

WOLAITA SODO UNIVERSITY

SCHOOL OF LAW

LAW OF TRADERS AND BUSINESS ORGANIZATIONS

By: Yared K.

Law of Traders and Business Organizations(B.Os)

- B.Os passed **stages of dev't** which have made up distinct organizational forms prevalent in Ethiopia today.
- They grew from a **single individual** to a **group** (partnerships) and finally to a **corporate** form.

1. Franco-Ethiopian Railway Company:

- 1st B.O during emperor **Minilik** and formed by **imperial concession** granted to Alfred Ilg in 1894.
- To construct a **railway** from **Djibouti to Ethiopia** via Harar to Entoto and then to the White Nile.
- **Incorporated in France** in pursuance of **French company law,** & its head office was in **Paris.** So, it remained a **French company** for all practical purposes.
- In exchange for the concession, several shares had been assigned to the Emperor. The concession was for 99 years and, upon expiry, ownership of the company was to be conveyed to the Imperial Ethiopian Government.

2. Bank of Abyssinia = formed in 1905 as a branch of the National Bank of Egypt.

- formed by virtue of a **concession** granted by the Emperor.
- Its total subscribed capital was $500,000 of which $100,000 was to be paid after the company commences business.
- The Imperial Ethiopian Government was entitled to 20% of share in the profits while the other shareholders were entitled 70%.
- Formed to **exist for 50 years** from the date of its formation, without any stipulation as to the company's fate upon its **expiry**.
- Ethiopia government bought the company and renamed it as **"Bank of Ethiopia"** in 1931.

3. Agricultural and Commercial Development Company of Ethiopia:

- Unlike its predecessors, the company was **incorporated in Ethiopia**, and thus, it was the **1st Ethiopian company**, though its incorporation had not been made in compliance with **no existing law** other than an **imperial decree** issued to that effect.
- **Formation** of the **above companies** and general trend led to enactment of the following commercial laws: **the Law of Loans of 1924, the Decree of Concessions of 1928, the Law of Bankruptcy of 1931, and the Company Law of 1933.**

3.1. Company Law of 1933:

- Provides for various forms of B.Os, namely, **share co., joint stock co., PLC, ordinary partnerships, and limited partnerships.**
- Contains provisions pertaining to **formation, operation**, and **dissolution** of co.

3.2. Commercial Code of Ethiopia(CCE):

- Was enacted in **1960** & **comprehensive**.
- **Drafting process:**

✓ Having accepted an invitation from emperor to draft a **CCE and a Maritime Code for Eth**, **Pro. Jean Escarra**(1954) consulted with Codification Commission and submitted to it the texts later promulgated as Books II, IV, and V of CCE.

✓ Work on CCE was **interrupted** due to **death of Escarra** in 1955. Then, the emperor sent an invitation to **Pro. Alfred Jauffret to complete** the unfinished draft code by preparing texts of **Books I and III** & **to revise Escarra's work**.

- ✓ **Prof. Jauffret** submitted his **draft texts** along with a Final Report on March 1, 1958.
- ✓ The Amharic version was then submitted to the parliament & approved in 1960 with several amendments.
- ✓ **Final draft** text of CCE was **promulgated on May 5, 1960** and the Code **came into force** on September 11, 1960.
- ➢ Is the Commercial Code should be **subjective or objective?**
- ➢ **Subjective Commercial Code** = regulates a **community of persons designated as "traders".** It considers above all the traders, but in order for the legislature to decide which persons have the status of a trader he/she must take into consideration the profession or activities which he/she deems to have a commercial character.
- ➢ **Objective commercial code** = regulates acts known as **"acts of commerce",** as opposed to persons. The **scope of application** of such commercial code is determined entirely by the **enumeration of these acts.**

- Draftsperson opted for **subjective system** to the CCE:
  - Subjectivity of the Code gathered from **Art. 5 and 10**. Article 5 incorporates a list of commercial activities secondarily.
  - **Logical organization of the Law of Traders and B.Os**. Law of Traders and B.Os, as found in Books I and II of the CCE, regulates a group of persons called **traders and B.Os.**
  - According to Prof. Escarra, **"it is the only logical system for determining the scope of coverage of the Commercial Code."** Prof. Jauffret also says that he followed Prof Escarra's suit while drafting the text of Book I.
  - Subjective system is the most widely adopted in recent laws.
- There is **no watertight distinction b/n subjective and objective commercial law** in practice and there is hardly any law which is **exclusively subjective or objective.**

Scope of Commercial Code:

- Is there (or should there be) a “commercial law” distinct from the “civil law”?
- Suppose that one decides that there must be a special law for traders, special provisions of commercial law within the general civil law, **on what criterion does one establish the special category of persons or of acts to be regulated by the Commercial Code**?
- ✓ Legislature which promulgates the Commercial Code can declare, that the Code will regulate a **community of persons designated as “traders”.**
- ✓ Conversely, legislator may decide that the commercial Code will regulate not persons but **“acts of commerce”,** to which the commercial law applies no matter what the status of the individuals who carry out these acts.

- The first method leads to the preparation of **subjective commercial law** i.e. the legislator to decide which persons have the status of trader he must arbitrarily take into consideration the **professions or activities** which he believes have a commercial character.
- During the *ancient régime,* **French commercial law** was fundamentally **subjective**. Traders formed castes or "corporations" and it is for these corporations that the commercial law had been created in the from of special legislation. Moreover, traders sought to expand the scope of a law which was essentially favorable to them and the result was that, especially in the legal disputes between traders and non-traders, the latter were subject to the jurisdiction and procedure of the commercial courts.
- When **French Revolution** decided to suppress the corporations, it is interesting to note that this automatically entailed the disappearance of the **"subjective"** commercial law of the ancient régime.

- Authors of **new Commercial Code** were preoccupied with the desire not to revive a system which had been condemned and they decided in favor of an **“objective” Commercial Code**. They invented the theory of “acts of commerce” - enumeration of acts.
- French Commercial Code enumerates acts of commerce under Arts. 632 and 633, & **Article 1** defines **“traders” as “those persons who perform acts of commerce as a regular occupation”.**
- This shows that the only logical system for determining scope of the Commercial Code is the **subjective system**.

- Existence of **commercial law as an independent discipline** is problem concerning the delimitation of this law.
- Creation of a special law for traders, as a supplement to the general civil law, is a historical phenomenon.
- Present, dominant tendency seems to **"commercialize" civil law.** Eg. in France the contract of pledge, is regulated by the provisions of the Civil Code when it has a civil purpose and by other provisions on pledge contained in the Commercial Code when it has a commercial purpose.
- **Rules of the civil law** are much **more formalistic** than the **commercial law rules**, and the provisions on **proof in civil matters** are also much more **rigid** than in **commercial matters**.

- Eg. in **Switzerland** there is no Commercial Code but a general Code of Obligations which contains, the common source and a certain number of special institutions for traders, such as commercial B.Os.
- Recently, Italy has promulgated a Civil Code containing not only a common law of obligations but also some institutions used only by traders.
- The problem of the autonomy of commercial law and its fusion with civil law is not purely theoretical. A country could have a Commercial Code distinct from Civil Code. Countries with a single Code still must regulate special commercial institutions within the general provisions.
- The same type of contract in the two Codes would be bad legislative technique and the two French legal advisers called on to draft the Civil and Commercial Codes have certainly decided not to make this error.

- So, the future CCE will contain, specifically commercial institutions and by reference to the Civil Code, the general rules of law for those contracts and obligations which apply to both traders and non-traders with the exception of a small number of cases which will have to be determined.
- The Imperial Ethiopian Government decided to prepare two distinct codes, the principal general problem which will have to be resolved will be to determine the persons and the transactions to which the Commercial Code will apply.
- **Some countries have both a commercial law distinct from civil law or two separate Codes and special commercial courts**, the compositions of which varies, distinct from civil courts.

General Orientation of the CCE

- Prof. Escarra (18 January 1954) reported technical problems involved in the preparation of a Commercial Code. The questions on the very foundations of the commercial law which have not yet been answered are:
- ✓ Will the Ethiopian commercial law be subjective or objective?
- ✓ If the Ethiopian commercial law is to be subjective, must the theory of acts of commerce be included?
- ✓ What will be the relation of the commercial law with the civil law?
- ✓ He explained the differences between the two streams of commercial law, subjective and objective. Will commercial law be applicable to traders and only to traders or will it be the law applicable to certain acts, called acts of commerce, no matter who the persons carrying out these acts are?

- Book I of **CCE** is devoted to the **subjective concept**: the point of departure of the Code is found under Arts. 5 & 10 -devoted for the status of the trader, a status supplemented by the bankruptcy provisions of Book V.
- Even in a **subjective system**, there can be a theory of **acts of commerce as a secondary** concept.
- **There could be special legal rules for acts of commerce** like special rules on judicial jurisdiction, special rules on the law of obligation/contracts, and even, as in German Law, special set of regulations for certain contracts when they are acts of commerce (commercial sale or commercial pledge, for example, which are not regulated, at least on certain points, by the rules of civil sale or civil pledge).

- The absence of commercial courts in Ethiopia avoids any interest in a question which is very important in France, for example, where these commercial courts exist.
- The principle remains that there is no longer a distinction between civil and commercial contracts or between civil and commercial instruments.
- One might conclude that the Commercial Code should be reduced to Books I, II and V which deal with the status of traders and of commercial B.Os.

- A Commercial Code should contain the rules on instruments, contracts and transactions which are interest of traders. This is the justification for the existence of Book III devoted to Carriage and Insurance: particular interest to traders b/c the carriers and insurers are traders and traders are the most important clients of these carriers and insurers. Contract of sale or of pledge find a more logical place in the Civil Code because they are also frequently used by non–traders. Commission contract interests traders but it is logical to include provisions governing this contract among the Civil Code provisions governing agency because it is merely a variety of agency contract.
- Book IV should stay in the CCE because NIs are used by traders, since bankers are traders, and because the most important clients of banks are traders. CCE in its present draft appears as a Code regulating special status of traders and of commercial B.Os and governing certain transactions or contracts which have interest for traders and commercial B.Os.
- The place of commercial law in relation to civil law apparently not considered by Prof. Escarra. A recent theory, maintains that commercial law is autonomous.
- Commercial law is thus only a law supplementing the Civil Code. Article 1 of CCE, **-"Unless otherwise provided in this Code, the provisions of the Civil Code shall apply to the status and activities of persons and B.Os carrying on a trade."**

Scope of CCE

- Central to the scope of the Code is the issue of the territorial scope of application of the Code: is it applicable in administrations that are directly accountable to the Federal Government only, or to the Federation? – Arts. 55(4) & 52(1) of FDRE constitution.
- Art. 1 provides for the pre-eminent place of the Civil law. It encapsulates the classical principle of the priority of civil law in respect of the theory of obligations and the regulation of contracts.
- Hence, the only reason for the existence of the commercial law will be to supplement the Civil Code.
- Art. 2 renders applicable in pertinent part provisions of the Maritime Code to persons and B.Os carrying on maritime Code to persons and B.Os carrying on maritime trade.
- Art. 4 excludes application of the CCE to bodies corporate under public law, as they are not going to be presumed to be traders even where they carry on activities under Art. 5(2) of the same renders the first paragraph in applicable is cases where the bodies corporate under public law only participate in the undertakings as partners or shareholders.

UNIT TWO
TRADERS AND BUSINESSES

Traders:

- **Businesses** are operated by persons, whether **physical** or **juridical**.
- But, **sole businesses/proprietorships** can only be run by **physical persons**.
- **Traders** = physical persons who operate a sole business - chapter 2 of Title I in Book I (Art. 5). This provision has **two key elements**:
- ✓ **General condition=** consists, in the existence of an enterprise or business, of a profession, and the goal of realizing profits.
- ✓ **Special condition=** the person carries out any of the activities enumerated in art. 5 as his/her business object.
- ❖ So, **Traders=** are persons who **professionally** and for **gain** carry on:
- Purchasing of movables and immovable with a view to re-selling them either as they are or after alteration or adaptation;
- Purchasing of movables with a view to letting them for hire;
- Warehousing activities as defined in Art. 2806 of the Civil Code;
- Exploitation of mines, including prospecting for and working of mineral oils;
- Exploitation of quarries not by handicraftsmen

- Exploitation of salt pans;
- Conversion and adaptation of chattels, such as foodstuffs, raw materials or semi-finished products not by handicraftsmen;
- Building, repairing, maintaining, cleaning, painting or dyeing movables not by handicraftsmen;
- Embanking, leveling, trenching or draining carried out for a third party not by handicraftsmen;
- Carriage of goods or persons not by handicraftsmen;
- Printing and engraving and works connected with photography or cinematography not by handicraftsmen;
- Capturing, distributing and supplying water:
- Producing, distributing and supplying electricity, gas, compressed air including heating and cooling;
- Operating places of entertainment or radio or television stations;
- Operating hotels, restaurants, bars, cafes, inns, hair- dressing establishments not operated by handicraftsmen and public baths;
- Publishing in whatever form, and in particular by means of printing, engraving, photography or recording;
- Operating news and information services;
- Operating travel and publicity agencies;
- Operating business as an agent, broker, stock-broker or commercial agent;
- Operating a banking and money changing business; and
- Operating an insurance business.

Positive Definition of trader:

- **Trader** =operates a business/enterprise, engages in **business professionally**, and **for gain**.
- ✓ **Requirement of the existence of a business** has not been made as explicit as in the unofficial French master-text as the remaining two. It can be referred from Art. 5 because one cannot be a trader without operating a business or an enterprise and from conjunctive reading of Arts. 125(1) and 5. Article 125(1) = **"Every trader operates a business**." From this, it appears that there is no trader who does not operate a business.
- ✓ **Requirement of profession** = something different from the standard lexical meaning of the word "profession" or "professional". The business that is being operated by a certain person has to be his/her **principal calling**. One who operates a business as a pastime or in leisure not considered as a trader.
- ✓ **For profit** = seeking gain

- Is the enumeration under Art. 5 **illustrative** or **exhaustive**?

