LAW OF SALES AND SECURITY DEVICES

(Laws-571)

Rift Valley University College Center for Distance and Continuing Education

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CHAPTER ONE

INTRODUCTION

1.1 Understanding the Organization of the Civil Code

Sale is a part of the civil code, your better understanding of the subject under study (sale) depends on your knowledge of the placement of law of sales in the civil code and its relation with other parts of the civil code. This view in mind, we will consider the organization of the civil code.

The civil code is divided in to five separate parts. The first part of the civil code (the law of persons) deals with the subjects of the law. It determines entities that may have rights and obligations under the law. Such entities are called persons and the definition of the term person; the process of acquiring personality; the attributes of personality and other related matters are regulated under this.

Once the first part of the civil code determines physical persons as entities that may have rights and obligations, the second part governs matters relating to families of such persons and the consequent issue of succession among family members and relatives.

The third part of the civil code, on the other hand, regulates questions of property (goods). That is we find legal rules and principles relating to possession and ownership (both individual and joint) of goods (and other matters relating to) in this part of the civil code.

The fourth part, as a continuation to the preceding parts, provides legal rules and principles concerning issues of civil obligation. In this part, you can see that the sources of civil liability (obligation) are contracts (consent), representation and the law itself (extra-contractual liability). In other words, apart from these sources, a person may never be held liable civilly.

In the end, the fifth part, as a constitution to the contractual source of civil obligation, goes on providing special rules relating to the different special contracts in existence in Ethiopia. Sale contract, as a special contract, is found in this part of the civil code. As such its

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placement in the civil code and its connection with the other parts of the civil code be understood accordingly.

Before we can discuss the nature of the concept, it is necessary to deal with the idea and meaning of contract.

1.2 What is a Contract?

Contract are probably a necessary device is any kind of market economy where goods and services are exchanged by people acting in their own interest. Contracts are so crucial in daily life.

There is in old economic principle which says that resources are limited while men's needs are always growing multiplying and increasing. In simple terms, we can bare at a particular point in time can not be the only thing you need for a comparable survival. It is because of this that the concepts of sharing and exchanging have come in to existence.

Most of the social relationships in any society are based on contracts. Think of, for instance, your interactions with people before you read this part of the module. Have you got your shoe polished? Have you used a pension? A taxi? Purchased a pen? A coca cola? If you had, your acts definitely constitute a contract.

It is clear that a contract is an agreement or an under taking entered in to by two or more persons to do something in exchange for consideration. But, Can any such agreement amount to a contract? The answer is, No! In order for an agreement or an under taking to be consider for an agreement or an undertaking to be considered as a contract, there has to be the fulfillment of four prerequisites, these are that the contract/agreement has to be entered in to with free and full consent, free from defects the persons entering the agreement should be capable or have capacity as required by law, the object or subject matter or the contract has to be both legal and moral, finally, if there are any requirements of form laid down by law, such requirement should be respected.

What do you think would happen if the prerequisites of a contract were not fulfilled?

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In short, a contract is legally enforceable promise or set of promises. However, note that not all agreements (promises) are contracts. There are preconditions for the valid creation of contracts more over, validly created contracts have effect only on parties to the contract and not on outsiders (third party). Validity of contracts, therefore depend on

1. Capacity of parties forming the contract,
2. Consent of parties forming the contract,
3. Object of the contract
4. Formality requirements.

So, when we are dealing with contract sale, we should realize this special form of contract should also respect all requirements of a valid contract.

The civil code's article 2266 and the following deals with contract of sale and the obligations of parties as well as consequences of non-performance, but we have to first deal with the definition given their in by looking in to the elements of the definitive article:

Article: 2266

A contract of sale is a contract where, by one of the parties, the seller undertakes to deliver a thing and transfer its ownership to another party, the buyer, in consideration of a price expressed in money which the buyer under takes to pay him.

What elements of the above definition cay you identify?

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The first thing that has to be noticed from the above definition is that a contract of sale as we have said previously is a contract. This is simply mean that it is a special type of contract. The implication that this is that, in addition to fulfilling the requirements of a valid contract dictated by the general rules on contract, there are certain features or additions that

would make the contract of sale particular or contract of sale always remembers that it is always a contract subject to the rule governing the same issue to consider as rules we will discuss through out this module.

The second issue to consider would be the parties, i.e., the two parties will be called the seller and the buyer. Therefore, here after, when we are dealing with a contract of sale, the two parties will be the buyer and the seller who will each have distinct obligation.

Why do you think the nomenclature is different for a sale contract?

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The third thing here is that the contract of sale is an undertaking, which in plain terms means a promise. In the legal sense, it would be a contract in which the seller undertakes or promises to fulfill obligations in return for consideration. This clearly indicates that the contract of sale is at the formation stage since there is just a promise to perform certain duty and not performance it self.

If you read closely, Art .2266 also clearly defines the obligations of the parties. Firstly, the seller has two obligations**;** delivery of the thing and transfer of ownership.

Delivery, as defined by Art. 2274, is just *an act of handing over of the thigh and its accessories, transfer of ownership on the other hand has a wider scope than the mere handing over the thing since it implies the obligation of the seller to warranty against defects and dispossession which will be discussed further.*

What do you understand, the difference between delivery and transfer of owner ship?

Next, let's note the subject matter of sale, which as laid down in Art. 2266, what does a thing mean and what scope of coverage is also covered by the succeeding article.

Article 2267

1. *The provision of this chapter shall apply to the sale of corporeal chattels.*
2. *Nothing in this article shall affect the special provisions relating to the sale of certain kinds of corporeal chattels.*

It is, therefore, mainly that the corporeal chattels, which this article of the civil code governs.

What is the meaning of corporeal chattel?

It is the property in question should be tangible. There fore, properties such as intellectual ones which are intangible can not be treated under this part. The term "**Chattels**" implies that coverage will be give to 'moveable property or properties' and not immovable ones in this part. In other words, immovable properties are not subject of sale and the provisions in this part of the code although looking at Art.2875 of the civil code fells us that there is a possibility to refer to this part when dealing with immovable as long as there is no contradiction between the spirit of the two parts and a gap in the provisions dealing with immovable. But when we exclude immovable, it doesn't mean that all properties that have a connection or relation with immovable properties are excluded. This can be traced from Art.2268 of the civil code.

Article 2268

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1. *The Sale of intrinsic parts of immovable shall be deemed to be a sale of movables where such parts are under the contract to be separated from the immovable and transferred as corporeal chattel to the buyer.*

2. *The provision of sub-Art. (1) Shall in particular where the sale relates to corps, materials of a building under demotion or product of a quarry.*

Article. 2268 is talking of a concept that you may have covered in the course "The property and Land Law. Regarding that, a thing can be called an immovable by destination if it is an intrinsic element of its destined thing. A simple illustration would be a window `` frame that would be affixed to a house an immovable and frame thought initially a movable, because it is an intrinsic element of the other thing, which is the house, would be called be called immovable by destination. So, in essence, Art, when sold separating from the immovable that they are eventually destined for, they will still be considered as movable and treated under the contract of sale and its provision.

On the other hand, different legal systems use different Yardsticks to identify between a contract of service and that of sale. In Ethiopian context, however, Art.2269 has a great role to play in their identification

Arti 2269

" ……. The delivery of corporeal chattels to be manufactured or produced shall be deemed to be a sale where the party who undertakes delivery is to provide the main materials necessary for the manufacture production.."

Here, the words we have to give attention to be main materials. This provision has indirectly set the Yardstick that the main materials for delivery have to be provided by the seller for the contract to be considered as a contract of sale.

