:

- The term ”promissory note” inserted in the body of the instrument and expressed in the language employed in drawing up the instrument.
- An unconditional promise to pay a sum certain in money.
- The time of payment.
- The place of payment.
- The name of the person to whom or to whose order payment is to be made or a statement that the note is payable to bearer.
- The date when and the place where the note is issued.
- The signature of the person who issued the instrument (maker).

Note: the discussions relating to the endorsement, time of payment and alterations of a bill of exchange are applicable to promissory notes.

2.4 Cheques

Nature: Owing to the great development of banking, the cheque has become the most popular instrument of payment. A cheque is a bill of exchange drawn on a banker payable on demand. A cheque is an unconditional order in writing drawn on a banker, signed by the drawer, requiring the banker to pay on demand a sum certain in

money to the order of a specified person or to bearer, and which does not order any act to be done in addition to the payment of money. There are primarily three parties to a cheque. They are: drawer – the party by whom or by whose authority the cheque is signed; drawee (the banker) – the party authorized to pay out the money and payee – the party to whom or to whose order the money is to be paid.

There are various conditions that must be fulfilled if the document (instrument) is to be rightly called a cheque.

- The order to pay must be unconditional so far as the banker is concerned. Accordingly, if a document in the form of a cheque orders a banker to pay on demand a sum certain in money to a specified person on a condition that a form on the face of the cheque acknowledging receipt of the money is duly filled in, then the document is not a cheque. If the instruction as to signing the receipt form are addressed not to the banker but to the payee, then the order to pay may be regarded as unconditional.

- A cheque must be in writing:
- The order to pay must be addressed by one person to another, and that other person must be a banker. Therefore, a banker's drafts drawn by one branch on the head office or on another branch is not a cheque, because the head office and all the branches are considered to be one institution whereas the drawer and the drawee must be distinct parties.
- The sum certain named in the cheque must be payable on demand. A cheque is payable on demand when it is expressed to be so payable, or when it is drawn payable at sight, or on presentation or when no time for payment is expressed.
- A cheque must be payable to or to the order of a specified person or to a bearer. Hence, where the cheque is not made "payable to bearer", the payee must be named or otherwise indicated with reasonable certainty.

Issue

The issue of a cheque means its first delivery complete in form to a person who takes it as a holder. That is to say, a cheque is issued when the drawer parts with it to another person with the intention that the proceeds of the cheque shall be paid to that person, or to his/her order, or to bearer, as the form of the instrument may determine.

In order to be valid, the cheque must either bear the drawer's signature, or a signature put on by the authority of the drawer. A cheque is not invalid by reason that it is not dated. Moreover, a

cheque is not invalid, by reason only that it is antedated or post-dated or that bears a date on Sunday.

An antedated cheque is one that bears a date before the date of issue:

- A post-dated cheque is one dated later than the date of issue.
- Stale cheques – A stale cheque is overdue or, as it is called "stale" when it appears on the face of it to have been in circulation for unreasonable length of time, if a stale cheque is negotiated, it can only be negotiated subject to any defect of title affecting it when it was due.

All material alterations in a cheque must be made with the assent of the drawer evidenced by his signature or initials. Any material alteration made without his assent render the cheque void. If there are two or more signatories to the cheque, all must join in the confirmation. Material alterations include all those of date, crossing, place of payment, amount and name of payee.

Mutilation

If a drawer tears a cheque across in such a way that its condition affords sufficient evidence that he/she intended to cancel it, the banker must suffer any loss that may be incurred by his/her paying it to a person who has pasted the pieces together and presented the cheque. If the payee accidentally tears it into two before presentation, he/she must get the drawer's confirmation, or collecting the banker's guarantee, before the drawee – banker – will pay it. The general form is "Accidentally torn by us" followed by a banker's signature.

Payment of Cheques

The paying banker is the banker to whom the order to pay is addressed. Where the order takes the form of a cheque, it is not the duty of the banker to honor his customer's cheques provided;

- That the balance standing to the creditor of his customer is sufficient to pay him.
- That the cheques are drawn in the proper form
- That there is no legal bar prohibiting payment

This duty to honor his customer's cheques is an implied term of the contract entered into by the banker and his customer when the account is opened.