- The list in Art. 5 was meant to be exhaustive. However, it has been broadened by subsequent legislations.
- Commercial Registration and Business Licensing Proc. No. 67/97, as amended, the Re-enactment of the Investment Proc. No. 280/2002, as amended, and the Trade Practice Proc. The said laws redefined the scope of the enumeration of commercial activities under Art. 5 of the Commercial Code. For instance, such activities as higher education, health, and construction are included.
- Art. 2(2) of Proc. No. 67/97 **replaces** the word **'trader' by 'businessperson'.** The term 'businessperson' defined in the same way as found in Art. 2(2) of Proc. No. 67/97.
- **Businessperson** = "any person who professionally and for gain carries on any of those activities specified in Art. 5 of the CCE, or who dispenses services, or who carries on those commercial activities designated as such by Regulations issued by the Gov't."
- Art. 2(10) of the Trade Practice Proc. No. 329/2003 uses the term 'trader' with the same definition given for the term 'businessperson' by Proc. No. 67/97.
- Commercial Registration and Business Licensing Proc. (Amendment) No. 376/2003 introduces a new term **'sole businessperson**'.

❖ **All of the above terms refer to the same legal concept**. i.e, **trader.**

Negative Definition of trader:

- Arts. 6-9, which exclude farmers, fishermen and artisans from the scope of the Code's applicability.
- ✓ The list in Art. 5 is very long. One could, in effect, summarize commercial activities in a shorter formula, as has been done in the Italian Civil Code. But, the danger of these general formulae is that they raise difficulties of interpretation.
- ✓ Enumeration should be limitative.
- ✓ It must exclude from commercial law the farmer and handicraftsman.
- ✓ Arts. 6 and 7 deal with agriculture; art. 8 assimilates to farmers fishermen and persons who breed fish.
- ✓ Art. 9 deals with handicraftsmen, already excluded by sub – arts. (5), (7), (8), (9), (10) and (11) of Art. 5, which declare that certain activities are not commercial if carried on by handicraftsmen.
- ✓ **Handicraftsmen** = maximum no. of employees and apprentices allowed must be three.

Businesses (*fonds de commerce)*

- **Business** = an *incorporeal movable* consisting of *all movable property* brought together and organised for the purpose of carrying out any of the commercial activities specified in Art. 5 . Art. 124-212
- The ultimate essence or quality of any business is its **incorporeality** irrespective of the existence of **corporeal** elements. The importance of the incorporeal elements figures in prominently under Art. 127, which stipulates:

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

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

✓ the trade-name;

✓ the special designation under which the trade is carried on;

✓ the right to lease the premises in which the trade is carried on;

✓ patents or copyrights;

✓ such special rights as attach to the business itself and not to the trader.

- **Corporeal elements** that make up a business include **equipments** and **goods** - Art. 128.
- **Immovables** = i.e. the **business premises** and **land on which the premises has been erected**, had been **excluded** from the ambit of the definition of the **elements of a business** even though they are owned by the trader himself- chapter 2 of Title 4 in Book I of CCE.
- **The right to lease of the premises** incorporated in the enumeration of the **elements of a business**. It is linked with the goodwill of the business.
- **Business** = embraces **tangible** and **intangible assets**, including **tools, equipments, raw materials, goods in stock, good will, trade name, trade mark, patent, copy right, and the right to lease of the premises.**
- ✓ **It is an entity distinct from its constituent elements**, as long as **the whole** is more valuable than **the sum of the constituent parts**.
- ✓ So, it is a *res*, thing, or object over which a person can exercise **property rights**, including **ownership, usufruct, and lease**.

Goodwill and Its Protection by Unfair Competition

- Definition of goodwill in Art. 130 is defective because it fails to tell essence or nature of goodwill rather it gives you an extra piece of information concerning its origin and the obvious thing that goodwill has a value. Art. 130:

- ***The goodwill results from the creation and operation of a business and is of a value which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services.***
- **Goodwill** - is only another name for ***reputation***, ***credit***, ***honesty***, ***fair name, reliability***..."
- The advantage arising from the reputation and trade connections of a business, in particular the likelihood that existing customers will continue to patronize it.

- To understand the nexus between **goodwill** and **unfair competition** peruse the following instances of unfair competition:
- ✓ Trademark infringement, dilution of goodwill and trademarks, use of similar trade or firm names, simulation of product packaging or configuration, false advertising, passing off goods for those of another, and theft of trade secrets.
- Utilizing someone else's commercial reputation for commercial benefit or ‘sailing in their wind’.
- This commercial reputation or ‘wind’ is referred to, in legal parlance, as the ‘good will’ of a business.
- Unfair competition law is one of the devices designed to protect or preserve the goodwill of a business.
- Two alternative courses of action have been put at the disposal of a trader in the hope of enabling him to effectively safeguard his goodwill -Art. 131.
- 1. Bringing an unfair competition claim under Art. 133.
- 2. Instituting a proceeding based on the legal or contractual prohibitions specified in Art. 30,40,47,55,144,158,159,204 and 205.

Commercial Unfair Competition

- Art. 133 sets forth acts of competition that are regarded as unfair as follows:
- ✓ **Any act of competition *contrary to honest commercial practice* shall constitute a fault.**
- The following shall be deemed to be acts of unfair competition:
- ✓ any acts *likely to mislead customers* regarding the undertaking, products or commercial activities of a competitor;
- ✓ any false statements made in the course of business with a view to *discrediting* the undertaking, products or commercial activities of a competitor.
- Art.133 has been modelled upon the Convention of Paris for the Protection of Industrial Property of 1833, as amended. For the purpose of comparison, the full content of Art.10bis is reproduced below:
- The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.
- Any act of competition **contrary to honest practices** in industrial or commercial matters constitutes an act of unfair competition.

The following in particular shall be prohibited:

- 1. All acts of such a nature as to create **confusion** by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
- 2. False allegations in the course of trade of such a nature as to **discredit** the establishment, the goods, or the industrial or commercial activities, of a competitor;
- 3. Indications or allegations the use of which in the course of trade is liable to **mislead the public** as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.
- As quick look at the above cited provisions discloses, the definition of unfair competition in Art.133 is substantially the same as the 1st and 2nd alineas of sub-Arts (2) and (3) of Art.10bis of the Paris Convention.
- Implicit in the notion of commercial unfair competition are two ideas: unfairness and competition. Before we move onto a discussion of the unfairness aspect, a few words are in order about the competition aspect. Competition presupposes the existence of competitors. Competitors are traders who are trying to reach the same customers. In other words, competitors are traders who offer products or services in the same market. Thus, inherent in the idea of competition are three elements: they must be selling similar products, in the same area, and at the same time. Consider the following counterexamples:
  - A trader who produces coffee beans is not in competition with a trader who grows roses. In economic parlance, the goods or services have to be at least substitutes.
  - A trader who exports bottled potable water is not in competition with a trader who markets bottled potable water only in Ethiopia.
  - A trader who ceases to offer products or services for sale or does not yet offer products or services for sale is no longer in competition with a trader who does.

- Turning to a tentative treatment of the unfairness aspect, Art.133 gives us two standards whereby we can designate certain acts of commercial competition as unfair. The first, which I may call the general standard, is provided for in sub-art.(1). The second, which might be called the specific standard, is provided for in sub-art(2). The specific standard can further be broken down into two alternative requirements: likelihood of confusion and false discrediting statements. In connection with the scope of these standards, the first, by contrast, is broader than the second in that it is difficult, if not impossible, to figure out, at a given point in time and space(i.e., now and here), all possible situations of unfair competition that it covers. Put differently, the scope of activities prohibited by the general standard of unfair competition in sub-art.(1) is wider than the specific acts mentioned in sub-art.(2).As a result, this provision can be construed as a catch-all for all forms of unfair competition falling outside the purview of sub-art.(2). Unfair competition, as defined in sub-art.(1), expresses the idea that a particular act of competition is to be condemned as unfair because it is inconsistent with the community's currently accepted standards of honest practice. Thus, unfair competition depends upon commercial custom in determining what acts are honest and what are not. By virtue of its flexibility, the general standard requires judges to exercise their discretionary powers. In exercising their judicial discretion, the judges must take into account the peculiarities of each case as well as the historical and cultural context in which the case arises.

The Specific Standard - Misleading Commercial Practices

- A confusion analysis has to be made to reach a decision pursuant to sub-art (2) (a) of Art. 133. Any act gives rise to liability if it is "likely to mislead customers", though it does not create actual confusion. It is sufficient that an act passes the test of likelihood of confusion. One standard example of an act of unfair competition that is likely to mislead or confuse customers is trademark infringement. To prove a claim of unfair competition based upon trademark infringement, it is not necessary to prove actual confusion of specific customers. Proof of the likelihood of confusion in the market circumstances satisfies the requirement, so that similarity between two marks can make the case for unfair competition. Strictly speaking, sub-art. (2) (a) Does not grant legal rights in trademarks beyond registration. However, sub-art (2)(a) affords a remedy for unfair competition involving special designations, including trademarks. Unlike trademark infringement claims under the Trademarks Registration and Protection Proclamation, unfair competition claims do not require any registered marks. As a result, sub-art(2) (a) of Art.133 involves all unfair competition claims based upon trademark infringement and extends further to cover other situations of unfair competition.
- A likelihood of confusion exists when there is confusion as to the enterprise undertaking business, products and services, or commercial activities. More particularly, confusion may occur with respect to any of the following:
-
- (a) trade-names
- (b) distinguishing marks
- (c) the appearance of a product,
- (d) the presentation, including advertising, of products or services

False Discrediting Statements

- Sub-art.(2) (b) of Art.133 broadens the touchstone of liability for unfair competition by making actionable any false statement that is likely to discredit or compromise the reputation of a business or its activities, when made in a competitive context. A claim of unfair competition under sub-art.(2)(b) requires a showing that a party made misrepresentations in the course of business. The elements an alleged injured party must show to sustain a claim of unfair competition based on false discrediting statements are:
-
  - a party uses any false statement,
  - it is the course of business,
  - aims at misrepresenting the nature, characteristics, qualities or geographic origin of a competitor's undertaking, goods or services and,
  - it is with the purpose of discrediting the establishment, products or services of a competitor.
-
- Typically, situations that fall under sub-art.(2)(b) include, if not limited to, false advertising. Here, it has to be emphasized that any false allegations made, in the course of business, against the person, rather than against his undertaking, products or services, do not fall under sub-art.(2)(b). Such cases may constitute defamation, subject to the fulfillment of the requirements in Arts.2044-2049 of the Civil Code.

Effect of Unfair Competition

- In any event where an act of unfair competition has been committed by one trader against another, the Commercial Code affords the victim remedies. Article 134(1) provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act. The orders may in turn take the form either of an order for corrective publicity under Art.2120 of the Civil Code or an injunctive order Art.2122 of the Civil Code. Sub-art (2) of Art.133 stipulates:
- (2)The court may in particular:
  - order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful acts in accordance with Art. 2120 of the Civil Code.
  - order the unfair competitor to cease this unlawful acts in accordance with Art. 2122 of the Civil Code.
- The courts, while entertaining a claim for damages arising from unfair commercial competition, must stick to the rules and principles of the Civil Code governing extra-contractual liability. In the words of Everett F. Goldberg: “Since unfair competition is a species of extra-contractual liability, all the Civil Code provisions on extra-contractual liability dealing with matters not expressly covered in Articles 132-134 are applicable; for example, period of limitation, burden of proof, extent of damages, responsibility of persons or bodies corporate for the acts of others, etc.”

Trade Practice Proclamation

- The Trade Practice Proclamation, which entered into force on 17th of April 2003, contains 31 articles under 4 Parts. Part one, being general, deals with short title, definitions, objective, and scope of application whilst Part two contains rules regulating, as can be gathered from its caption, anticompetitive practices. Part three establishes the Trade Practice Investigation Commission and defines its powers. Part four provides for such miscellaneous matters as indications of prices, labels, power to regulate prices of basic goods, issuing and keeping of receipts, administrative measures and penalties, rule-making powers, repeal, and effective date.
- A closer perusal of the above legislation reveals that it prohibits two types of commercial behaviour: anti-competitive and no-competitive behaviours. The former comprises of three categories of acts, viz. anti-competitive agreements, unfair competition, and abuse of dominance while the latter consists of non-compliance with the legal requirements pertaining to indications of prices, labels, price lists of goods and services subject to regulation; conditions of distribution, sales and movement of same; orders for replenishment of stock of same; and the issuance and keeping of receipts.
- The proclamation applies to all commercial activities except such “activities that are, according to investment proclamation, exclusively reserved for the Government.” Besides, “[e]nterprises having significant impact on development and designed by the Government to fasten growth and facilitating development” are also excluded and so are “[b]asic goods or sevices that are subject to price regulation.”

- The declared aim of the Trade Practice Proclamation, in keeping with the free market economic policy of the country, is maximizing economic efficiency and social welfare by promoting competition and regulating anti-competitive practices. In particular, the proclamation has two objectives: to secure fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices, on the one hand and to safeguard the interests of consumers through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services, on the other.
- In what follows, I shall focus on unfair competition as found in Article 10 of the Trade Practice Proclamation No.329 and leave out the remaining forms of unfair trade practices untreated, as they fall beyond the scope of this paper. Here, again, it has to be borne in mind, as a caveat, that the scope of activities prohibited by sub-Art.(1) is broader than the specific acts enumerated in sub-Art.(2), though the list in the latter is more elaborate and lengthier than its counterpart in the Commercial Code.