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Mean while, the price, which has to be stated in the contract, is also another requirement for the existence of valid contract of sale. This can be affirmed by reading Art.2266 together with Art.2271.

This article implies that *if the seller and buyer can not reach an agreement as to the price of the thing or do not have expert knowledge to give a reasonable price for the thing, then a third party arbitrator has to resolve the issue of price*. Going to the next sentence of this same article, we can clearly see that there shall be no contract of sale if the arbitrator is unable for what ever reason to determine the price.

The other issue in relation to the same article that can be raised is the scope of power endowed to the third party arbitrator. This is to mean, we have to understand how binding the price estimation of the third party arbitrator. This is to mean, we have to understand how binding the price estimation of the third party arbitrator is.

In the strict sense of the word, an arbitrator is a person who settles a dispute and whose decision is binding. If we are going to stick to this definition, we will also be implying that the inability of the parties to determine price would amount to a dispute and the price given by the arbitrator would be binding whether one or none of the contracting parties disagree. But the above would lead to a very dangerous conclusion since the parties would still be forced to remain in the contract though there is no consent of either one of the parties.

This confusion can however be cleared by saying that the third party who is called up on by the parties would only be considered if the parties that is “both” parties agree up on it, so, in short, the arbitrator in Art.2271 shouldn’t be taken in the strictest sense but rather as a third party or an expert who can be called up on to give an expert or experienced opinion which can either be taken or other wise.

1.3. Sale: One of the Special Contracts

How would you give meaning to sale contract?

Have you said that sale is the transfer of ownership over things in exchange for money? Yes, sale is a contract to transfer ownership in goods for price. As stated earlier, individuals are not capable to produce everything they want, but they can get things they do not have from others having in excess their needs. And sale is one of the devices through which individuals may obtain thing they don't produce from other producing in excess.

Let's refer back to Art .2266, again. From the article we make two critical points. They are:-

- The sale is a contract.
- They form reaching elements of thing and price.

Surely, sale is a contract, but a special one.

The special status of sale contract are the result of its nature that it involves transfer of owner ship. In sale contract, in opposition to other contracts, you always find assignment of rights. There is always change of title. Of course, there are some contracts that result in change of title. To that extent, these few contracts (like donation) are same as sale. But sale is different from these contracts because it always involves consideration element is always expressed in terms of price (money). Missing this price element, a contract is never a sale one. It may be a contract, but could not be a sale contract.

Activity 1

1. Can you state the reason why sale is different from barter? Donation?

2. Feyisa has several old and rare coins. Do you think that he can make such coins subjects of a sale contract? Why?

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3. What is a contract of service? How is it different from the contract of sale?

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4. Can you identify some of the obligations of the seller and the buyer?

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5. It was agreed that one of the parties, in addition to a sum of money, was bound to hand over a thing in consideration to the other party's transfer of owner ship of a thing. Do you think this agreement constitutes a sale contract? Why or what not?

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1.4 Contract of Sale and Contract Allied to Sale

From our previous investigations you can realize that the existence of contracts that resemble sale. But you should note that such contracts are only appear sale contracts and are never sale contracts. The reasons why these contracts are precluded from being considered sale is because they do not fit to the definition give to sale contract, from our earlier discussion. The consequence of maintaining the difference is that the area of the law governing such similar transactions it different from the one governing sale contract. As such a distinction be made between sale and contracts resembling sale. Of course, Some times it is difficult to distinguish between sale contracts and other contracts, resembling sale. Different contracts that can be allied to sale and their distinction from sale contract needs better clarification.

1.4.1 Sale and Barter

Barter is an exchange of goods for other goods rather than for money. As you may have a clear information on the historical account of development of sale, before the innovation of money as a medium of transaction, people used to practice exchange of goods to obtain resources that they do not produce on their own. Historically, barter preceded sale. But, later the system of barter was superseded by the use of price terms-money. Even today, especially in rural areas, you may find people exchanging goods for different goods, which they consider, are of equal value. They only used to exchange each other their items belonged only to themselves.

Do you think there are similarities between sale contracts and bartering? Of course, that you do recognize the similarities between the two types of contracts. Can you state any ground? If you say, both transactions involve delivery of a thing and transfer of ownership of the item, then you are quite correct. In fact, it is this nature of involvement of transfer of little that makes both sales contract and barter special contracts. It is on this ground that these contracts are different from other types of contracts. To this extent the two are similar.

But their similarity should not cloud our vision and there by blind us from realizing their differences. In the case of sale contract the obligation of the buyer is always expressed in terms of price (monitory terms.) The buyer may not assume as a consideration performance of any obligation other than paying the purchase price. In the case of barter, the obligation of parties to the contract, wholly or partly, involves delivery of a thing to the other party.

For our better understanding of the obligation of parties to contract of barter, let’s refer the relevant legal provisions here:

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Art. 2408 – **Differences from sale**

1. *Each of the exchangers shall, as regards the thing subject to the exchange, have the same rights and obligations as a seller.*
2. *The exchanger who is bound by the barter contract to pay a balance shall, as regards the payment of the balance, have the same obligations as a buyer.*
3. *Unless other wise agreed, the exchangers shall share equally in the expenses of the barter contract.*

Art. 2409 – Reference to provisions regarding Sale.

The provisions applicable to contracts of sale for the remainder apply to barter contracts.

As can be seen from the provision above, each party to the contract of barter is assimilated to a seller. In other words, the obligations that the law of sales imposes against the seller are also imposed against both parties to contracts of barter towards the other contracts party. The obligations that the law of sales imposed on sellers include duty of delivery of the thing, duty of transferring perfect title over the thing and warranty against dispossession, duty of delivering a thing that may serve its normal purpose or useful for commercial exploitation, and duty of warranty against non-conformity.

Another important point is that when one of the contracting parties, in the case of barter, undertakes to pay money in addition to delivering of a thing, he is considered in relation to the payment of that money as a buyer. In other words, the obligations imposed on the buyer by the law of sales are imposed on him. Such obligations include, interalia, the obligation to pay the price and the attendant duties in relation to this obligation.

Another point of difference between contract of sale and contract of barter goes to the determination of the contract. In the case of sale contract the expenses of the contract, unless other wise agreement, will have to be covered by the buyer (Art.2314) When it comes to barter both parties are responsible to cover expenses of the contract jointly, unless there is an other wise agreement (Art.2408 (3),) Except these differences discussed here in above, the

two forms of contracts are same. In effect, the legal regime governing both transactions in one and the same for the remainder issues (Art. 2409).

1.4.2 Sale and Hire Purchase

Do you have any idea of hire purchase?

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Contracts of sale resemble contracts of hire purchase very closely, and indeed the real object of hire purchase is the sale of the goods ultimately. However, a sale has to be distinguished from a hire purchase as their legal incidents are quite different.

In the case of hire purchase agreement the goods are handed over to the hire purchaser for use during the currency of the agreement but the owner of the goods agrees to transfer ownership in the paid by hirer till that time, the hirer remains the bailer and the installments paid by him are regarded as the “hire-charges” for the use of goods. If there is any default by the hire purchaser in paying an installment, the owner has a right to resume possession of the goods immediately as owner ship rests with him. In addition, he may claim a fair ret and an indemnity for the wear and tear of the thing.

Other wise, the installments paid will have to be refunded to the hire purchaser. The essence of hire purchase agreement is, therefore, that there is no agreement to buy, but there is only a bailment of the goods coupled with an option to purchase them, which may or may not be exercised.

Note that the mere fact that payment of the price by installment under an agreement does not necessarily make it a hire purchase.