The conditions which must be fulfilled before a banker is justified in honoring his customer's cheques are:

- Sufficiency of funds
- Proper form – The cheque drawn must be signed by the drawer himself or by his authority, must be due for payment, must have the sum to be paid expressed in words, or in words and figures

which should agree, must purport to be properly endorsed, if an endorsement is required, must bear the drawer's confirmation of any material alterations.

The following are sufficient causes to justify the banker in not paying a cheque.

- Notice from the customer to stop payment
- Knowledge of any defect in the title of the person presenting the cheque.
- Notice of presentation of a bankruptcy petition by or against his customer, and possibly in the case of third party cheques, notice of an available act of bankruptcy by his customer.
- Notice of the customer's death or mental incapacity.
- In the case of a company customer, notice of the commencement of winding up.
- Knowledge that the customer contemplates a breach of trust in case where it is known that funds credited to the account are trust funds.

Payment in Due Course

A cheque is discharged by payment in due course, that is to say payment made by the drawee to the holder of the cheque in good-faith and without notice that his/her title to the cheque is defective. The holder to whom payment is made may be the payee, an endorsee or the bearer according to the nature of the instrument, or the way in which it has been endorsed. A thing is deemed to be done in good faith where it is in fact done honestly.

In ordinary circumstances, a cheque drawn in proper form, and complete in every particular must be paid or refused payment as soon as it is presented. But if the circumstances connected with its presentation are as to raise reasonable suspicions in the banker's mind, he is entitled to use discretion in the matter of immediate payment.

It seems reasonable to suppose that the banker would also be entitled to postpone payment if the cheque were drawn in an unusual manner, or bore upon its face peculiarities that would raise doubt in an ordinary person's mind as to the genuineness of the order.The holder is entitled to be paid in a legal tender. It should be noted that although bankers, when paying cheques, usually ask the presenter in what form he would like to be paid, this custom is merely a matter of courtesy, and is not obligatory. All what the law requires is that the bank should pay in legal tender.

Requirements

A cheque shall contain:

- An unconditional order to pay a sum certain in money.
- The name of the person who is to pay (drawee)
- The time of payment

- The place of payment
- The date when and the place where the cheque is drawn
- The signature of the person who draws the cheque (drawer).

Where any of the above requirements is missing, the instrument shall not be valid as a cheque. A cheque may only be drawn on a banker or on an institution or establishment regarded by law as a banker. A cheque may only be issued if the drawer has funds with the drawee, and in accordance with an express or implied agreement under which the drawer has the right to dispose of these funds by cheque.

Notwithstanding any provision to the contrary, a cheque in respect to which cover is available to the drawer may be certified by the drawee if the drawee requests so. A cover in respect to a certified cheque shall remain blocked in a separate account for the benefit of the holder until the expiry of the period of time for presentment.

A cheque may be made payable to:

- A specified person with or without the express clause “to order”, or
- A specified person with a clause “not to order”, or any similar clause.

A cheque made payable to a specified person with the words “or to bearer” shall be deemed to be a cheque to bearer. A cheque that does not specify a payee shall be deemed to be a cheque to bearer. A cheque may be drawn to the drawer’s own order or for account of a third person. A cheque drawn, by the banker on himself may not be to bearer. The drawer of a cheque guarantees payment. Any provision by which the drawer releases himself from his guarantee shall be of no effect.

Negotiation

- A cheque made payable to a specified person, with or without the express clause ‘to order’ may be transferred by means of endorsement.
- A cheque made payable to a specified person in which words “not to order” have been inserted can only be transferred according to the form,and with the effects of an ordinary assignment.
- Person sued on a cheque cannot set up against the holder defense founded on their personal relations with the drawer or with previous holders, unless the holder in acquiring the cheque has knowingly acted to the detriment of the debtor.

Presentment and payment

- A cheque is payable at sight.
- A cheque shall be presented for payment within six months of the date thereof regardless of when the cheque was issued.
- The stopping of the payment of a cheque by the drawer is sufficient authority for a bank to refuse payment.

- Neither the death of the drawer nor his/her incapacity after the issue of the cheque shall have any effect as regards the cheque.

Alterations

In case of alternation of the text of the cheque, parties who have signed subsequent to the alteration shall be bound according to the terms of the altered text; those who have signed before the alteration shall be bound according to the terms of the original text.

Reference

- The Civil Code of Ethiopia (1960).
- The Commercial Code of Ethiopia (1960).
- The Revised Family Code.