Unfair Competition

- Any act or practice, in the course of commercial activities, *that aims at eliminating competitors* through different methods shall be deemed to be an act of unfair competition.
- The following activities, in particular, shall be deemed to be acts of unfair competition.
  - Any act that *causes* , or *is likely to cause*, *confusion* with respect to another enterprise or its activities, in particular, the products or services offered by such enterprise;
  - Any act that *damages* , or *is likely to damage the goodwill or reputation* of another enterprise falsely;
  - Any act that *misleads or is likely to mislead* the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise;
  - Any act of *disclosure, acquisition or use of information* without the consent of the rightful holder of that information in a manner contrary to honest commercial practice ;
  - Any *false or unjustifiable allegation that discredits, or is likely to discredit* with respect to another enterprise or its activities, in particular the products or services offered by such enterprise;
  - Any act that directly or indirectly *restricts, impedes or weakens the competitive production and distribution* of any commercial good or the rendering of any service;
  - Any act that *restricts or debars the timely or economic means of producing or distributing* any good or rendering of any service;
  - The importation of any goods from any foreign country into Ethiopia *at a price less than the actual market price or wholesale price of such goods in the principal markets of the country of their production with the intent to destroy or injure the production of such goods in Ethiopia or to restrict or monopolize* any part of trade in such goods;
  - Trading in any manner in *goods imported into Ethiopia for humanitarian purpose without authorization* by the Ministry. (Emphasis added.)

- In connection with the definition of unfair competition in Art.10 of Proclamation No.329/2003, I should say the following by way of commentary. First, it is important to bear in mind that the logical organization of Art.10 is parallel to that of Art.133 of the Commercial Code. Despite the absence of the element of honest commercial practice in sub-art.(1) of Art.10, unlike sub-art.(1) of Art.133, both deploy general standards: likelihood of elimination of competitors in the former and contrariness to honest commercial practice in the latter. In spite of the structural similarity between these two provisions, however, the missing element renders the literal application of Art.10(1) broad and impractical. For example, under a strict interpretation of the provision, a trader who resorts to producing better products, which is an honest method, and thereby eliminates competition would be held to be liable for unfair competition. Also sub-arts.(2) of the two articles consist in specific standards. The difference between these sub-articles lies in the farmer's inclusion of such activities as provided for in (d), (f), (g), (h), and (i). Even (d) can be interpreted to fall within sub-art.(1) of Art.133, as the test deployed is the one encapsulated in the phrase " in a manner contrary to honest commercial practice." In my opinion, the whole of the provisions under sub-art(2) can be reformulated in such a manner as to avoid redundancy, which I suspect has been an outcome of bad legislative draftsman ship. In this regard, my proposal is to merge some of the provisions together.
  - and (c): Misleading/confusing activities;
  - and (e): False discrediting statements;
- (d): Secret information;
- (f) and (g):Restricting, impeding, debarring, or weakening the competitive(efficient)
- production and distribution of goods and services;
- (h): Dumping, and
- (i): Trading in humanitarian aid.

- With respect to sub-art. (2)(d), it is interesting to note two serious pitfalls. That the information has to be secret is self-evident in as much as what is prohibited is the acquisition, disclosure, or use of such information contrary to honest commercial practice. But, what kind of information is considered secret is not clear. Besides, the legislation fails to pin down the nature of the sort of information that it purports to protect. The legislation should have made it explicit that to qualify for protection, a piece of information should not only be secret, but also a trade secret.
- Finally, I wish to point out one substantive loophole in the Proclamation. In this regard, no where in the text of the Proclamation, unlike the Commercial Code, is it provided that a violation of any provisions thereof constitutes a fault. Of course, there is no question that any infringement of a specific and explicit provision of a law constitutes a civil offence by virtue of Article 2035 of the Civil Code. Consequently, it is doubtful whether a judicial remedy is available for a plaintiff claiming under Art.10 of the Proclamation in the first instance, rather than under Art.2035 of the Civil Code, as long as the only type of remedy mentioned by the Proclamation is administrative measure or/and penalty.
- It is instructive to consider, at this point in time, the manner in which other legal systems deal with the same problem. For example, Art.8(2) of the Protection Against Unfair Competition Act of 1998 of Barbados defines the term “secret information” as follows:
- “ For the purpose of this Act, information shall be considered “secret information” if
- it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally would have knowledge of or access to the kind of information in question;
- it has commercial value because it is a secret; and
- the rightful holder has taken responsible steps under the circumstances to keep it secret.”
- Cf. Sub-art.(1) of same to see how the law of Barbados attempts to establish the nature of the secret information.
- The Uniform Trade Secrets Act, §1(4) (1979), defines trade secret as “information including a formula, pattern, compilation, program, device, method technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”
- See also Art.39 (1) and (2) of Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPS), which reads:
- In the course of ensuring effective protection against unfair competition as provided in Art.10bis of the Paris Convention (1967), Members shall protect undisclosed information….
- Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
  - is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
  - has commercial value because it is secret; and
  - has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Trade Practice Investigation Commission

- In 2003, through the enactment of the Trade Practice Proclamation No.329, the House of Peoples' Representatives created the Trade Practice Investigation Commission and charged it with the duty to prevent and eliminate "…anti-competitive and unfair trade practices [and]…any restraints on the efficient supply and distribution of goods and services." To this end, the five-member commission, representing the public sector, the private sector, and consumers' association and being appointed by the Prime Minister upon nomination by the Minister of Trade Industry, is empowered to conduct appropriate investigations and hearings and to take against violators administrative measures and penalties. Sub-art.(2) of Article 15 provides the following.
  - The Commission shall have powers to:
    - » investigate complaints submitted to it by any aggrieved party in violation of the provisions of this Proclamation;
    - » compel any person to submit information and documents necessary for the carrying out of the commission's duties;
    - » compel witnesses to appear and testify at hearings;
    - » take oaths or affirmations of persons appearing before it, and examine any such persons;
    - » enter by showing the commission's Id card and search the premises of any undertaking during working hours, in order to obtain information or documents necessary for its investigation;
    - » appoint or employ, upon the approval of minister, experts to undertake professional studies as may be necessary;
    - » take administrative measures or/and give penalty decisions on any complaints submitted to it.
- The said legislation also requires that in order to execute any decision for administrative measures and penalties, it must be endorsed by the Minister of Trade and Industry which has the discretion to approve, amend, or remand the same.

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

- The Commission may impose the following administrative measures, where any person violate the provisions of this Proclamation, Regulations, Public Notice or Directives issued for the implementation of the same.
- Suspend, correct or eliminate the practice in question;
- Suspend or cancel business license;
- Take any appropriate measure that enable the victim's competitive position to be reinstated;
- Seizure and selling of goods that are subject to price regulations, provided that the proceeds less any selling expense shall be paid to the owner, who in no case shall demand interest or any other payments.
- Moreover, the Proclamation imposes fines upon defendants who have been proven to have violated any provision thereof by way of penalty. Article 26 reads:
- Without prejudice administrative measures that may be taken pursuant to Article 25 of this Proclamation, the Commission may impose the following penalties where any person violates the provisions of this Proclamation or Regulations, Public Notice or Directives issued for the implementation of the same.
- Fine upto 10% of the value of the total assets of the violator or 15% of yearly total gross sales of the violator, alternatively.
- Fine from 5,000.00(five thousands) upto Birr 50,000.00(fifty thousands) where the direct or indirect cooperation of any individual in any prohibited practice is proven.
- In addition, the Proclamation, in its Article 27, sets forth factors that the Trade Practice Investigation Commission should take into account while assessing the amount of fines. As a result, the Commission is expected to take stock of such factors as the extent of the damaged caused, the market share of the violator, the size of the market affected, and the financial status of the violator.

- At this point in time, I should draw particular attention to an important procedural lacuna in the Trade Practice Proclamation. In connection with the procedural issue, neither the Civil Procedure Code nor the Proclamation has a rule on pendency which precludes an administrative tribunal from adjudicating a matter brought before it at any time subsequent to the institution of a civil matter in a competent court of law. The Proclamation incorporates a rule on appeal, instead of one on pendency. According to Article 17(1), any party may appeal to the Federal High Court against any administrative measures or/and penalty decisions within 30 days from the date that he was aware of the approval of the execution. Besides, sub-Art.(2) of the same prohibits the Ministry of Trade and Industry from executing any decision before the expiry of the 30 days period. In this connection, I wish to raise the following issues. First, what is the legal ramification of sub-Art.(1) of Article 17? Does it divest Federal First Instance Courts of their jurisdiction to hear and decide unfair competition claims under Article 10 in the first instance? As long as all that the said provision talks about is the appellate power of the Federal High Court and as long as there is no explicit provision prohibiting Federal First Instance Courts from assuming jurisdiction over lawsuits for unfair competition in the first instance, the author contends that Federal First Instance Courts must have competence to adjudicate such matters. If so, at this point, the procedural problem pointed out earlier figures in prominently, viz. if it is the case that both forums, the judiciary and the administrative tribunal, have competence to hear and decide claims for unfair competition in the first instance, will it be fair and expeditious to allow the parties continue litigating in two different forums on the same matter? Does the Trade Practice Investigation Commission have the power to award damages? Can't damages be read into sub-art.(3) of Art.25 that provides for the Commission's power to "[t]ake any appropriate measure that enable the victim's competitive position to be reinstated" ? What if both forums reach inconsistent decisions, say, the civil court decides on the merits that the defendant is not liable whilst the Commission holds him liable? Does it not give plaintiffs ample opportunity to harass and vex defendants by instituting judicial and administrative proceedings at the same time?

Criminal Unfair Competition

- In addition to the civil and administrative remedies discussed above, the Ethiopian legal system affords victims of unfair competition a criminal remedy. Although Article 719 of the Criminal Code defines criminal unfair competition, Articles 720 and 721 also criminalize such specific cases of unfair competition as infringements of intellectual property rights. In connection with Article 720, it has to be noted that it "is essentially a form of unfair competition, in that it emphasizes the misconduct of the wrongdoer in misleading the purchasing public. But its scope is both broader and narrower than Article 133 of the Commercial Code." These differences in the scope of the said articles have a major advantage from the vantage point of the victim as long as a violation of Article 720 brings about extra-contractual liability in accordance with Article 2035 of the Civil Code. Commenting on the similarities and differences between Article 674 of the Penal Code (which Article 720 of the Criminal Code mimics) and Article 133 of the Commercial code, Goldberg has this to say:
- Insofar as the act of imitation, the likelihood of misleading customers and the involvement of products are concerned, there is little difference between Article 674 and Article 133. Article 674 speaks of infringement and passing off as well as imitation, but for purposes of this discussion these words essentially mean the same thing. Article 674 says, "in such a manner as to deceive the public," instead of "likely to mislead customers," but the two phrases should be interpreted the same way. One might argue that the phrase in the Penal Code requires actual confusion, but such a strict construction is unsound in light of the difficulty of proving actual confusion and the relation of Article 674 to unfair competition generally. A strict reading is not justified by the fact that penal sanctions are more severe than civil sanctions, since the requirement of intent adequately protects the offender's interests in this regard. …
- The major differences between Article 674 and Article 133 are that Article 674 *may* apply even if the offender and victim are not competitors and that it will *not* apply unless the offender actually intended to imitate the victim's mark in such a manner as to deceive the public.

Article 719 stipulates:

- Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:
- by discrediting another, his goods or dealings, his activities or business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit therefrom against his competitors; or
- by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or
- by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or
- by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or
- by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.
- With respect to the above definitional article, the following words are in order. First, I propose to re-organize the 5 sub-articles in Article 719 into three categories for the purpose of this paper. (1) using false or discrediting statements; (2) misleading acts; and (3) trade secrets.

UNIT THREE
BUSINESS ORGANIZATIONS

- In a free market economy, business organizations are a familiar part of every day life. Business organizations run the supermarkets from which we buy our foods and attires; they supply the water, gas, and petroleum products we depend on; they publish the books and newspapers we read. We deal with them so often as consumers of their products and services that the image which the phrase “business organizations” brings to mind is usually of entity concerned with marketing and collecting payments for products and services which they have offered. It is necessary to go behind this image to get to the entities which are the subject of the Law of Business Organizations.
- Most, if not all, of the business organizations with which lawyers are concerned are legal entities which have firm-names and head office; they can acquire rights and incur liabilities, and can sue and be sued under their firm names. Business organizations, from a legal viewpoint, are undertakings with more than one member, having assets distinct from the private assets of the members and a formal system of management, which may or may not include members of the organization. The first feature, initial plurality of membership, distinguishes the business organization from the business owned by one man; in the latter case the trader can do as he pleases with its assets, since he is personally liable for debts and obligations incurred in connection with the business, no special rules are needed to protect its creditors beyond the ordinary provisions of bankruptcy law.

- The second feature, the possession of distinct assets, is essential for two purposes: to identify the assets to which creditors of the organization can resort to satisfy their claims (though in the case of some organizations, such as the partnerships they can also compel the member to make good any deficiency), and to make clear what assets the managers of the organization may use to carry on business for the member's benefit. The assets of an organization are brought in directly by its members by way of contribution. Contributions may be made in cash, kind, and service in all forms of business organizations other than the share company or private limited company.
- The third essential feature, a system of management, varies greatly. In a simple form of business organization the members are entitled to participate in the management, and each member has an equal voice in management decisions.
- Business organizations are affected by the legal environment in which they operate. Accordingly, two aspects of the Law of Business Organizations should be noted. First, the law facilitates various combinations of labor, capital and management. Certain business or economic goals may be better served by one organizational form than another. The second noteworthy feature of the Law of Business Organizations is that each form of organization imposes varying degrees of legal formalities on its participants. Further, one's business relationship may have different legal consequences, depending on which organizational form is selected.
- In subsequent sections, the concept of business organizations will be elaborated in the light of the Commercial Code provisions regulating business organizations, it will be contrasted with associations and cooperatives, the basic legal structure of each form of business organizations will be outlined, and the factors that distinguish one form from another will be examined. In addition the legal implications of conducting business under certain organizational form will be discussed.