Here are summery points of distinction between sale and hire purchase:

a) In a sale, ownership in the goods is transferred to the buyer immediately at the time of delivery, where as in the hire purchase the ownership in goods passes to the hirer up on payment of the last installment.(Art. 2412&2266)

b) In a sale the position of the buyer upon delivery is an owner, however, the position of the hirer is that of a bailer. (Art. 2412&2266)

c) In sale the buyer shall not terminate the contact unilaterally; otherwise, he will be liable for the payment of compensation. In the case of hire-purchase the tenant may at any time terminate the relationship unilaterally and that does not entail liability.(Art. 2414)

d) Risk is borne by the hire- purchaser from the time of delivery onwards. In sale risk follows ownership, not delivery.(Art.2413)

Except the differences mentioned above, there is no distinction between sale and hire purchase and therefore, the rules governing both transactions are the same.

1.4.3 Sales and Transfer of rights other than ownership

What do you think are rights other than ownership?

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The ownership comprehends three basic rights first, you have the right of use of the thing. This says that with out prejudice to such restrictions as are prescribed by law, the owner may use his property the way he deems proper, the way he thinks fit(Art. 1205 (1.) The second component of the right of owner ship is the right to collect the fruit of a thing that one owns. Here, too, the owner must exercise his right with out prejudice to restriction imposed by law on such a right. By far the most important component of right of ownership is the right to dispose the thing. This is the grand right as the owner may dispose of this property for consideration or gratuitously, inter vivo or mortis causa (before or after his death) (Art. 1205(2).)

Since ownership is the widest right over a thing, the other rights must be such rights that a person may have over a thing ownership minus any of its component. These rights include the right to use and collect the fruits of a thing. Of course, the right of ownership May, especially, the right to dispose, neither be divided nor restricted except in accordance with the law (Art-1204(2).) Thus, as article 2410 makes it clear the right of usufruct may be reduced and be transferred.

Art.2410Transfer of usufruct

1. The provisions applicable to contracts of sale shall apply where a person transfers for consideration the usufruct of a thing.
2. The obligation of the seller to transfer the ownership of the thing shall in such case be replaced by the obligation to transfer the usufruct of such thing.

As can be seen here in above, the rule is that a person who transfers rights over a thing other than ownership is regarded as a seller and the other contracting is considered as buyer. In other words, all the rights and obligations that the two parties have under the law-governing sale are applicable to this contract for the transfer of usufruct. The only difference is that the obligation of the seller to transfer ownership is substituted by the obligation transfer the usufruct of such thing.

Mean while, the rule under Art.2411 says in relation to the transfer of incorporeal rights as the following:

Art.2411: Transfer of Incorporeal Rights

(1) The provisions applicable to contracts of sell shall, as far as possible and with out prejudice to the provisions of special Laws, apply where a person transfers for consideration an incorporeal right.

(2) THE transfer of chooses in action shall be subject to the provisions of the title of this code relating to "contracts in general" (Art. 1962 -75).

The rule is therefore, that the Laws governing sale contracts and contracts relating to the transfer of incorporeal right are one and the same except that when ever there are special laws designed to regulate transfer of incorporeal rights such rules will be given primacy over the rules controlling (governing) sale contracts. When it comes to choose-in-action, which are personal rights not reduced in to possession but recoverable by a suit at law.

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Self Check exercise

Part One: True /False Questions

_____ 1. All agreements are contracts.

_____2. Barter comes next to sale in history.

_____3. Contract of insurance resembles sale contract.

_____4. In contract of work, Labor risk belongs to the employee.

_____5. The Law governing contract of sale does not have any relation with other parts of the civil code.

Part two: Choose the appropriate answer from the give alternative

6. One is not a special contract

A. administrative contract B. Insurance
C. Barter D. Sale contract E. None of the above

7. Sale is a special contract because

A. I involves assignment of title over goods
B. It involves parties
C. It is governed by law of contracts in general
D. All of the above

8. The concept of contract includes all except,

A. Agreement entered
B. Free from defects
C. Capacity of parties forming the contract
D. It can be run with formal requirements always
E. Effect includes the involvement of third party as mandatory for its validity

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9. The obligations of parties in contracts clearly defined in _____

A. Art.2274 C. Art. 2408 E. Art. 2408(3)

B. Art. 2266 D. Art.2409

10. One is not always essential for the formation of valid sale contract.

A. form C. consent E. none of the above

B. capacity D. impossibility of object

Part Three: Give short answer

11. Mention the relation ship between the Law of contracts and the Law regulating sale contract.

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12. How is sale different from contract of hiring purchase?

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13. What is the objective behind the distinction between contract of sale and contract of service?

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14. Mention the difference that exists between delivery and transfer of ownership?

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CHAPTER TWO

PERFORMANCE OF SALES CONTRACT

As you know sales is a contract and, thus, the source of obligation under sales contract is consent. Hence, the content of the sale contract will have to be determined by parties to the sale contract (Art.1711). However, the contract may not necessarily deal with every aspect of the obligation. As such it is not uncommon to see parties leaving accessory obligations undefined hoping that they are obvious in circumstances. In such cases, the incidental effects having regard to custom, equity and good faith must supplement the agreement. This is what Art 1713 tries to state. More over, the obligations of parties depend on provisions of the law as well, both mandatory and permissive. The conclusion will then be obligations based on their agreement, custom, good faith, equity and provisions of the law.

There fore, in this chapter, we will concentrate on the provisions of the law as one of the determinant factors useful to identify obligations of pacifies to sale contract. In addition to the obligation we must resort to the contract document, the custom of the place where the contracting parties come from, good faith, and equity of reasonableness when resolving real disputes among the contracting parties to any sale contract.

Obligations originating from mandatory provisions may not be contracted out or transposed to the other party for they ensuring public interest. On the other hand, if the background of such obligations is a permissive provision of the law, parties may reverse its application for such provisions don not involve public interest and, in relation to private interests, individuals have freedom of contract.

? What would be the effect of provision incorporated in a contract of sale violating mandatory provision of the law of sale? _____

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2.1. Obligation of the Seller

A person gives his consent in relation to a certain contract; civil obligations originate from the consent. And the content of that obligation depends on the agreement itself, custom, good faith, and equity. More over, once the contract is formed the content of the obligation extends to what the provisions of the law, both mandatory and permissive, state.

Of course, if there are otherwise agreements in the contract in relation to permissive provisions, the obligations of parties will not depend on such provisions of the law. Instead, it will be the agreement that will be the source of that specific obligation. Therefore, when you strive to decide the content of obligations of the seller under a contract, do not forget to visit the contract document, custom, equity and good faith addition to the obligations you study in this particular chapter.

Who do you think is the most interested person behind the identification of the seller's obligation? _____

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It is a buyer who is principally concerned with the determination of the seller's obligation. What do you think the reasons behind the buyer's concern? _____

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If the buyer is to talk about non-performance against the seller, he must first know what the duties that the seller has to carry out are. Other wise, the buyer may fail to proceed on reasonable grounds or may proceed on basis of unreasonable grounds which may ultimately loss to his interest.

2.2. General Provisions of the Law on the Obligations of the Seller

Art.2273. General Provisions

1. *The seller shall deliver the thing to the buyer in accordance with the provisions of the contract and of this (chapter of the civil) code.*
2. *He shall transfer the ownership of the thing to the buyer and warrant him against certain defects in the thing.*
3. *He shall in addition be liable for any other obligation imposed up on him by the contract of sale.*

The provisions display that the seller has the following obligations in this regard.

- Obligation to deliver the thing agreed,
- Obligation to transfer ownership over the thing agreed,
- Warranty against only certain defects. There is no warranty against all forms of defect, only some selected defects,
- Warranty against non-conformity,
- Other obligations that may be in the contract of sale it self, i.e, the agreements,
- Other obligations arising from custom, good faith, and equity.

2.2.1 What Delivery Is

As stated under Art. 2274, *delivery is the handling over of the thing and its accessories sold to* the buyer. Dealing with such an act, you have to know exactly when, where, and how delivery is made.

2.2.2 Modes of Delivery

Delivery, which is the voluntary handling over the thing therefore transferring possession, can be affected through a number of ways. If a particular mode has already been agreed up on by the parties, any divergence or non- compliance to the agreed made may be taken as the breach of the terms of the contact and the party who has failed will be liable.

Delivery can be conducted in many forms, but at the end of the day, its main pupose is to band over possession of the thing to the buyer or a person that latter has authorized.

Can you mention some of the modes of delivery you have known before? _____

The three modes of delivery are:-

A. **Actual delivery**
B. **Constructive delivery**
C. **Symbolic delivery**

A. Actual Delivery

This simplest and most common form of the delivery where the seller will just send over the thing directly to the buyer, this is therefore why it is called actual delivery.

B. Constructive Delivery

This is the type of delivery in which there may not be actual handling over the thing directly to the buyer. In this case, there may be delivery of the thing to the person authorized by the buyer or there is also a possibility for the seller to hang on to the thing. But, the most important thing to remember is that from the time of delivery the seller, if one continues to hold the thing, it will be on behalf of the buyer and not as the owner of the thing, so when we think about, it is no longer the seller a person authorized by the buyer who might be any one including the former seller. Of course, the above also may mean that any outsider- third party-may be involved and the delivery may be affected to this person authorized by the buyer. There is also another scenario which shouldn't be ignored in that, the buyer before taking delivery may have been holding the thing for the seller on the latter's behalf and later the two parties may enter in to a contract. On the agreed up on date of delivery, the former possessor will take "delivery" of the thing as a buyer therefore changing one's role from possessor to buyer and not by actual delivery or taking of the thing and, this can also be referred to as constrictive delivery since again there is no delivery or direct to the buyer at the time of delivery.

C. Symbolic Delivery

This is the last type of delivery in which the actual thing is not delivered but rather another thing through which the actual thing is found is given to the buyer

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The best example would be a bill of lading with the thing to be shipped on it when bill is given, it will be considered as though delivery has been effected since the out come is the same in the sense that the bill is the means to the end, which is the thing agreed on to be delivered

2.3 Quantity and Quality of Delivery

In the formation stage of a contract of sale or any other contract, the amount and type of thing to be due up on delivery will be agreed up on by parties. This agreement, assuming that it is valid shall serve as law between them.

What do you think the consequence if there in uni-lateral divergence from a contractual agreement? _____

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Up on delivery, the agreed up on quantity and quality will be delivered and non-compliance by one of the parties, in our case, the seller would amount to a uni-lateral version of the contract. As per Art.1745 of the civil code "The creditor shall not be bound to accept a thing other than due to him not with standing that the thing offered to him is of the same or greater than due to him."

So, seen from this angle, delivery, no matter which mode we wish to follow has to be made in line with the contract. But, some times, we may not be precise as to the quality or quantity and use phrases like, "About a certain quantity." etc. In such cases, it shall be the seller who determines the exact quantity to be delivered unless it appears from the circumstances that such has been included in the contract for the sole interest of the buyer (Art.2275).

According to the above article, **Art. 2275 "Quantity fixed approximately".**

1. *Where the seller undertakes to deliver "about a certain quantity" of specified goods, it shall be for him to determine the exact quantity to be delivered, unless it appears from the circumstances that such stipulation has been included in the contract in the sole interest of the buyer.*

2. *The difference between the approximate quantity fixed in the contract and the quantity actually delivered may not be more than ten percent, where the sale relates to the whole cargo of a ship, or five percent in other cases.*

Thus, when ever the quantity is not fixed exactly but it was agreed that "about a certain quantity" would be delivered, it is up to the seller to decide what quantity to deliver unless it is to the advantage of the buyer that such a clause is incorporated. Note here that if the exact amount is not fixed or implied and nothing is said or implied about the approximate quantity then there is no contract of sale.

2.4 Place of Delivery

What is the legal stipulation in the law of contract as to place of delivery?

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_____

There are certain places which are designated as a place of delivery by law in the case where there is no agreement reached in the contract and the contract doesn't mention a particular place. Thus, the issue of determining place of delivery is another crucial matter worth elaboration for it again one way or the other is related to the cost of the thing, time enjoyment of the thing and/or the possibility of reselling the thing. Then the issue that should be clarified will be determining the party having the power to decide on the place of delivery.

Who do you think has the power, the seller, or buyer, or both, to decide the place of delivery? _____

_____

Obviously, both parties must have a say on the place of delivery and there has to be a joint decision of where delivery is to be made under the contract. When ever the place of delivery is stated in the contract, the goods must be delivered at the named place during business hours on working days.

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The problem will be how should we resolve a dispute among parties to a sale contract on grounds of place of delivery in the absence of a clear agreement on the point in dispute? By then we will have to resort to legal provisions to fill the gap in the contract. The legal provision to that effect reads.

Article 2279- <u>place of Delivery</u>- 1 principle unless other wise agreed, the seller shall deliver the thing at the place where, the time of the contract, he had his place of business or, failing such, his normal residence.

Thus, in principle, where there is no agreement as to the place of delivery in the contract, the goods are to be delivered at the seller's place of business.

If the seller does not have a place of business, then delivery is to be made at his normal residence, i.e., his home. If the seller has more than one business residence, delivery should be made at any one of such residence.

Beware here that because the rule says delivery will have to be made at the business place of the seller (debtor) we do not have to raise the issue of principal business place. When ever the seller has several business places he should be allowed to effect delivery at any of his business place except that when he does that he should respect his obligation to deal in good faith with the buyer. The same holds true when the buyer has no business place but has several normal residence.

In exceptional circumstances found under Art.2280 the rule we studied earlier does not apply.

Article 2280- Exception

1. *Where the sale relates to a specific thing and parties know the place where such thing is at the time of the contract, the seller shall deliver the thing at such place*
2. *The provision of sub-Art (1) shall apply where the contract relates to fungible things selected from a stock or a specific supply or to things,*

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which are to be made or produced in a place known to the parties at he time of contract.

Thus, the rule is that in relation to particular, fixed, determined or named goods delivery will be made at a place where the goods were situated if such fact is known to both the buyer and the seller. It should be noted that if there is an otherwise agreement this rule will not apply.

The same rule applies when the sale relates to fungible things selected from a stock or a specified supply and the future goods, i.e., goods to be manufactured or produced. Even if the thing is fungible ones selection is made and the thing to be delivered is identified, then thing is counted as specific thing and place of delivery depends on the rule applicable to sale of specific thing.

2.5 Time of Delivery

A time at which a thing sold is to be delivered may be expressed in the contract of sale, in this case has been said before, a contract will serve as law between the contracting parties and assuming that they have entered in to a valid contract of sale, the time stipulated in the contract will be taken as the time of delivery.

Time of delivery is one of the sensitive issues in the sale of goods. Because, one way or the other, delay in delivery relates to cost of the thing. More over, when the purchaser is a consumer, even if there is performance after the due date, it will be late after the agreed time, so that for a time the purchaser is deprived of the enjoyment of the thing that he had counted on. If the purchaser is a trader, he may have lost a good chance to resell the object for that is his intention.

When do you think, then, the time of delivery be?

_____

If you say “at the spot” you are right. But you need some correction. Before that you must consult the contract for if any thing is said in the contract as to the time of delivery, the

agreement of parties takes primacy over the rule of the law which say delivery be effected at the spot.

The appropriate legal provisions in relation to the matter at hand are Art.2276-2278. But, it would be convenient if we first analyze the last article.