What is a Business Organization ?

- Article 210 of the Commercial Code defines a business organization as “any association arising out of a partnership agreement.” A partnership agreement, pursuant to Article 211 of the Code, is “a contract where by two or more persons who intend to join together and to cooperate undertake to bring together contribution for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out there or ,if any.”
- A cursory look at Articles 210 and 223 reveals two important aspects of business organizations, namely the contractual and institutional (or, organizational) aspects. According to article 210 a business organization is an association stemming from a contract known as “partnership agreement.” Here it is important to note that the word “association” is a mistranslation of the original French term “le groupment” Article 223 suggests that even if a business organization emanates from a partnership agreement, the mere fact of concluding a valid partnership agreement is not enough to create a business organization at law. There is more to the formation of a business organization *de jure* than the conclusion of a partnership agreement. In the words of Everett F. Goldberg, “[a] business organization has an institutional aspect with an existence dependent upon, but separate from, the partnership agreement.”
- A business organization is a contractual association of two or more persons who undertake to bring in contribution with a view to carrying out an economic activity. It is an essential character of a business organization that it should have a profit motive, this being the feature which distinguishes it from an association.

Business Organizations Vs Associations

- Article 404 of the Civil Code defines an association as " a grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits. " What transpires from this definition is the most important distinctive feature of associations, namely profit. If profit is considered to be the underlying motive for the formation of a certain organization, then it is said to be a business organization. Associations are always formed for non-profit purposes. Examples are charitable organizations, religious groups, literary clubs, local and international NGOS, etc.
- Associations and business organizations are governed by two different legal regimes which are independent of each other. Associations are regulated by Articles 408-482 of the Civil Code whereas business organizations are governed by Book II of the Commercial Code. Accordingly, the power of executive oversight in respect of these entities vests on two distinct offices. While associations are being supervised by the office of associations of the Ministry of Justice or the respective offices of the Regional States' Justice Bureaus, business organizations fall within the jurisdiction of the Ministry of Trade and Industry or the respective Regional States' Bureaus.
- Associations are expressly prohibited from engaging in any of the commercial activities listed in Article 5 of the Commercial Code. Article 25(1) provides that "associations may not carry on any trade. " A question may be raised in connection with this ban. Assume that a not-for profit association is formed and it eventually engages in profit-seeking activities. Sufficiently, this would serve as a ground for dissolution of the association by court, on motion of its board of management, or one-fifth of the associates, or of the office of associations of the Ministry of Justice pursuant to Article 461 of the Civil Code.

Cooperative Societies Distinguished

- Cooperative Societies are groupings that are organized to provide an economic service without profit to their members. Cooperative societies are governed by the Cooperative Societies Proclamation No.147/1998. According to Article 4 of the Cooperative Societies Proclamation, Cooperative Societies shall have one or more of the following objectives:
- to solve problems collectively which members cannot individually achieve;
- to achieve a better result by coordinating their knowledge, wealth and labor;
- to promote self-reliance among members;
- to collectively, withstand and solve economic problems;
- to improve the living standards of members by reducing production and service costs by providing input or service at a minimum cost or finding a better price to their products or services;
- to expand the mechanism by which technical knowledge could be put into practice;
- to develop and promote savings and credit services;
- to minimize and reduce the individual impact of risks and uncertainties;
- to develop the social and economic culture of the members through education and training.
- This form of groupings is generally adopted by groups of individuals who wish to pool their resources to gain some advantage in the marketplace. Consumer purchasing cooperatives are formed to obtain lower prices through quantity discounts. Seller marketing cooperatives are formed to control the market and thereby obtain higher sales prices from consumers. Credit cooperatives and farmers' cooperatives are other examples of this form of groupings.

Classification of Business Organizations

❖ Partnerships and Companies

- Business organizations Based on the general characteristics they share in common: **partnerships** and **companies**:
- **Partnerships = an aggregate or collection of individual members.**
- ✓ **Personality of the individual partner is important** as **incapacity, death, or serious disagreement** between partners may result in **dissolution** of the partnership firm, unless otherwise agreed. Intimate personal collaboration is expected of each partner, only persons who know each other very closely may enter into a partnership agreement giving rise to a partnership firm.
- ✓ Are suitable **for small business** involving a relationship of **mutual trust and confidence.**
- ✓ The partners are **agents for each other**. They are normally **jointly and severally liable.**
- ✓ A partner cannot transfer or assign his interest in the firm to an outsider or third party and make the transferee or assignee a partner without the consent of all the other partners.

- **Companies =** an aggregate or collection of shares or capital.
- **Capital = important** for legal personality of company.
- May own property, make contracts, and sue and be sued under its name.
- It is entirely **distinct** from its members.
- Has **perpetual succession** - death or insolvency of a shareholder does not affect its existence.
- **Shares are freely transferable** unless the company's AOA otherwise provides.
- **Shareholders are not entitled to take part directly in the management** of the company unless they become directors. A company is managed by a BOD, general manager, shareholders' meetings, and auditors.

Forms of Business Organizations – Art. 212

- **Partnerships** - divided into ordinary partnership, joint venture, general partnership, and limited partnership.
- **Companies** - comprises of share company and private limited company.

Commercial Vs Non-Commercial Business Organizations

- Individual may be classified by Ethiopian law as either a trader or a non-trader,
- Business organizations may be either commercial or non-commercial.
- Commercial business organization - objects under MOA or in fact are to carry on any of the activities specified in Art. 5. - Art. 10(2)
- Share and PLC shall always be deemed to be of a commercial nature whatever their objects & whether or not their objects include any of the commercial activities listed in Article 5.
- Business organizational listed in Art. 212 may be commercial except for an ordinary partnership - Art. 214
- Ordinary partnership may not be a commercial business organization, and, as such, may not engage in any of the activities listed in Art. 5.
- General partnerships, limited partnerships and joint ventures may or may not be commercial, depending on whether one of the objects under the memorandum of association or in fact is to carry on any of the activities listed in Art. 5.
- If a commercial business organization is formed in the form of an ordinary partnership, or if its form is not specified, the organization is deemed to be a commercial general partnership - Art. 213(2),

Generally, this distinction rests on two criteria:

- Determines whether or not a business organization is commercial which devotes itself, either under its MOA or in fact, to commercial operations specified in Art. 5.

Two exceptions:

- Share company or the private limited company are always commercial
- Ordinary partnerships are prohibited from engaging themselves in the commercial activities listed under Art. 5.
- The general distinction between commercial and non-commercial business organizations entails several legal consequences.
- Business organizations are subject to differential treatment of the law depending on whether they are commercial or non-commercial.
- ✓ Only commercial business organizations are required to keep accounts and only they may go through bankruptcy. But all business organizations other than joint ventures must register and be publicized and all business organizations are subject to the provisions governing traders.

Formation

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

The Key elements in the definition of the partnership agreement

A Partnership agreement is a contract

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

Persons Incapable Under the Civil Code

- The validity of a partnership agreement is affected by the incapacity of a party to it in the same way as in any other contract. In this regard, the Commercial Code contains a few provisions that supplement the Civil Code.
- Article 11(1) prohibits persons incapable under the Civil Code from carrying on any trade. Sub-article(2) of the same provides that if an incapable person carries on a trade, any of his acts related to the trade may be invalidated in accordance with the pertinent civil code provisions. The provisions of article 11 also apply mutatis mutandis to the incapacity of a party to become a member of a business organization in which one has the status of a trader. A general partner in a commercial general partnership or commercial limited partnership is deemed to be a trader.
- Article 12 prohibits the tutor of a minor or an interdicted person from carrying on a trade in the name and on behalf of the minor or interdicted person, except in the cases provided in article 288 of the Civil Code. The effect of this provision is to preclude the tutor from joining, in the name of a minor or an interdicted person, a business organization which would make the minor or interdicted person a trader. According to Article 288 of the Civil Code, a tutor may carry on commercial, industrial or other enterprises forming part of the estate of the incapable if is so instructed by the family council. Also under article 276 of the Revised Family Code, the tutor shall do so if is enjoined to do that by a court. The family council or the court, as the case may be, must instruct the tutor whether to liquidate or to keep them going, having regard to the time for which the tutorship is to last, the abilities and potentialities of the tutor, and the interest of the incapable.
- Article 13 provides that emancipated minors may not carry on a trade unless authorized in writing by the family council.
- Beware that protection of the addressee is the purpose of the rules on incapacity. The law extends protection also to third parties against the risks of having dealings with incapables and thereby promoting security of commercial transactions. Pursuant to Article 14, minority cannot be set up against third parties where a minor who carries on a trade got himself entered in the commercial register as though he were of age. According to Article 15, judicial interdiction does not affect third persons unless notice of the incapacity is entered in the commercial register.
- **(b)Spouses**
- As per Article 16, married couples may become members of a business organization as if they were not married. A spouse may object in the interest of the family to the other spouse’s becoming a member of a business organization which bestows upon the latter the status of trader. The effect of such objection is to limit the trading spouse’s liability for business debts only to the extent of his personal property. As long as such debts are normally considered to be of the marriage, and, thus, recoverable against the personal property of each spouse and the matrimonial regime, such objections do not preclude the trading spouse from becoming a member of the business organization. The objections can be set up against third parties if only entered in the commercial register.

- **Two or more persons, physical or juristic, can be parties**
- Generally, nothing prevents a business organization from becoming a member of another business organization. An association may not become a general partner of a commercial general partnership or commercial limited partnership, since, pursuant to Article 25, it " may not carry on any trade." Whether it may become a member of another business organization depends on whether it thereby acquires as one of its purposes the making of profits. If it does, it may not become such a member. Nevertheless, noting seems to prevent an association from joining a share company or private limited company as a means of investing extra funds or acquiring more funds to carry out its legitimate purposes.
- The minimum requirement of two persons is true for all business organizations except the share company, for which there must be at least five. The automatic effect of the operation of the rule on the minimum number of persons who can enter into the partnership agreement is the exclusion of sole proprietorships from the Law of Business organizations. Put differently, one person cannot form a business organization by himself.
- On the other hand, a question arises as to the maximum number of persons who can be members of a business organization. There is no general limit on the maximum membership size of business organizations, except in the private limited company where it is fixed at fifty.
- **(iii) Intent to Join Together and Cooperate**
- For a partnership agreement to be valid, the parties to it must have had the intention "to join together and to cooperate." In effect, this is to mean that the parties to the partnership agreement acted in the way they did with a view to forming a business organization. In addition, they must have intended to collaborate on an equal footing though they all need not intend to participate in the management and control of the business organization. The degree of collaboration expected from members varies from one form of business organization to another.

Contributions

- The parties must undertake to bring in contributions in order that a contract subsists as a valid partnership agreement. Contributions can be made in cash, kind, or services. In all business organizations, except in a share company or private limited company, they should be made in cash or kind. Capital contribution includes intangible property. Cases in point are copyrights, utility models, patents, trademarks, service marks, and trade secrets, including debts owed to and the use of property belonging to the contributor.
- **(v) For the purpose of carrying out economic activities**
- The objective of the parties to a valid partnership agreement must be to engage in economic activities. The formulation under article 211 which stipulates that "activities of an economic nature" is so broad that it would appear to cover almost any profitable human endeavor, provided that it is possible, moral and lawful. At this stage, it has to be pointed out that economic activities include, but not limited to, all of the commercial activities mentioned under Article 5. However, you should bear in mind that all non-economic activities are excluded outright by virtue of the above-mentioned requirement.
- **(vi) Participating in the profits and losses arising out thereof**
- Every party to the partnership agreement must have the intention to share in the profits and losses. Profits and losses will be distributed between the members in the proportion stipulated in the partnership agreement. In the absence of such stipulation, every partner shall have an equal share in the profits and losses, irrespective of his contribution [Article 252 (1)]. Any stipulation giving all the profits to one partner or relieving one or more of the partners of his share in the losses is null and void (Article 215).

Publicity

- A further formality requirement imposed on the parties to a valid partnership agreement is publicity. According to Article 219(1) of the Commercial Code "any business organization other than a joint venture shall be made known to third parties." The policy consideration behind the publicity requirement is to protect third parties. Members are required to bring to the attention of the public that they have formed a business organization. This requirement is unique to partnership agreements, as distinct from other contracts, because the very existence of the business organization depends on its fulfillment.
- Publicity consisted in cumulative fulfillment of the requirements relating to publication of notice, deposit of documents, and registration in the commercial register [Articles 220-224, Com.C.]. However, Proclamation No.376/2003 does away with the first element of publicity, namely publication of notice. Article 2(2) of the same provides that "Business organizations shall acquire legal personality by registering in the commercial register without being publicized in a newspaper as provided for under Article 87,219,220,223, and 224 of the commercial code for their establishment and amendments to their memorandum of associations."

Legal Personality and its Attribute

- As far as the law is concerned, it is not only human beings who count as persons. In some cases, the law creates artificial persons, such as bodies corporate under public law, associations, cooperative societies, and business organizations, which are dealt with legally as if they were people; this is called having legal personality. Only when an entity has legal personality can it have legal rights and duties. A human being has legal personality from the beginning to the end of his life. Article 1 of the Civil Code provides that "the human person is the subject of rights from its birth to its death." In addition to individuals, groups of people can have legal personality. They are broadly called business organizations, and they allow the law to treat the group as separate from the individuals who operate or own it. Article 210(2) of the Commercial Code stipulates that "any business organization other than a joint venture shall be deemed to be a legal person." Legal personality, therefore, is a device whereby groups of people such as business organizations become the subject of rights and duties.