Article 2278- simultaneity with payment

1. *Unless other wise provided in the contract delivery of the thing shall be simultaneous with the payment of the price.*
2. *The seller may in such a case retain the thing until payment is made*

This provision makes it clear that when the parties contract is silent about the time for delivery of the goods, delivery of the goods and payment of the price are concurrent condition that is, the seller should be ready and willing to deliver the goods to the buyer in exchange for the price and the buyer should be ready and willing to pay the price in exchange for possession of the goods simultaneously, just like in a cash sale over a shop counter.

For instance, If Shemsu contracts to sell Ato Mengesha seven Killos of honey for one hundred forty birr, but the date of delivery is not mentioned in the agreement then Shemsu has to be ready and willing to deliver the honey unless Ato Mengistu is not ready and willing to pay the price, i.e., one hundred and fourty birr.

Thus, always where the date of delivery can not be inferred from the will of the parties, the seller has to deliver the thing as soon as the buyer is ready and willing to pay the purchase price.

Article 2277-

Delivery during a given period where the parties have agreed that delivery shall take place during a given period, it shall be for the seller to fix the exact date of delivery unless it appeals from the circumstances that it is for the buyer to do so.

As you can see if a specified period is given, it is the discretion of the seller to decide the exact date of delivery unless the surrounding facts imply that the time benefit is for the

advantage of the buyer. But this discretion has to be exercised in a reasonable manner. Delivery by the seller must be made during reasonable hours and for a reasonable period of time so that the buyer can take possession of the goods.

Again demand of delivery by the buyer should by made at a reasonable hour when the discretion is left to the buyer. What is a reasonable hour is a question of fact.

2.6 Obligation to Transfer Ownership

In the case of a sale contract, since the title in question would be ownership, the transferor (seller) should have an ownership title that s/he can transfer to the transferee (buyer).

For instance, if you take contracts of insurance they are special due to their nature that these contracts allow people to shift to another a risk of loss that they ordinarily have to bear. Again, if you take contracts of agency they are special due to their nature that a person will be civilly liable for the acts of another (the agent) if the latter acts with in the scope of authority conferred up on him by law or by the principal.

Also, if you take administrative contracts, such contracts are special because the parties to these contracts are the government and an individual, the latter having the power to enact laws that may affect the other party. If you take contract of pledge it is special because it results in only mere transfer of possession of goods belonging to debtor for the purpose of securing performance of the debtor's obligation, when it comes to sale contract, sale is a special contract because it has the nature of transferring title (owner ship) over the goods sold. That is sale is always designed to assign ownership and, as such, the seller has the duty of transferring title as one of its obligations under a sale contract.

We have to remember at this juncture that the subject matters of sale contract are corporeal chattels. Consideration of Art.1186 would set the ground rule for the means to transfer ownership of such corporeal.

Article 1186 stipulates that ownership title of corporeal chattels is effected up on delivery of the thing. It now becomes clear that, though delivery and transfer of ownership are not one and the same, the materialization try to the latter is always dependent on the former; therefore, making delivery is a principal requirement for the transfer of ownership.

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So we always have to remember that a valid ownership title has to be there fore, the seller to transfer the same to the buyer via delivery.

Now then let us see how this obligation to transfer ownership imposed up on the seller is expressed under the law and the contents of this obligation, i.e., what are the components of this obligation or what is the seller supposed to under take so that he discharges his obligation of transferring ownership.

Article 2281-steps necessary for the transfer of ownership

> *The seller shall take the necessary steps for transferring to the buyer unassailable right over the thing.*

The crucial points in the above article are duty to take all the necessary steps and the idea of unassailable right over a thing. BY all the necessary steps, it is meant that the seller should deliver the thing and surrender the control over the thing so that the buyer will exercise all the rights of ownership over the thing. These rights of ownership that a person may have over a thing include the right to use the property and exploit the owners right to dispose of the thing for consideration or gratuitously, inter vivo or mortis cause (before or after death) (art. 1205).

2.7 Warranty against Defects in the Thing and Non-Conformity

The other very important obligation of the seller is warranty against dispossession. Warranty against disposition, a warranty in simple terms, is a guarantee against undesirable out comes that may occur after the delivery of a thing. In modern contract of sale, including the Ethiopian contract of sale, there are certain assurances given to the buyer which would enable one to go against the seller if the title transferred has certain defects. One of such guarantees provided by law is warranty against dispossession.

As implied by the name, it emphasizes that the seller not only has to transfer possession, but also, a possession that would have the effect of transferring ownership rights up on the buyer free from claims by outsiders- third parties- who may have better titles than that transferred by the seller to the buyer.

? What do you think will happen if a person sells a thing that another third party has already bought, what will be the fate of the current buyer?

_____

_____

2.7.1 Meaning of Non-Conformity and warrantable defects

Non-Conformity literally means not to behave in accordance with generally accepted idea or customs. When it comes to sales contract nonconformity refers to the sealer's duty of delivering the goods to the buyer strictly in accordance with the terms of the contract.

Look in to the meaning given to non-conformity under own law of sale of goods.

Art.2288 – Conformity with contract

The thing shall not be deemed to conform to the contract where:

a. *The seller delivered to the buyer part only of the thing sold or greater or lesser quantity than he had undertaken in the contract to deliver; or*
b. *The seller delivered to the buyer a thing different to that provided in the contract or a thing of a different species.*

From the above statements you can consider the following things.

- Delivery of part only of a thing,
- Delivery of greater or lesser quantity than agreed in the contract,
- Delivery of a thing which is completely different from the one agreed
- Delivery of a thing which is of the same genus but of a different species,

All these constitute non- conformity in our legal System and if a seller undertakes delivery in any one of the above modes then there is non conformity on his part, i.e., performance is not in accordance with the forms of contract.

Debebe sold Alemu a 180 litters Samsung refrigerator. On the actual transference date Alemu was delivered 200 litters Samsung refrigerator.

But Alemu has rejected the thing. Do you think Alemu's act is legally justifiable? How?

_____

_____

_____

_____

2.7.2 Warranty against Defects

In precise terms, defect relates to usability, utility or quality of the thing sold as opposed to quantity or identify of the thing sold. Having that, how does our civil code define defect?

Art-2289- Warranty against defects

The warranty shall become effective where the thing

a. *Dopes not possess the quality required for its normal use or commercial exploitation; or*
b. *Does not possess the quality required for its particular use as provided expressly or impliedly in the contract; or*

c. *Does not possess the quality or specifications provided expressly or impliedly in the contract.*

2.7.3 Preconditions to raise Defect

The preconditions include the duty of buyer to inspect and examine the thing at the time of delivery and the duty of providing notice to the seller. Failure to satisfy these requirements means that the buyer may not proceed against the seller on grounds of defect and non-conformity

The first pre-condition relates to the time when defects are to be considered.

Art.2290- Time when defects are to be considered

1. *The conformity with the contract and the absence of defects shall be ascertained having regard to the condition of the thing at ht time of the transfer of risks*
2. *Where no transfer of risks occurs as a result of the cancellation of the contract having been declared or the replacement of the thing would have been transferred, had the thing been in conformity with the contact*
3. *The seller shall be held to his warranty where non- conformity or defects occur at a date later than that specified in this article and are caused by the seller or a person for whom he is liable.*

There fore, as you can see the rule is that the time when existence of defects and non-conformity should be checked is the time when risk is transferred to the buyer.

2.7.4 Notification of Defects

The other precondition to proceed against the seller on account of defect and non-conformity is the requirement of notice of defects and non- conformity discovered through examination to the seller.