Attributes of Legal Personality

- **(a) Capacity.** The fundamental importance of legal personality is that an entity with legal personality is capable of enjoying, as opposed to exercising, rights. Business organizations are, pursuant to Article 22 of the Commercial Code, expressly invested with the capacity to "carry on any trade in accordance with the provisions regulating such trade." Nevertheless, no express rule exists pertaining to the capacity of business organizations to carry out other activities and to enter into juridical acts in general.
- With respect to scope of the capacity of business organizations with legal personality, we can put forward the following argument by drawing on the general rules for physical persons as well as associations provided in Articles 192 and 454(1) of the Civil Code respectively. Business organizations with legal personality should be capable of performing all the acts of civil life consistent with their nature unless declared incapable by law.
- Since a business organization is basically a combination of individual members and initial capital, the members would be co-owners of the property if the organization does not have a separate legal existence. Any liability incurred, in the normal business practice, by one or more of the members in their name shall rest with them. However, if the law bestows upon the organization legal personality, it may acquire right of ownership over the property and incur liability in its name. Furthermore, it can litigate legal proceedings in its firm-name. Also, it is primarily liable on its property, income & taxable activities.

- **b)Firm name.** The name of a business organization, firm-name, is chosen by the members in pursuance of the rules governing firm-names. The Commercial Code contains specific requirements for names of all business organizations except an ordinary partnership. The name of any business organization other than the ordinary partnership must indicate the form of organization: whether it is- “General partnership,” “ share company,” etc. Besides the firm-name of a general partnership should include the names of at least two partners and the name of a limited partnership may only consist of the names of the general partners. A share company and private limited company may be operated under assumed names chosen freely, provided that they do not offend public morals and the rights of third parties.
- **(c) Head Office.** The head office of a business organization is the place where its principal organs of administration and management are situated. The legal effects of the place of its head office are the same as those of residence for the physical person. The significance of the location of its head office figures prominently in procedural matters in particular in relation to judicial jurisdiction and service of process. Moreover, it determines nationality of the business organization under consideration.
- **(d) Nationality:** The general principle concerning bodies corporate whose head offices are situate abroad is that they have such nationality as is given to them by the laws of that country. Consequently, a legal person with its head office in Ethiopia is presumably of Ethiopian nationality in spite of the absence of an express provision. As can be gathered from a reading of Articles 545-549 of the Civil Code in conjunction with Articles 555-560 of the Commercial Code, the formation or operation of a business organization and its enjoyment of rights in Ethiopia depend upon the following three factors; the place where its principal business purpose is situate, and the country under whose law it is formed.
- A business organization with its head office in Ethiopia is subject to Ethiopian law with respect to its formation and operation.
- An organization with its head office abroad is subject to Ethiopian law if it is formed in accordance with Ethiopian law or if its principal business object is in Ethiopia.
- An organization formed abroad (and, presumably, with its head office and principal object of business abroad) must register in Ethiopian offices.

Individual Assignment - 1

1. Define business organizations.
2. Distinguish business organizations from associations and cooperative societies.
3. Discuss classification of business organizations.

- **Ordinary partnership(O.P):**

- ✓ **a partnership which lacks in legal characteristics that make it a commercial partnership- Art. 227.**
- ✓ Is always non commercial – Art. 213(2).
- ✓ If commercial b.o formed with O.P form=General P.
- ✓ **Involuntary joint ownership-** excluded from O.P - Art. 228(1).Eg. Succession property before partition.
- ✓ Co-owners may agree to create O.P.

Contributions

- ✓ Every partner must make a contribution.
- ✓ It may be in money, debts, other property or skill.
- ✓ Only usus of property may be contributed- Contributing partner assume obligations of **lessor**, risk remain with the contributor.
- ✓ If ownership of property contributed- Contributing partner assume obligations of **seller,** *warranty against defect & dispossession, risk transferred upon delivery.*
- ✓ If debt contributed- contributor guarantees only existence of the debt, not solvency of debtor, unless otherwise agreed. Art. 230
- ✓ deemed to be equal, unless otherwise agreed-

Partnership Capital

- is the **original value** *(at the day of contribution)* of contributions in cash or in kind, not skill or service. Art. 80(1).
- may change only through amendment to the partnership agreement.

Partnership property

- refers to **"property, debts and rights brought into or acquired by the partnership"**. Art. 245.
- sum of the value of the partnership's assets, includes all the **cash, corporeal and incorporeal property and rights originally brought** into the partnership or **subsequently acquired by the partnership**.
- Includes any property

Ownership and Possession of Partnership Property

- Partnership property belongs to the partners in common (common property of partners)-Art. 245.
- Every partner may use partnership property according to usual partnership practice- Art. 245(2).
- No partner may use/possess partnership property against the interests of the partnership or so as to prevent his co-partners form using, unless otherwise agreed.

Creditors of the Partnership

- creditors of the partnership may claim against partnership assets. Art. 255(1).
- May claim against personal property of partners who are jointly and severally liable to them for the obligations of the partnership, unless otherwise agreed - Art. 255(2).
- a partner who is sued on his personal property, may raise benefit of discussion as a defense like simple guarantor- Art. 1934-35 Civ.C + Art. 255(2).
- Any provision relieving partners or some of them of joint and several liability may not be set up against third parties unless 3rd parties were aware of such provision.

Creditors of the Partners

- personal creditors of partners may not attach partnership property- Art. 256(1).
- a partner may assign his partnership interest to a creditor or to anyone else- **assignee entitled to receive that partner's share of the profits.** Art. 250.
- A creditor who gets a judgment against a partner may obtain from the court an order against the partner's interest.
- If profits are insufficient to pay off the creditor, the court may order that the partner's share be sold - Art. 256(3).

Types of Managers

1. **Statutory managers**:- specifically designated in the partnership agreement or following an amendment thereto.

- **Partners or 3rd parties** may be appointed as managers- Art. 236.
- They may carry out **all acts of management** in **disagreement** with the **other partners** in the absence of fraud- Art. 239.
- They may not be **revoked or his powers restricted** by the other partners, save for good cause- Art. 240(1).

2. **Subsequently appointed managers:-** appointed by decisions of the partners at any point in time subsequent to the making of the partnership agreement.
3. **Managers at law:-** Every partner has the right to act as a manager in the absence of both statutory and subsequent managers- Art. 236
4. **Sole manager:-** where a single individual has been appointed a manager.
5. **Several managers:-** When 2/more persons have been appointed managers and their duties have not been specified or where it has not been specified that they act jointly.

- ✓ each carry out **acts of management**.
- ✓ Each manager may object to dealings contemplated by other managers & the objection decided on by a majority vote of all the partners- Art. 237.

6. **Joint mangers:-** where **joint managers** have been appointed, decisions shall be taken by **consensus**.

- ✓ However, where an act of management is of an **urgent nature** and the **other joint managers cannot be consulted**, one of them may act alone like a sole manager- Art. 238.

The Authority of Managers

- Arts. 33-36 applicable to B.O except to the extent they are expressly or impliedly modified by provisions on B.O- Art. 3.
- B.O is bound by any contracts or other acts made in its name by an agent acting within the scope of his powers- Arts. 216(1) + 2189(1).
- **2 levels of authority:**

1. Express Authority:

- ✓ specified in partnership agreement.
- ✓ stipulated in employment contract.

2. Implied authority

- ✓ authority to bind the firm which arises, by operation of the law, from the fact of partnership.

Rights and Duties of Partners

- Mutual rights and duties of the partners may be determined by the partnership agreement.
- **General Duties.** Partners are bound to:
  - ✓ exercise the **diligence and skill** which they use in conducting their private affairs- Art. 243(1).
  - ✓ act in the " **strictest good faith" or "utmost good faith**" towards the partnership- Art. 2208(1), 2263(1) Civ. C.
  - ✓ exercise the same **diligence** as a *bonus pater familias*- Art. 2211(1).
  - ✓ be with the same **care** as a *bonus pater familias* .
- **Sanction:** Indemnity
  - ✓ Every partner shall be liable to the other partners in respect of any damage which he caused by his default- Art. 243 (2).

Specific Duties:- Duty to:

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

- **Partners are:**
- not entitled to receive remuneration for taking part in the conduct of business;
- entitled to share equally in the profits and losses-Art. 251 & 252.
- A partner making any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of 9% per annum-Art. 247(1).
- Receiving payments from the debtors and issuing receipts against them.
- Engagement and dismissal of employees of the firm.
- Accepting, drawing, and issuing negotiable instruments on behalf of the firm.
- Borrowing money and pledging the firm's goods or chattels as security.

Mode of doing act to bind a firm

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

Liability of Partners to Outsiders

- **Liability of a partner for acts of the firm.**
- ✓ Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner-Art. 255.
- **Liability of the firm for wrongful acts of a partner.**
- ✓ Where by the wrongful act/omission of a partner or with the authorities of his partners loss or injury is caused to any third-party, or any liability is incurred, the firm is liable to the same extent as the partner- Art. 2222.

Dissolution, Winding up, and Termination

- Extinguishment of a partnership consists of 3 stages:
  - ***Dissolution***
  - ***Winding up or liquidation, and***
  - ***Termination.***

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

- Upon dissolution, the partnership is not terminated but:
  - ✓ continues until the winding up,
  - ✓ unfinished business is completed,
  - ✓ receivables are collected,
  - ✓ payments are made to creditors, and
  - ✓ remaining assets are distributed to the partners.

Grounds of Dissolution

Grounds of Dissolution (Applicable to All Forms B.O): - 3 categories **-** Art. 217-218:

1. **Legal Dissolution:-** Where the business purpose has been **achieved or cannot be achieved**- Art. 217(a);

- Where the term for which the B.O was formed **expires**, unless the partners agree to continue the B.O – Art. 217(c).

2. **Consensual Dissolution:-** Where partners agree to dissolution prior to the expiry of the term for which B.O was formed- Art. 217 (b).

3. **Judicial Dissolution:-** dissolution for good cause by the court on the application of a partner- Art. 218(1).

- ✓ There shall be good cause (Eg. Where a partner seriously fails in his duties, becomes through infirmity or permanent illness or for any reason incapable of carrying out his duties or where serious disagreement exists between the partners).

Grounds of Dissolution Specific to Partnerships

A. Dissolution by Notice

- Partnership may be dissolved at any time by any partner by giving six months notice, especially in conditions where:
  - ✓ no period time is agreed on (or where a partnership agreement is entered into for an undefined period);or.
  - ✓ a partnership agreement is entered into for the life of one of the partners; or
  - ✓ the power to dissolve on notice is provided in the P/P agreement- Art. 258.

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

- Partnership shall be dissolved where one of the partners dies or is no longer able, under the law, to be a partner- Art. 260(1).
- a partnership shall be dissolved where partner is declared bankrupt or where one his personal creditors causes his share to be disposed of under Art. 256(3) + 260(1).

Continuation upon Dissolution

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

2 situations in which continuation in Ethiopia are:-

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

Winding up/liquidation - Arts. 264-270

- Involves **completing unfinished business, collecting debts, taking inventory, reducing assets to cash, auditing the partnership books, paying creditor, and distributing the remaining assets to the partners.**
- Liquidators may be 1/more appointed under the partnership agreement (**statutory liquidators**), or , in default, by liquidators appointed by all the partners (**consensual liquidators**) or, in default, by court appointed liquidators(j**udicial liquidators**).

Duties and Responsibilities of Liquidators

- ✓ Liquidators shall have the same duties & responsibilities as managers- Art. 265.
- ✓ Draw up an inventory of assets and liabilities of the partnership -Art. 266.

Powers of Liquidators – Liquidators:

- ✓ shall take all steps necessary to complete the winding-up of the partnership.
- ✓ may sell the property of the partnership, represent the partnership in legal proceedings and may compromise or refer to arbitration any matters in issue.
- ✓ may not undertake new business in the name of partnership but may complete business already started- Art. 267.

Distribution of Assets

- After all the partnership assets have been collected and reduced to cash, they are distributed to creditors and the partners.
- When the partnership has been profitable, the order or distribution is not critical; however, when liabilities exceed assets, the order of distribution has great importance. (**Arts. 268-270).** ***Amounts owing to:***
- ✓ ***creditors other than partners- Art. 268(1);***
- ✓ ***Partners other than for capital and profits, and restoration of properties whose use only were contributed to the partnership - Art 268(2);***
- ✓ ***Partners for capital- Art. 269;***
- ✓ ***Partners for profits - Art 270(1).***
- Partners may (by agreement) change the internal priorities of distribution (number 2, 3, & 4) but not the preferred position of third parties.
- Proportion in which the partners bear losses depends not on their respective capital contributions but on their agreement. If no specific agreement exists, losses are borne in the same proportion in which profits are shared.
- If the partnership is insolvent, the individual partners must contribute their respective share of the losses in order to pay the creditors- Art. 268(1).

UNIT FIVE
Joint Venture

- **Joint venture:-** is a grouping of people arising out of a partnership agreement, which is also known as **a joint venture agreement** in which two or more persons combine their labour and/or capital for the purpose of carrying out economic activities and participating in the profits and losses arising out thereof - Arts. 271 + 211.
- Is the **simplest** form of business organization.
- Regulated by title III of Book II of the Comm. Code.
- Joint ventures, more often than not, are used for a **single transaction or project, or a related series of transaction or project.**

- Large organizations often investigate new markets or new ideas by forming joint ventures.
- **Joint ventures have the following merits:**
- Its secret nature;
- It is exempted from registration

CHARACTERSTICS OF JOINT VENTURES

- It is subject to the general principles of law relating to partnerships - Art. 271.

Exceptions to the application of partnership principles to joint ventures include:

- It is not made known to third parties. Its agreement need **not be in writing** and is **not subject to registration -**Art. 272.
- **A joint venture does not have legal personality - Art. 272(3).**

✓ may not have a firm-name; may not enjoy ownership right over the capital; may not incur liabilities; may not have a head office; cannot sue or be sued in its firm-name; cannot be declared bankrupt.