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Art.2292- Notification of Defects

1. *Where examination discloses non-conformity with the contract or a defect in the thing, the buyer shall with out delay give notice there of the seller.*
2. *In notifying the defect, the buyer shall indicate its nature in accordance with custom good faith.*

Art. 2293- Absence of notification

1. *Where the buyer has not notified the seller as provided in Art-2292, he may no long avail himself of the non- conformity or defects unless the seller admitted their existence.*
2. *Where a defect is subsequently discovered which could not be discovered by the normal process of examination, the buyer may avail himself of such defect where he notifies the seller as soon as he discovers it.*
3. *The seller who has internationally misled the buyer may not avail himself of the fact that the notification of defects has not been sufficiently precise or made in due time.*

As we have already seen the buyer has to invite the seller or his representative when he examines the thing. The rule of notification intern requires the buyer to notify the seller of the defects discovered through examination in the presence of the seller or his agent. There should not be any delay to notify. The buyer must, stating the nature and type of defects in the notice he should conform to the requirements of good faith and the custom of examination.

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2.7.5 Warranty limited by Agreement

These days it is not uncommon to hear various companies announcing that they warrant certain qualities or good working conditions of their products during some specified period.

For instance Samsung Television company quadrants you through their distributor the good working condition of its product, say, for a year, and you realize that your Samsung TV is not serving its normal purpose a month later, you do not have to notify the seller of the defects you discovered the same month instead, you do not have to notify the seller of the defects you discovered the same month instead, you may stay for six months and notify the seller of the defects you discovered and ask the seller for warranty. In this regard, the buyer (you) can notify and proceed accordingly in as long as the one year period has not expired.

This exceptionality is what we can refer under Article 2294.

> ***Art-2294- Warranty limited by agreement***
>
> *Where the seller has warranted during a specified period certain qualities or the good working condition of the thing, it shall be sufficient for the buyer to inform the seller of the defect before the expiry as such period.*

2.7.6 Seller's Right to put defects Right

Some times even when the things delivered are defective, we may not have to put an end to the contractual relation ship. That is because, if it is possible to maintain the contract with no substantial inconvenience or expense it is better that the transaction (sale contract) be secured. That is, it should not be subjected to cancellation. Again, some times ending the relation ship (the sale contract) might have catastrophic consequences.

That is why the law sometimes allows the seller to make defects right even after the expiry of the period of performance of the sale contract.

> *Art.2300- Seller may put right defects*
>
> *1. In a sale of fungible things, the seller may replace defective things by new ones with in the period provided for in the contract.*

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2. In a sale of goods to be manufactured or produced by the seller on the specifications of the buyer, on the specifications of the buyer, the seller may put right the defects with in a reasonable time, even after the expiry of the period fixed for delivery, provided that the delay causes the buyer no substantial inconvenience or expense

3. Nothing shall affect the right of the buyer to claim damages.

Self Check Exercise

Part one- True/ false questions

_____1. Delivery is a common obligation of parties to sale contract

_____2. There is no warranty against dispossession when the buyer knows probability of dispossession

_____3. Some types of defects in a thing are warrantable and some are not

_____4. The seller's obligations are exhaustively listed in the law of sales

_____5. Place of delivery primarily depends on the agreement of parties.

_____6. Non- Conformity relaters to usability or utility of the thing sold

Part two: Choose the right answers from the alternatives given

7. Warranty against defects does not exist when
   a. The defect is hidden
   b. The buyer failed to state the nature of defect in the thing
   c. The buyer failed to notify the seller
   d. The buyer failed to examine the thing
   e. All except "d'

8. One of the following includes the others
   a. Modes of delivery
   b. Quantity and quality of delivery
   c. Obligation to transfer owner ship
   d. Obligation of the seller
   e. Warranty against defects

9. Handling over of the thing and its accessories sold to the buyer is referred to as _____

   a. Warranty b. Delivery c. Contract

   d. transfer of ownership e. pledge

Part three – Give short answers

10. Do you think that a buyer who enters in to a contract knowing of defects should benefit from warranty? Why? Or why not?

_____

_____

_____

11. What is the consequence of not notifying defects?

12. When should we seek or look for defects?

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13. What is the difference between normal use and commercial exploitation?

_____

_____

_____

_____

14. What is quality for a particular purpose?

_____

_____

15. What do you think would happen if the buyer did not join the seller due time?

_____

_____

_____

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CHAPTER THREE

OBLIGATION OF THE BUYER IN THE CONTRACT OF SALE

When we study the obligations of the buyer, be informed that such obligations are what the law provides as duties of the buyer some times, after receiving delivery, the buyer, for different reasons may decide to return or refuse it. In such instances, if there is actual delivery directly from the seller to the buyer, no problems would arise since the buyer can hand back the thing on the spot or refuse to take delivery because of defects or non-conformity. In such a case, no problem would arise since the buyer would not keep the thing. But, there are instances where by the buyer may receive the thing via mail or another third party in which case he may not be able to refuse to take the thing. The law, in such cases tells us that the buyer shall have the obligation to preserve the thing until it can be handed over the seller. This is so because, just like the seller owes the buyer the duty not to be negligent when the latter is late in taking delivery or effecting payment, it is only fair that the same obligation of preservation, of course at the defaulting person`s expense, falls up on the buyer as well. The buyer, if he decides to return or refuses the thing has to give legitimate reasons for doing so. Seller, who owes the buyer casts of preservation, may hinder, the pain of not getting the thing preserved back, be made to effect payment for presentation of the thing.

Article 2321 of the civil code thoroughly explains all said in the above as follows

Art. 2321

(1) Where the thing sold has been received by the buyer, he shall, where he intends to refuse its ensure its preservation at the seller's expense.

(2) He may not return the thing to the seller with out further formality.

(3) He may retain the thing until he has been in dignified by the seller for the expenses he incurred in preserving the thing

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On the other hand Art. 2303 – Reveals the general provision. If you have carefully observed these general provisions, you may discern the following duties of the buyer.

a) The duty of paying the purchase price,

b) The duty of taking delivery, and

c) The duty of cooperating with the seller so that the seller discharger his obligation towards him.

3.1 The obligation to pay the Price

Can you imagine the possible issues that may arise in relation to the buyer's duty of paying the purchase price?

The possible issues that may arise are what the type currency to be employed, what the duty of payment it self constitutes, how to solve problems when parties fail to explicitly provide the price, and the issues related to time and place of payment.

Before we directly go to the discussion of the various obligations of the buyer in relation to payment of price, it would be fine if we refresh our memory of the meaning of the price element in a sale of goods. The price is an essential element in every contract of sale of goods that is no valid sale can take place with out a price. Thus, the price element must exist and expressed in the form of money for transaction to be considered a sale contract. Another point is the mode of payment does not affect the constitution of a valid contract of sale. Thus, payment may be effected through cheque, bill of exchange, etc.

The major issue that we encounter with respect to payment of money debts (price) is the type of currency to be used to effect payment. Especially, in international transactions it is true that different currencies are involved. This issue is unequivocally resolved under Art.1749(1) This provision states the rule that the currency to be employed for the discharge of money debts is local currency. Still you may face another problem that is what does local currency mean?

The word local represents the place of payment which currency relates to the legal tender that can not be refused when presented to discharge monetary debts like price. Accordingly, if the price is to be paid in Ethiopia, the local currency to be used is birr while in France and England frank and pound are respectively used.

The Other issue relate to what the obligation to pay the price constitutes read in Art. 2303 to sufficiently appreciate the problem raised.