- where a joint venture is made known to third parties, it shall be deemed, insofar as such parties are concerned, to be an **actual partnership**-art. 272(4)].
- That is, in case third parties happen to be aware of the existence of a commercial joint venture, it will be presumed to be a ***de facto*** **general partnership**.
-

UNIT – 5
Joint Venture

UNIT – 6
General Partnership(G.P)

- Article 294 - ***"No action may be taken against individual partners for debts due by the partnership until after payment has been demanded from the partnership."***
- ✓ It allows the creditors to bring a direct action against partners for the **repayment of fictitious dividends** which they have received.
- ✓ G**ood faith** has no place in the case of the G.P.
- **Art. 295?**

- **Limited partnership: Arts. 296-300**

✓ consists **at least one general partner** and **one or more limited partners**.

✓ **General partners** assume **management responsibility** and have full responsibility for the partnership and for all the debts of the partnership-**personally liable**.

✓ Formed by **written MOA** signed by the partners & **registered** by the official in charge of the commercial register.

- **MOA** = must contain particulars under Art. 284.

= a clause indicating the identity of general & limited partners.

- **L.P** = shall have a firm name, which must contain the **names** of the **general partners** accompanied by the words “Limited partnership”- Arts. 298 and 299.

✓ ***Example***: *“XY Limited partnership”*

- In case a **limited partner** allows his name to be included in the firm-name, he shall be **liable** to **third parties** in good faith as he were a general partner - Art. 297.
- **Partnership creditors** may have a **direct action** against the **limited partners** to require them to pay their **contribution** - Article 301(1).
- **Limited partners** exempted from having to repay **fictitious dividends** received in **good faith** on the basis of an approved balance sheet -Article 301(2).

- **Limited partners** may never take part in *external management* and give *third parties the illusion* that they are dealing with general partners.
- **Limited partners can conduct:**

✓ ***consultation with co-partners***

✓ ***dealings with the firm***

✓ ***investigation of managerial acts***

✓ ***advising and counseling to the firm***

✓ ***giving permission to do acts outside the manager's powers.***

- **Death, incapacity, or bankruptcy of a limited partner does not constitute a ground for dissolution,** unless otherwise agreed.
- ***Shares may be assigned*** by the consent of the **managers, the general partners, and the majority of the limited partners** – Arts. 302 & 303.
- ***Art. 303?***

- **Sole proprietor & partnership have limitations;**
- ✓ They are unsuitable for large scale business.
- ✓ So, **alternative forms** of business ownership in keeping with the rapidly **changing political, legal economic and technological scenarios** became important – **"COMPANY".**
- **Western world** had bequeathed to the man kind many a **great invention or innovation** and the company form of business ownership in one such innovation which created ripples in the **business & political** world.
- The company form had its humble beginning in the late 16^{th} or early 17^{th} century & then grew in **size & power**.
- **In USA** = known as **corporations** or a **multi-national**.

COMPANY

SHARE COMPANY
(Sh. Co.)

PRIVATE LIMITED COMPANY(PLC)

Company

1. **Membership:**
   - Min: 5 – Max: unlimited members.
2. **Directors:**
   - managed by directors whose minimum number shall be three.
3. **Public Subscription:**
   - can invite public to subscribe to its shares and debentures.
4. **Prospectus:**
   - goes to public to raise its capital is required to file a prospectus.
5. **Minimum subscription:-**
   - all capital must be subscribed and 25% of the capital must be paid-up before registration.

PLC

1. Min: 2 –Max: 50 members.
2. managed by one or more managers.
3. can not go to public to raise its capital.
4. is exempt from this requirement.
5. It can be registered by fully paid-up capital.

Company

1. **Membership:**
   - **Sh. Co**: **Min**: 5 – **Max**: unlimited.
   - **PLC: Min**: 2 – **Max** : 50 members
2. **Legal status:**
   - Separate legal entity.
3. **Liability:**
   - Limited.
4. **Transferability of interest:**
   - Subject to some restrictions.
5. **Management:-**
   - **Sh. Co**: **BOD**.
   - **PLC: Managers.**
6. **Implied Agency**
   - No member can act as an implied agent and bind the company.
7. **Stability**
   - Perpetual succession.

Partnership

1. **Min**: 2 – **Max**: Unlimited.
2. legal entity with exception of joint-venture.
3. Unlimited.
4. Not freely transferable.
5. Partners= participate in management & even Managers.
6. Every partner has an implied authority.
7. Unstable

Merits of Company

A. Financial Resource: - It helps to mobilize huge funds, required by big business because large number of members can subscribe its capital in small & affordable quantities.- *Shares & debentures*.

B. Limited liability: - Shareholders are not personally liable for the debt of the co.

✓ Company= popular by its limited liability, profitability & confidence in the management.

✓ = ***"low-risk and high return factor."***

C. Scope of growth:- company can grow and expand at a rapid pace and faster due to huge resource.

D. Professional management:- Competent & professional management is vital for targeted rates of growth and expansion.

E. Stability of the company:- continuity and stability of business are equally important for the success of any business.

- With its ***perpetual succession*** of ownership theory, only the company form can ensure both continuity and stability.

F. Positive social benefits:- a company is beneficial not only to its members, creditors and employees but also to the public at large.

- It supplies goods and services at a competitive rates by introducing new and sophisticated technologies and by exploiting the natural resources.
- provides employment opportunities both direct and indirect to the needy and competent persons in the society.
- It channels small savings of people into productive investments.
- It contributes by way of direct and indirect taxes and duties.

Share Company

- **Limited liability**: - No member is liable to contribute anything more than the nominal value of the shares held by him.
- **Perpetual succession:-** unlike partnership sh. Co. will not be dissolved by the death or incapacity of its members. It is an entity with a perpetual succession.
- **Transferability of shares:-** Even though it is possible to restrict free transfer of shares in the AOA (Art. 333(1). As a general principle shares of Sh. Co. are freely transferable and can be sold or purchased in the share market.

Founders

- **Founders** are: (Not defined in the CCE). Article 307

➢ Before formation of share company persons who:

✓ Form a ***share company*** (brings a share company into existence);

✓ Take the **necessary steps** to carry that intention into operation.

✓ Decide the **scope** and **business** of share company.

✓ Prepare the **necessary documents**.

✓ Make arrangements for **advertising** and **circulating the prospectus**.

✓ There may have **several founders** – (**individual** & **body corporate**).

✓ **Non-members** may be founders acting like as a ***solicitor, engineer, accountant or valuer***.

Art. 307 - Founder are persons who:

- Sign MOA and subscribe the whole capital or
- Sign the prospectus (where the company is formed by issuing shares to the public), bring in contribution in kind, persons who are allocated special shares in the profit or
- Person outside of the company who initiated the plans of facility the formation of the company.

Roles of Founders – They:

- are **not agents** because there is no principal.
- Start to act with the name of the company they stand in a fiduciary position towards the Sh. Co.
- Have the power of **creating and modifying** the company.
- They **deal with 3rd parties** in the name Sh.co , but they may be **refunded** after the company has formed - (Art 308/2/).

Rights of Founders

- Paid a **share which shall not exceed one fifth of the net profits** – (stated in MOA) - (Art 310). In the absence of such statement, a founder has no right against the company for his payment.
- If it is stated, it is presumed that there is a contract which gives the directors power to pay the preliminary expenses out of the company's funds. Such benefit may not extend for more than three years.

Liabilities of Founders

- The violation of acts (Art. 309) may lead into the violation of stated provision and this in turn may result into criminal liability.
- If the required capital and subscription is not fulfilled (Art 309/1/a/) it is violation of law.

✓ *E.g. 1. If founders formed share company without fully subscribed, such will lead to the violation of the law.*

✓ *2. As to the contribution in kind, it must be done by an expert (Art 315), and be verified. If the amount of valuation of in kind contribution does not conform to exact value then there is violation.*

✓ *3. The same is true if false prospectus is advertised.*

Memorandum and Articles of Association

1. Memorandum of association(MOA):

- ✓ Document which sets out the **constitution** of B.Os and is the foundation on which the structure of the B.Os is based & **signed by subscribers**.
- ✓ It contains the **fundamental conditions** upon which alone the B.Os is allowed to be **incorporated – Objects & scope of activities** of the B.Os – **not to be Ultra virus**.
- ✓ It becomes a **public document & available for inspection** (Art. 92), after registration of the B.O.
- ✓ It must comply with the **provisions of the commercial code** & all other documents of the company must comply with MOA.

Purpose of MOA

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

➢ **Source of information for intending partner/shareholder** –

✓ they can refer field, object/purpose, risk of the B.Os.

✓ Any one dealing with the company can refer its corporate objects.

Contents of MOA – commonly it contains 5 clause:-

A. Name clause:- include name of the company – Any name except illegal, immoral, similar name with other existing co.

✓ Eg. “XYZ share company”.

B. Registered office clause:- include name of the state where the registered office of the company is situate. This clause important because:-

- it ascertains the **domicile** and **nationality** of the company & **jurisdiction** of courts;
- it is the place where various **registers** relating to the company must be kept and to which any **communications and notice** must be sent.

C. Object Clause:- The most important clause because it:

- ✓ ***shows the object of the company;***
- ✓ ***determines the extent of the powers which the company.***
- ➢ Objects must be **clear** to give information for shareholders and third parties.

D. Liability Clause:- provide nature of liability incurred by members – Limited (unpaid capital) & unlimited liability.

- Helps members to know their liability to the company.

E. Capital Clause:- provide subscribed & paid-up capital, nominal value of each share.

- Only altered by the amendment of the MOA.
- Eg. ***The capital of the company is birr 2,000,000 divided into 20,000 shares of Birr 2,000 each.***

2. Articles of Association(AOA)

- Rules and regulations of a company framed for the purpose of **internal management** of its affairs.
- Deals with **rights & duties** among **members**.
- Framed for carrying out the aims and objects of MOA.
- **Subordinate** to and are controlled by the MOA.
- If there is a conflict between **MOA** and AOA the provisions of the former shall **prevail**.
- if MOA is **ambiguous, or silent**, reference may be made to **AOA** to explain the ambiguity or to **supplement** where it is silent.
- If there is **no ambiguity or lacuna in MOA**, its terms can not be controlled or modified by AOA.

MOA

- **Charter/ constitution/** of co. – extremely important for co. affairs.
- is of **interest to outsiders** who wish to deal with co.
- defines relation of the **co. with outsiders.**
- defines **scope of activities** of co. - if acted beyond the scope, it is **ultra-virus**

AOA

- contain rules governing the **internal management** of co. Subject to MOA – can't contradict with MOA, can't confer wider powers on the co. than those in MOA.
- are of **interest mainly to shareholders and directors**.
- deal with **rights among members** of the co. and r/p of co. with members.
- Must be in the scope limited in MOA.

Similarities:

- Both are public document & be registered.
- Where there is any ambiguity or where MOA is silent on any point, AOA may serve to explain or supplement the MOA.
- Both bind the company and its members.
  - ✓ *The members to the company*
  - ✓ *The company to the members*
  - ✓ *The member inter se,*
  - ✓ *The company to the outsiders.*

1. Constructive Notice

- MOA & AOA must be **registered** at the competent registration office/public authority/ - then becomes public document – accessible & open for public inspection upon payment.
- Every one dealing with the co., whether a shareholder or an outsider is presumed to have read & understood MOA & AOA. This deemed knowledge of the two documents and their contents is known as Constructive Notice of MAO & AOA.

2. Doctrine of indoor management

- is an **exception** to the rule of constructive notice.
- Internal arrangements, other than registered in the office of registration, conducted by the company do not bind outsiders – they are **presumed not known by the outsiders**.
- Seeks to protect outsiders against the company – **positive towards outsiders & negative towards co**.

Deposit and Registration_(Art 323)

- The following documents must be **deposited** at the office of registrar at Ministry of Trade and Industry at Federal level and Trade and Industry Bureau's at regional level:
  - MOA
  - AOA
  - The prospectus, if any
  - The minutes of the subscribers' meeting and all complementary documents.

- Upon registration, the co. acquires **personality**.

Amendment of MOA & AOA

- By **special resolution(extra-general meeting)** of the shareholders - Arts. **422-425.**
- **Rigid procedure** used for amendment of the nationality and increase of the shareholder's investment – all shareholders present/represented & unanimous vote required.
- The company exercises its power of amendment subject to the following limitations:
  - ✓ ***Must not be against the provisions of***

Securities

- Share Company can issue 2 kinds of securities, **equity and debt securities.**

1. Equity securities: are shares issued by co.

- Described as the ***counter part*** of the shareholders ***contributions*** to the capital of co.
- It include ***common stocks, preferred stocks*** etc.
- Give to their holders ***pecuniary rights*** and mainly consist of the **right to receive dividends, liquidation profits (if any), to exercise preferred subscription rights** in the context of capital increase.
- Give to their holders **personal rights** which allow the shareholder to be ***informed on the management*** of the co. and to ***participate in shareholders' meetings***.

Shares:

- It expresses a ***proprietary relationship*** between the co. and shareholders – consists of rights & obligations
- A shareholder is ***proportionate owner*** of the co. but - not own the co.'s assets which belong to the co. as a separate legal entity.
- It is a ***personal estate*** & ***transferable***.
- It is ***movable(corporeal) property*** which can either be ***mortgaged or pledged***.
- Is the ***interest*** of a shareholder in the co. measured by a ***sum of money*** for the purpose of:

✓ ***liability*** and

✓ ***interest*** & ***series of mutual covenants*** entered into by all the shareholders.

Issuance - Share certificate

- Issuance creates a ***binding contract*** between the parties.
- Issuance creates **shares**(documents) to exist - ***partly paid-up or fully paid-up.***
- It enables the shareholder to deal more ***easily in the market***.
- ***Particulars*** on the share certificate are:
  - ✓ Name, head office and period for which the co. is established;
  - ✓ Amount of capital and par value of the share;
  - ✓ Date of MOA and & place of registration of co. ;
  - ✓ Serial no. of share, its series class - ordinary or preferential and the kind of preferential share;
  - ✓ Amount of part payment on shares not fully paid up or a statement that the share is fully paid; and
  - ✓ Its transferability to a foreigner.