> ***<u>Art. 2304</u> – Obligation to pay the price***
>
> *(1) The obligation to pay the price shall include the obligation to take any step provided by the contract or by custom to arrange for or guarantee the payment of the price.*
>
> *(2) The buyer may thus be completed, according to the circumstances, to accept a bill of exchange, to open a credit account, to provide bank security or other wise.*

As you can see there are two basic components of buyer's obligation to pay the price in the provision above. The first one is that the buyer has to take any step provided by the contract or custom to arrange for the payment of the price.

What do you think arranging for the payment of the price means?

_____

_____

It means that the buyer must settle in advance or to make preparations for the payment of the price. For instance, the buyer must count the amount of birr in his chest. He may also be compelled to accept a bill of exchange or to open a credit account, to provide bank security or other wise.

The second component of the buyer's obligation to pay the price is the duty to take any step provided by the contract or by custom to take guarantee the payment of the price.

What does guaranteeing payment imply and what does guaranteeing means?

_____

_____

Guaranteeing here refers to the buyer's formal declarations that he will effect payment of the price as agreed and presupposes that payment of the price will be effected at a later date that the date of delivery, i.e., credit sale. Thus, the buyer may be required to furnish some thing of value to the seller to keep until the buyer fulfills his promise the buyer may give his camera to the seller.

The Other important rule to fill the openings in a sale contract is the current price mechanism. Some times the parties to a sale contract may omit a price term or left the price element to be determined at a future data or by some external means. By then, if parties could not agree, the code provides a price term to the parties.

Art. 2306 - Thing at current price.

Where the thing sold is quoted on the market or has a current price, the parties shall be deemed to have concluded the sale at this price, having regard to the time when and the place where delivery is to take place.

This, even if the price element is missing, if the thing has a quoted market price or has a current price the parties will be taken to have agreed the price to be such price at the time and place of the delivery of the thing. For practical demonstration, currently the market price of a SIM- card is one hundred sixty eight birr. Thus, if parties fail to say any thing about the price of that SIM card their sale contract could not be invalidated instead the price of that SIM card will be taken to be the market price.

Some times, we may have to follow a different formula to decide the price when parties fail to agree on the price of the thing than the above method. Such is when the thing is usually sold by the seller. In this regard, the provision, Art.2307 says,

<u>Art. 2307 -</u> Thing usually sold by seller.

(1) Where the sale relates to a thing which the seller normally sells, the parties shall be deemed to have concluded the sale at the price normally charged by seller, having regard to the time when and place where delivery is to take place.

(2) The amount Shown in the invoice presented by the seller shall be deemed to conform to such price.

Thus, if the seller is principally selling the good forming the subject matter of the sale contract then price will be taken to be the price set by the seller. This price may be less or greater than the market price. For instance, in distant places, say maji, some sellers may charge 168 birr + if they sell a SIM card. Thus, even if the market price is one hundred and sixty eight birr, if there is no statement between parties as to price, the price will be taken to be 168 plus some amount of birr.

Another problem we may encounter is what is the price of the thing delivered by the seller in excess of the agreed quantity?

Do you think the market price or the price usually charged by the seller determines the actual sale for exceeding the agreed quantity?

Examine the following Article

> ***<u>Art. 2307 –</u> Quantity greater than agreed.***
>
> *(1) Where the seller delivers a quantity greater than that provided in the contract, the buyer may accept or refuse such quantity as exceeds the agreed quantity,*
>
> *(2) Where he accepts the whole quantity, he shall pay a price in creased in proportion to the quantity delivered to him.*

Form the above provision you can see that if the buyer is unwilling he may refuse the excess quantity, for the seller's act by then constitutes non-conformity (non-performance) but, if he

accepts the excess quantity, the price of the extra amount will be the same as the price of the agreed amount. Here we do not worry about market price or the price usually charged by the seller which may be greater or lesser than the agreed price for the normal quantity.

3.2 Obligation to Take Delivery

The idea of taking delivery of the thing implies that the buyer has to come to the place of the seller or the place where the thing is situated and collect it. The buyer may also agree to accept delivery.

The contract may provide an obligation on the seller to forward the thing to the buyer at the buyer's place or at any place the contract provides. In such a case, if the thing delivered conforms to the contract, the buyer has to accept it.

In this regard Art.2303 (1) stipulates under its first sub-article that "**The buyer shall pay the price and take delivery of the thing".** But we all understand that this obligation does not come bare, rather the obligation to take delivery is only imposed if the thing in question is one that is agreed up on the contract. If it isn`t, then as repeatedly mentioned before, there would be no forcing the buyer to take delivery of the thing that he has not agreed to take.

Can the buyer refuse to take delivery of the thing if he does not want it anymore?

Of course, if the things delivered are not in conformity with the terms of the agreement or that they are defective; the buyer has the right to reject the thing delivered. Other wise, it the buyer refuses or rejects the thing delivered in accordance with the terms of the agreement and free from warrantable defects, then he will become liable to the seller for any loss oceioned by his neglect or refusal to take delivery. For instance, if Gurmu purchased 100 quintals of coffee from mussa and mussa transported the coffee from Gore to Jimma, where delivery is to be effected but the buyer (Gurmu) was not at his business place to take the delivery, Gurmu- the buyer – will be responsible for all the losses Muss – the seller – incurs as a result of gurmu`s failure to take the delivery. Such losses may include ware housing, guarding, and preserving.

This duty of taking delivery extends to the level of taking such steps that may be necessary on the part of the buyer for completing the delivery of the thing sold (Art-2313) .for instance in the above example, assuming that Gurmu was there at his business place, the ware house of the buyer. When measuring the parties to the agreement may say that three quintals will be measured at once and they will add the total in the end. Thus, after all the coffee is measured and put in to the ware house of the buyer it is necessary that the two parties come together to add up the total measure & the coffee.

? What is the difference between taking delivery and accepting it?

_____

_____

Here it world help to make a distinction between taking delivery and accepting it. The former imposes up on the buyer the positive duty to the place agreed or the seller's address in the absence of agreement and to actively take delivery while the. Latter only imposes up on the buyer to wait for the delivery the thing to come to him at which time he just has to passively accept the thing which the seller brings over. In both case, however, unreasonable refusal of the buyer to either take or accept delivery would level to breach of the contract.

Taking or accepting delivery isn't the only obligation of the seller in effecting the delivery it self. This duty is imposed by Art.2312 of the civil code.

> ***Art. 2312 -***
>
> *The buyer shale, where approporiate, take such step as may be required of him to enable the seller to carry out his obligations to deliver the thing.*

For example, it there are specifications as to quantity, weight, colour, etc of the thing that the buyer has to give to the seller so that the latter can successfully extinguish one's obligation of delivery the buyer can not refuse to do so and still complain that the delivery has not been made by the seller. Under Article 2334, we can see that the seller has been given certain rights when such lack of cooperation occurs.

Art. 2334-

Where the buyer's right to decide latter as to the form, measurements or other details of the thing is reserved in the contract and he has failed to give such specifications with in the time fixed in the contract or on the expiry of the reasonable period of time notified to him, the seller may himself make the specifications according to the requirements of the buyer as he knows them.

So, here unless and other wise the buyer makes a specification, it would be impossible for the seller to extinguish one`s obligation of delivery unless as provided. In Article 2334, it is plain and clear what the interests of the buyer are is such a case for example, the non-performance is not due to the fault of the seller though he may not have a thing to deliver at the due data. This is because there was a failure on the side of the buyer since he had the obligation to take appropriate steps, in this case by making the necessary specifications to enable the seller to carry out his obligations. This is not what is meant by not just obligation to take to accept delivery, but also cooperation with the seller in effecting it.

Which party, you think responsible for the non-performance of the contract if the buyer doesn't cooperate and there is expiry of the due data?