Forms of Shares - Arts. 325 & 326

Registered Share

- **Registered** in the name of a shareholder.
- The **issuer has full access** to the shareholders list.

Bearer Share

- **Not registered** in the name of the shareholder.
- **Its holder is not known by the issuer** and can communicate with them only by way of press releases.

- Bearer shares can be **converted** into registered & vice versa, where bearer shares are not prohibited.
- Shares issued in **Ethiopia** are **registered shares**, **statutes** of share co. prohibits **bearer share** & it is very difficult to find bearer shares.
- **Shares** are issued in their **par value**. They may not be issued in less than their value. When it is permitted by the statutes it may be issued in greater than par value and the difference in known as **premium**.

Equity Shares

- Holder is **not entitled to special rights**/ privileges /.
- **Equity shareholders get more if the co. is prosperous** or get nothing if the business of the co. collapses.

Preferential Shares-336

- Confer up on holders a **priority** on annual profits preference dividends, preferential repayment right upon liquidation of the co. or the right to receive a liquidation bonus, except vote.
- Can be established either in the **initial statutes** or by a **decision of extra-ordinary** meeting.
- **Preference share should fulfill**:
- Preferential right as to the payment of **dividend** at a fixed rate and
- Preferential right to the payment of the paid up capital, during winding-up.

Rights and Duties of Shareholders

Rights of Shareholders

1. Individual rights - Include members' rights to:

- Participate in annual net profit;
- Share in the net proceeds on a winding –up , vote except preference shares;
- Preferential right of allotment of new shares based on shareholder's holding of share /or preferential right of subscription of cash share in proportion to no. of shares held.
- transfer shares subject to any restriction;
- inspect the registers, indexes, returns and copies of certificate etc. Kept by the co. and obtain extracts or copy thereof ;
- obtain copies of MOA and AOA on request and payment of fee;
- receive a copy of statutory report;
- remove directors by joining with others;
- obtain a copy of the profit and loss account and the balance sheet with the auditor's report;
- attend meetings of shareholders, receive proper notices & vote at meeting ;
- receive a share in the capital of co. and the surplus assets, if any, upon

2. **Corporate membership rights - ** group rights

- Can be exercised only by the **majority** (Art 416(1)).
- If and when the decision is contrary to the statute or law, confers **right to apply** to the court **to set aside** the majority decision within 3 months from the date of such decision has been made Art. 416/2/.
- Members holding not less than one-tenth of the capital of the co. **right to apply** to the court for the meeting of general assembly of shareholders - Art 391/2/.

Duties of Shareholders

- Duty to **pay** subscribed shares.
- All money payable by any member to the co. under MOA &AOA shall be a debt due to the co.

Temporary Warrants – Art. 343

- ***Bearer warrants -*** the transfer is by mere **delivery**.
- ***Registered warrants -*** shall be **registered** and **transferred like registered share**.
- ***Conditions*** to issue **temporary warrants:**

✓ The shares shall be **fully paid-up**.

✓ It is a **negotiable instrument**;

✓ It is share security & **easily transferable**;

✓ **Coupons for dividends** may be attached to the share warrant.

Joint Holdings - Art 344

- Certain capital of one share company may be hold by another.
- If co. “X” holds ≥10% of capital of “Y” co., “Y” can’t hold any share from “X” because it results in reduction of capital of “Y”.
- Such reduction of capital can only be effected by ***extra-general meeting*** of the shareholders as it may affect the rights of 3rd parties or creditors (due to its limited liability).

2. Debt Securities:

- Its holders are **creditors** and **rank prior** to shareholders .
- They are remunerated by **fixed interest** where as the income from **equity security** is **uncertain**.
- They are remunerated before equity securities, and
- They are issued for a defined term and are reimbursed to their holders.

2.1. Debentures - Art 429

- is a **document** given by a co. as **evidence of debt or acknowledging a debt to the holder** arising out of **loan** & secured by a **charge**.
- **Secure repayment** by mortgage or charge on the co.'s property or undertaking, and providing that until payment, **interest** will be paid there on at a fixed rate.

Characteristics of a debenture:- It is:

- in the form of a ***certificate,*** like share certificate/instrument in writing.
- an acknowledgement of ***indebtedness***.
- Provides for ***repayment*** of principal sum & its date.
- Provides for ***payment of interest***.
- It carry **no voting rights** at any meeting of the co.

Issuance of Debenture

- **issued according to AOA**, usually by a resolution of BOD.
- may be issued at par value, at a premium, or at a discount if permitted by AOA.
- unlike shares it may not be issued at a discount without any restriction b/se they don't form part of the capital of the co.
- It is not issued by:**– *Art. 429.***
  - ✓ ***individuals;***
  - ✓ ***company whose capital is not fully paid and***
  - ✓ ***if a co. has not issued a balance sheet in respect of its first financial year.***

Contents of debenture - Art 433.

- ✓ Name of co., its objects, head office, and place of registration.
- ✓ Date of formation and for how long.
- ✓ Paid-up capital on the date of issue.
- ✓ Date of resolution of the general meeting and its entry in the register.
- ✓ Serial no and nominal value of the certificate, the rate and date of interest payments and the terms for redemption.
- ✓ Amount of the issue and the special guarantors, attaching to the debentures and date of deed setting up such guarantees.
- ✓ Amount of debentures or loan stock issued previously and not amortized, indicating the guarantees attaching thereto. -Where appropriate the period or periods of time within which debentures may convert their debenture into shares and the provisions for such conversion.

Forms of debenture – 2 forms of debentures-Art 434 & 325/

- always issued in written form- An oral acknowledgement of a debt is not a debenture.

1. Registered debentures

- is **registered in the name of a holder** in the books of the co.
- is transferable in the same way as a **share** or in accordance with the conditions endorsed on **their back**, but a transfer to be completed has to be registered with a co.
- are **not negotiable instruments**. Interest on such a debenture is payable to the registered holder or to the order of the registered holders.

2. Bearer debentures

- Are **negotiable instruments** - transferable by mere **delivery**;
- The co. keeps **no register** of debenture holders;
- **Coupon is attached** to the bearer debenture for **payment of interest** and must be presented for payment;
- Co. can communicate with holders only by advertisement.

Debenture holders' meeting

- Can be called at any time by the debenture holders' representatives, by BOD at lest 20% of the debenture holder of the same class (Art.436).
- Are called and held under substantially the same conditions as to form and time as shareholders ordinary meetings (Art. 432)
- Debenture holders must be consulted on three types of issues provided in Art. 438.
- Determines term of office and remuneration of debenture holder representatives.
- Debenture representative may be dismissed at any time by the meeting. The authority to represent debenture holders can not be granted to the issuer, its management or its employee's related co. or to co.s guaranteeing the issuer's commitments.
- the representatives have the power to carry out any action necessary to protect the rights of the debenture holders (Art 443).
- They have the right to attend shareholders meetings and have access to the documents made available to the shareholders under the same conditions as shareholders.

Corporate Management

- Management of the company is carried on by the **shareholders' meeting, BOD & general manager.**
- **2 approaches** of conferring powers to BOD and general meeting of shareholders.

1. **Liberal approaches**:- to confer **specific power to general meeting** like altering statute of the co., appointment and removal of BOD, and conferring all other powers to BOD.
   - Common in USA legal system
2. **Restrictive approaches**:- to confer the power to BOD and general meeting by **specifying in MOA or AOA**.
   - **BOD has limited power**.
   - Common in **continental Europe legal system** - French company law, which is also model of CCE, confers the powers specifically to BOD.

Shareholders' meetings – Art. 388

- an assembly of persons connected with the co. who wish to discuss and decide matters related to it.

Types of meetings - Art 390.

1. General meetings:

- consists of shareholders or all classes.
- are classified into ***ordinary*** **and** ***extra ordinary general meetings***.

1.1. Ordinary general meeting – held once every year to discuss ***financial and administrative*** affairs of co.

- Decisions concern ***financial matters*** - approving annual accounts and management report (other than alteration of the capital) and ***administration of the co.(appointing BOD, determining remuneration and approving any transactions)*** - Arts. 418 & 419.
- may take all **decisions within the competence** of the shareholders, except those which are required to be taken by an extra ordinary meeting.
- Can be held only if the shareholders present or represented at least **one-quarter of the shares** of the voting shares.
- Resolution is passed by a **simple majority** present or represented. Accordingly, a shareholder who abstains is disregarded (Art 421)

1.2. Extra-ordinary general meeting – to consider a particular matter specially ***amendment of the statutes*** - Art 425

- ***Change of nationality*** of the co. or ***shareholder to increase investment*** in co. needs the present of all holders of all shares having voting right and unanimous voted.
- are subject to **stricter rules** as to **quorum and majority** than ordinary meetings.
- **At least half of all shareholders** having voting rights of the co. must be present or represented
- Resolutions are passed by **two-thirds majority** of the votes held by shareholders present or represented.

2. Special meeting - Art 426

- is a meeting that consists of ***shareholder's of particular class*** to transact business affecting their interest only - (Eg. the holders of ***preference share***).
- The rules as to quorum for special meeting and majority required to pass resolutions are the same as the rules governing **extra-ordinary meeting**.

Procedural rules common to all meetings

Calling of meetings

- Calling of the meetings are governed by ***statutes of the co***.
- Meeting may be called by ***BOD, the auditors, the liquidators or by officer of the court*** - Art 391/1/.
- **Urgent cases** - shareholders holding at least one-tenth of the share capital of the co., -Art 391/2/).
- Meetings can be called by **publication** in a legal newspaper notice setting out the name and form of the co., date, times, place and nature of the meeting and the agenda.
- at least 15 days must elapse the day when the notice of the meeting is published and the date of meeting if a quorum is not present at the first meeting, and at least eight day must elapse between the dispatch of the notice for a new meeting and the date on which such meeting is held /Art 395/.

Setting of agenda - Art 397

- The **agenda** of the meeting is determined by **its caller**.
- **Resolutions** passed based on the agenda.
- If the meeting has to be called for a second time because a quorum is not present on the first occasion, the agenda cannot be amended for the second meeting. However, meetings may remove any director and appoint other persons to replace them without these matters appearing in the agenda.

Voting by proxy - Art 398

- Shareholder may take **part in and vote** either personally or by proxy.
- Where the shareholder appoints proxy, he may not vote personally.
- The form, place and time of deposit of the proxy, is determined by BOD - Art 402/

Substantial rules common to all meetings

- **Right to information** - Shareholders are entitled to be given relevant information - Art 406.
- **Right to vote** - Art 407

Directors - Art 347.

- Are persons by whom the business of co. is carried on.
- **BOD**:- group of directors as an institution.
  - ✓ is the managerial body.
  - ✓ It is established by general assembly from among the **shareholders**(Art. 349).
  - ✓ The no. of directors is set in statutes, not less than 3 and not more than 12.
  - ✓ Individuals or legal entities can become directors. If a legal entity is appointed as a director, it must appoint an individual person (Art 347/4/). _

Appointment- Art 350

- The **first directors** may be appointed in the ***statute*** & confirmed by first meeting of subscribers.
- If not confirmed, **subsequent directors** may be appointed by **ordinary general meeting** of shareholders.
- **Term of office - 3 years**, re-election may be made.
- ***Directors may appoint new directors*** to replace departing or resigning directors & be ratified by ordinary general meeting – Art. 351.
- If the replacement is not confirmed, general meeting may appoint other directors.

Powers, Duties and Liabilities of BOD (Art 360 - 362)

- BOD has power given to it by ***statute*** and ***decision of general meeting. Acts of BOD binds the co.***
- ***In practice***, the business of the co. is taken care of by the chairman and general manager and BOD merely defines the general policies to be followed by the co.; takes or approves strategic decisions and controls its chairman.
- Duties of BOD are:
  - ✓ Organizing management and meeting records;
  - ✓ Keeping of accounts and books;
  - ✓ Calling shareholder's meeting;
  - ✓ Establishing reserve fund required by the law and statutes;
  - ✓ Applying to the court where the company is unable to pay debt.

Agreements between co. & directors - Art 355-357.

- To regulate ***conflicts of interest*** between co. and directors. There are 2 types of agreements:

1. Prohibited agreements

- Directors are strictly prohibited to be **partners** with ***joint and several liabilities in rival companies*** nor do they compete against the co. on their own behalf or on behalf of 3rd party.
- Directors can not enter any form of ***loan agreement*** with co.
- The prohibition of entering into contract of ***loan or guarantee*** does not apply when the ***director is legal entity or the co.*** operates a ***banking business***.

2. Regulated agreements - Art 356.

- Disclosure of potentially conflicting relationship.
- The regulation applies to agreements:
  - ✓ directly or indirectly between the co. and its directors
  - ✓ between the co. and another entity in which one of the directors is owner, partner, agent, director or manager of such entity.

- Such agreement requires ***prior approval*** by BOD & ***notice to the auditors***.
- The ***auditors must prepare special report*** on the agreement.

Directors' liability - Art 364-367.

- Directors may be liable to the co. and to 3rd party.

A. Liability to the company:

- directors are agents and trustees of the co. & jointly and severally liable to the co. and its shareholders.

B. Liability to the creditors:

- Directors have duty to preserve the capital of the co. intact to protect co. & 3rd party.

Proceedings against the directors

- Proceeding by shareholders against directors conducted if resolution is passed by general meeting at least voted 1/5 of the capital.
- Creditors may bring the case to the court where capital of the co. is insufficient to cover the debt.

Removal – Art 354, 397(2) - Director may:

- Be removed by general meeting before the expiry of term of office.
- Claim compensation, in the absence of good cause.

General Manager

Appointment: General manager:-

- carry on ***day to day activities*** of a co. & represents the co. in relation to 3rd parties.
- is appointed by the BOD - Art 348(1).
- is not member of the board to avoid potential ***conflict of interest*** and to ensure that the appointment of directors may always be freely revoked by the board -Art 348(4).
- AOA may specify that directors or one of director may be responsible as a manager - Art 362(2). So, manager can be appointed from among the board provided it is stated in AOA.

Powers, duties, liabilities and Removal

Powers:

- the power is delegated by the BOD. Board of directors decides on substantial policy issues. Such is implemented by general manager.

Duties:-

- to perform all his activities according to the power delegated to him, and according to the statutes and the law.
- occupies the position of a trustee for the co. and he has to safeguard the interest of the shareholders and the co.

Liabilities

- Liable to the co. or 3rd party for damage resulting from infringement of his power or violation of law, statutes.

Removal

- BOD has power to appoint & remove(for good cause) general manager.

Accounts and audit

1. Out of capital payment

- BOD must prepare **annual accounts** and a **management report** for submission to the general meeting (Art 446). Including:
  - ***balance sheet,***
  - ***profit and loss statement, and***
  - ***report on the activities and affairs of the co.*** (remuneration of the directors, auditors and proposal for the distribution of dividend, if any)
- **Dividend** is only paid where there is profit and such **profit** is declared to be paid by the **general assembly** - Art 458.
- If **no profit**, **no payment of dividend** out of capital.
- If dividend is paid from capital it shall be deemed as a ***fictitious dividends*** and the persons making the distribution shall be **criminally** and **civilly** liable.

2. Reserve funds – Art. 453, 454

2.1. Legal reserve:-

- is reserve ***required by law*** & ***net profit mandatorily*** be allocated on a ***long-term basis*** to the co.'s operation.
- is ***5% of annual profit*** until the amount of legal reserve is equal at least 10%.
- ***can not be distributed*** to the shareholders nor be used for the ***repurchase*** or ***redemption*** of the co. shares.

2.2. Supplementary reserve:-

- which must be allocated to the co.'s operation on long-term basis by application of AOA.
- can not be distributed to the shareholders.

2.3. Optional reserves:-

- correspond to ***profits allocated to the co.'s*** operation by a decision of the shareholders meeting according to AOA.

2.4. Free reserve:-

- Created by an ***ordinary general meeting***.
- Sometimes it is known as ***"revaluation reserve"***,
- Corresponds to ***difference revealed*** in asset revaluation between the historical book value of certain tangible assets (such as immoveable or trade marks) and their real market value.

Profits and dividends

Profits:- Art. 452

- is the net receipts after deduction of general costs and other changes.
- After the legal reserve and if appropriate other reserves have been funded, the annual meeting is free to use any remaining part of the profit by allocating them to the shareholder as dividends.

Dividend:-

- is the return that a shareholder gets from the company out of its profits.
- It may be a fixed annual percentage as in the case of preference shares or it may be variable as in the case of equity shares.
- The time and manner of payment of dividends is decided on by the annual meeting (Art 458/3/).
- Claim only after the same is declared by the co. in general meeting.

Appointment of auditors – Art. 368

- are appointed by shareholders and entrusted with the external control of the co.
- Their main functions are:
  - ***to audit the accounts of the co.,***
  - ***certify certain information provided to the shareholders, and***
  - ***prepare reports which must be submitted to the shareholders.***
- Company may elect one or more auditors and assistant auditor.
- Body corporate may be appointed as an auditor.
- ***The first auditors*** - appointed by the subscribers of the co. & hold the office until the first annual general meeting.
- ***Subsequent auditors*** - appointed by general meeting & hold office for 3 years - Art 369.

- ***Incompetent persons to be an auditor***

(Art. 370)

  - ***Founders, contributors in kind, beneficiaries enjoying special benefits/preferred rights/ BOD*** or one of its subsidiaries or its holding co.;
  - ***Blood relatives*** or in-laws of any person mentioned above;
  - ***Persons who receive*** from persons mentioned in above a salary or periodical remuneration in connection

- ***Auditors*** prohibited to be a ***directors or managers*** which they audit, nor of one of its subsidiaries of its holding co. with in 3 years from the date of the termination of their function.

Removal of auditors – Art. 371

- auditors may be removed by general meeting at any time.
- if they are removed not for good cause, can demand compensation.

Dissolution of co. – Art. 495

- Co. are rarely dissolved & shareholders usually prefer to sell their shares – Sometimes dissolution become unavoidable.
- Causes of dissolution of a co./partnership/, common to all kinds of B.O.
- Dissolution by:- (Art. 217-218)
  - ***application of law, statutes co./ partnership***
  - ***agreement of members to dissolve/***
  - ***judicial decision for just cause.***

Dissolution by law

- If the ***no. of members*** of B.O is below the minimum required by the law, B.O be dissolved – (Art 311).
- Where organ of the co. ***failed to function*** (Arts. 311 and 511).
- If it is failed to survive even by ***provisional arrangements*** by the court, it will dissolve.

Dissolution by agreements

- Co. may be dissolved ***prematurely*** by the agreement of ***members.***
- Co. may be dissolved by resolution of an ***extra -ordinary general*** meeting without alteration of its statutes - Art 495(d).
- Dissolution may be made as laid down in the statutes, they may relate to its ***duration*** or its ***objects***(achieved or unable to achieve).

❑ Dissolution by court order

- The court may dissolve a company, if there is ***just cause*** to do so (Art 218/1/).

❖ Liquidation of share company – Art. 497-500

- ✓ comprises all the operations required to complete its current transaction, to collect and realize its assets, to discharge its liabilities and repay its capital and to distribute any surplus of assets among its members.

UNIT NINE

Private Limited Company(PLC)

Nature of PLC – Art. 510

- is the ***most popular*** form of co. in Ethiopia. Because:
- ✓ it is particularly well adapted to ***small and medium–sized business*** and currently, Ethiopian business is at these stages.
- ✓ it is ***hybrid*** of(middle way between) share co. and partnership(i.e. limited liability, & shares are not freely transferred to the outsiders).
- Not allowed to engage in ***banking, insurance & similar activities –*** Art. 513.
- is always of ***commercial nature -*** (Arts. 10(2) & 510(2)).

Formation of PLC

- Min. no. of members = 2, Max. no. = 50 - Art. 510(2).
- Registration by Ministry of Trade and Industry and trade and industry Bureau at Federal and regional level respectively – Art. 4 of pr. 67/97.
- Application for Registration of PLC should be accompanied with the ff. documents:
  - MOA
  - AOA
  - Valuation documents of in kind contribution, if any
- **Firm name** = eg. “Electric materials trading PLC” – Art. 514.

- Acquires ***legal personality*** after ***registration***.
- ***Minimum capital*** = Birr 15,000 – Art. 512(1).
- Its capital must be ***fully paid-up*** – Art. 517(g).
- The ***face value of share*** capital may not be less than ***Birr 10*** & issues shares of ***equal value***, a member may hold ***>1 share***.
- MOA must contain a valuation of asset contributed in kind – Art. 519.
- ***Method of valuation-***determined by members.
- It ***does not issue transferable securities***.

Liabilities of members for co.'s obligation

- Liability of member- limited to their contribution– Art. 510(1).
- Liability can be enforced during the ***existence*** & ***winding-up***.

Members' meetings. Members:

- Take major ***decisions*** of the co.
- Must be ***informed about the affairs of the co***. (inspect and copy records and documents inventory, balance sheet and the auditors' report - Art 537.
- Are entitled to be ***consulted on major matters*** - Art 532 & 533.

- If ***members > 20***, a ***general meeting*** must be held ***every year***.
- ***Other meetings*** may be called by ***shareholders*** holding >50% of capital, or by ***manager*** or ***auditor*** - Art 532(2).
- Decisions of ***ordinary meetings*** are taken on the ***first call*** by the votes of shareholders >50% of capital.
- 2nd call decisions are taken by ***simple majority*** disregarding the capital represented.

Ordinary resolution

- ***Used for matters which involve no alteration of the co.'s statutes***. (resolutions authorizing the managers to enter into a transaction which the statutes require the prior approval of the members, resolutions appointing or remaining one or more non-statutory managers and resolutions ratifying contracts entered into between the co. and one of its managers or members).

Extra-ordinary resolution

- ***to alter the nationality of the co. must be decided by unanimous vote***. (i.e. transfer of share to outsiders (Art 523(2)), change of statutory manager (Art 527(1)) must be passed by the votes of members who together hold at least three quarters of the capital of the co. unless a larger majority is required by AOA).

Voting

- Members have the ***right to vote*** - Art 534).
- Any other provision as to voting rights in the statutes is null and void. (i.e. It is not possible to confer multiple voting rights on certain shares, or to deprive other shares of voting rights).

Management

- PLC is managed by one or more managers under the direction and control of shareholders - Art 525 – 528.

Appointment and dismissal of manager

- Managers can be appointed either from **shareholders** or **outsiders**.
- **2 types of managers.**

✓ ***Statutory managers*** (by statutes of the co.) and

✓ ***Non-statutory managers***–by general meeting-Art 535(1).

Removal of: – Art. 527

- **Statutory manager – 527, 536,**

✓ needs minimum of ***majority vote*** representing 3/4 of the capital unless a larger majority is provided in the AOA - Art 536(2).

✓ needs the ***amendment of the statute***, and amendment of the statute require minimum of 3/4 majority.

- **Non-statutory manager – 527, 535**

✓ It requires a **majority** of members representing > 50% of capital.

✓ In 2nd call, decision is passed by ***simple majority*** without regard to the capital represented - Art 535.

- ***Members may agree*** in AOA that manager may be dismissed at the pleasure of the members ***irrespective of the types of manager*** - Art 527(4).
- Removal must be for good cause(i.e. mismanagement, incompetence or physical disability…).
- **If removal is not justified, the dismissed manager may claim compensation.**

Powers of managers – Art. 528

- They have **extensive powers** (i.e. act on behalf of the co.)
- May be ***limited by the statutes***(prohibit the sale or mortgage of land possessed by the co., forbid the managers to borrow more than a certain amount of money in the co.'s name).

Manager liability – Art. 530

- Liable to the ***co. /3rd parties/ individually, jointly or severally***.
- Liability for damage resulting from infringements of the ***law, statutes, and deliberate or negligent acts of mismanagement***.
- They may be liable

Managers' remuneration – Art. 529

- Shall be fixed by the **resolution of the members** of the co.
- It may be in ***fixed salary or share in the profit or both***.

Shares and transactions in shares – Arts. 521-524

- **Shares of PLC:**
  - confer uniform rights.
  - must be made in writing.
  - are freely transferred among members.
  - free transferability may be restricted by AOA (Shares can be transferred to outsiders with the consent of majority of the members representing at least 3/4 of the capital unless a larger majority or unanimity is required in AOA).

Transfer *inter vivos* and *mortis cause*-Art. 524_

- AOA provide that any member intending to transfer his shares should offer the shares ***first to members***.
- Shares can be transferred to non-members only if any member is not willing to buy the shares. This is termed as ***"preemption clause".***
- When ***shareholder dies*** his shares ***transfer*** to his heir by the ***operation of law*** & transfer deed is not essential.
- Any person becoming entitled to a share on the death of shareholder may elect either:

✓ ***To register himself a holder of share or***

✓ ***To transfer the shares.***

UNIT TEN

Conversion and amalgamation of B.O

Conversion

- is an operation by which its ***legal form is changed without being creating new legal personality*** - Art 544(1).
- ***PLC*** may be changed into **Share Co**. and ***vice versa***.
- Doesn’t result in the ***creation of a new legal person***, but is treated for all purpose as a ***continuation of the original co.***
- must conform to rules contained in the law, statutes of B.O.

Procedure of Conversion

- ***Decision of conversion*** may be by ***unanimous or majority*** required by law or AOA.
- Conversion has to be notified through ***publication***.
- Conversion ***neither increases liabilities nor deprives the right of members***.

Effects

- A conversion takes ***effect*** from the ***date of registration*** in the commercial registers.
- Causes ***no interruption*** of its activities.
- ***Assets*** of former B.O transfers to new B.O.
- ***Terminates the appointment of management*** and powers of directors or managers of the original B.O - fresh appointment must be made.

Rights of creditors:-

- Conversion is effective when it has been published in 3 successive monthly issues of the notice – Art. 546(3).
- Creditors of former B.O retain all their rights, as regards new B.O.
- They may object and demand their debt to be paid before conversion. In the case of objection, creditors may be paid or guaranteed.
- No shareholders may be paid from the assets of newly established co. until all creditors are paid or guaranteed.
- Conversion doesn’t discharge member with unlimited liabilities from their former liabilities of former B.O - Art 548.
- If creditors have been informed the conversion with registered letter and do not dissent from the conversion within 30 days from the date of such notification and approves the conversion, members will be relieved from the liabilities.

Amalgamation:

- is the operation by which 2 or more B.Os group into only one B.O and by which the members of the amalgamated B.O receive shares issued by the B.O benefiting from the amalgamation.
- It may either result in:Art 549(1).
  - ***Creation of a new*** B.O to which one or more B.O contribute their assets and debts or
  - ***Take-Over*** - in the contribution of the assets and debts of one or more B.O to another existing B.O.
- All rights & liabilities of the amalgamated B.O are transferred to the beneficiary B.O.

Procedure of amalgamation:

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

Effects

- Within 3 months after completion of amalgamation to the court in order to protect their rights.
- When it is presented to the court, the court may reject the application if:
- ✓ all creditors are agreed to the amalgamation, and
- ✓ payment is effected to those who did not consent to the amalgamation or
- ✓ such payment has been deposited in the bank for the benefit of those who did not consent to the amalgamation.
- ✓ Court may reject such application by giving order that sufficient guarantee be produced by the beneficiary co. to the creditors.

THE
END!