_____

_____

Art. 2350 = -

Where the buyer has reserved in the contract the right to decide later on the form, measurements or other details of the thing and he fails to give such specifications at the date agreed as being compulsory or up on the expiry of a reasonable period granted to him by the seller the saller may declare the cancellation of the contract.

So, form the above statements, we see that the law gives the seller the right to cancel the contract uni-laterally because it is the buyer who is considered as the defaulting party for not carrying out obligations under Article 2312.

We have to remember that in the process mentioned above, the buyer also has certain duties. The first of such duty is to examine the thing since it is up to the buyer to find out and communicate the defects or non-conformities in the thing and not up to the seller. The later only has the obligation to make it good when delay and timely informed of the same by the buyer.

Self Check Exercise

1. Mitiku Purchased130 quintals of red – papper from Mohammed at Asendabo market place. In the agreement, the place of delivery was stated to be Jimma Town. Further, it was agreed that the sale is no credit basis. But, nothing was said as to when Mitku will pay the agreed price. Mohammed is insisting Mitiku to pay the agreed price in the afternoon of the day of deliver. Will he succeed under the Law? _____
_____
_____
_____

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2. What are the procedures that may assist determination of purchase price?

3. A certain book center in A.A sold some 500 library collection to Jimma public library under the authority of its acquisition department. In the agreement nothing is said as to the place of payment of the price. But, it was stated in the contract that the collection will be delivered in jimma. Latter, disagreement arose between the seller and the buyer as to the place of payment of the purchased price. Would you resolve their disputes based on your knowledge of place of payment of the purchase price under the Law?

4. Wasse bought a lorry of sand from Wondimu and got the sand alighted in from of his home. But when Wondimu asked Wasse to pay the price the later to the former that since there is no sufficient money in his hand he will surely pay him the next day. Can we say that the buyer in this case has discharged his duty of arranging for the payment of the price?

5. Write a short summary on the general obligations of the buyer in the contract of sale.

CHAPTER FOUR

COMMON OBLIGATIONS OF SELLER AND BUYER

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We have already discussed certain obligations that are unique to each of the contracting parties the buyer and the seller. These obligations are unique because what is an obligation for one party can not be taken as the right of the other.

Common obligations of seller and buyer are such as to be made good by both the seller and the buyer. In other words each of the parties will have to cover some of the liabilities. For instance, you have issues of expense in the performance of the sale contract like delivery. Such liabilities to be shared by both the seller and the buyer are responsibility (liabilities) pertaining to expense, preservation and matters of risk. These common obligations are one way or the other related questions of ownership.

4.1 Expenses of the Buyer

These are expenses which are incurred in order to make the contract a reality. Formation of the contract may be made by legal professionals and certain expenses may be necessary. In this case the law says that, it is the buyer who should cover such expenses. So in simple terms, these expenses are those incurred in the formation of the contract of sale. This is clearly put in the civil code's Art.2314 which says that "the expenses of the contract of sale shall be borne by the buyer."

There are also expenses of payment. These are expenses which are incurred in order to effect payment. So if the buyer has to send money to the seller through the bank, for example, one has to pay a certain amount of money for the services rendered by the bank. Such expenses are to be covered by the buyer. This is covered under Art 2315(1) of the civil code which says "the expenses of payment shall be borne by the buyer." The above holds true when the place of payment is one either stipulated by the parties in the contract of in the case of silence, the place of business of the seller.

Who will bare the expenses if the place of the seller's residence or business changes?

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Some times the place of residence or business of the seller may change. This may be done so owing to various reasons. The seller may far for example, more from Addis Ababa to Jimma owing to a range of factors. In such a case, the buyer's obligation to pay for expenses of payment would become more burdensome though the shift of the seller's residence or place of business is in no way related to the interests of the buyer. In such instances, the law says that it is the seller who has to bear such expenses because it would be unfair to the interests of the buyer taking in to consideration that it is the seller who has, due to his own personal reasons, decided to change the place where payment is to be effected.

This is put under Art. 2315(2) as an exception to the rule under 2315(1) which makes the Bayer incur such expenses.

The rule, Art.2315(2) is that if the seller changes his residence and as a result the cost of payment goes up then the seller will be responsible to cover the increase. Thus, if in the above example ukumo changes/ shifts his residence from Awasa to Wolayta and Donocho has to send the money through bank mechanism from Addis Ababa to wolayta, the additional expenses of sending the money will be covered by ukumo if the bank charges on the basis of distance.

What does a carriage delivery mean?

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Some times when parties enter in to a contract, they may agree that delivery is to be carriage free which simply implies that it is the seller would cover costs of transporting the thing to the buyer's place. This is covered under Art. 2318(2).

Art.2318(2)

Until delivery all the expenses of transport must be covered by the seller as ownership is not transport to the buyer.

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But, it the thing has to be sent to another place the extra expense must be covered by the buyer for owner ship passes to him at the place where delivery should have been affected. But, here, as is true to all forms of expenses, if there is any contrary agreement to this rule under the contract that provision overrides the rule we discussed here in above.

That the more fact that, under the law or the contract, one bears the expenses of transport does not mean that person is owner (risk bearer) of the goods sold. Ownership depends on time and place of delivery. Any provision in the contract or the law heating to any kind of expense stipulated under the law or by parties, in particular a provision where by expenses are to be borne by the seller, shall not in it self transfer risks (ownership) to any party to the sale contract (art.2327).

Would the buyer be made to pay for the extra costs if delay is caused by the seller?

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There is one exception to the principle that an owner always bears all expenses relating to a thing in the absence of contrary agreement in the sale contract.

Custom duties, which are expenses that are imposed by the government for importing goods to Ethiopia, is charged to protect domestic goods or discourage the import of certain goods. Such expenses are to be covered by the seller. How ever, if such duties are increased after the formation of the contract, it is the buyer who will be made to cover the additional expenses

Art.2319- Custom Duties

1. *Where import customs duties or other duties charging the imported thing are to be paid by the seller and such duties increase after the contract in made, such increase shall be added to the price.*
2. *Where, however, a delivery bearing such duties has been delayed by the act of the seller or of a person for whom the seller is liable, the additional duties shall be paid by the seller when ever the buyer can show that the increase would not have been due had the delivery been made at he time fixed in the contract or provided by law*
3. *When ever there is a decrease in customs duties, the price shall be reduced accordingly.*

In international sales you have customs duties involved, that is, when goods are imported there are taxes paid on goods entering the country. Such customs are imposed by an out side, the government, to parties to the sale contract. Thus, the government may increase these taxes after individuals have concluded a sale contact over goods that are the subjects of the sale agreement. By then ever if the foods are not yet handed over to the buyer and ownership is not transferred to him, the rule is to the effect that the buyer will bear such expenses (customs) (Art.2319(1.) conversely, when ever there is decrease in custom duties, the price will be reduced accordingly (Art.2319 (3)). The justification underlying this exceptional rule is that, first, it is all outsiders (government) that took the measure and increased the expenses resulting from taxes. Secondly, the buyer will probably distribute the taxes paid among the consumers in the form of increased prices problems may occur when the seller fails to take delivery on the due date and in the mean time customs duties decreased or that the seller failed on the due date and custom duties increased. By then the person (party) failing will bear the consequences as no one may benefit from his own wrong though ownership is transferred the buyer remain in the possession of the seller and times when the things are in possession of the buyer though ownership is not transferred to him from the seller for varied reasons. Thus, where the buyer has failed to take delivery or pay the price, owner ship in the hands of the seller, the seller has to preserve the things belonging to the buyer (Art. 2320(1).) Obversely, if the thing under the sale contract are not in conformity with the sale contract or are defective and account of the buyer refuses them, there will not be any transfer of

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ownership and only obligation of the buyer by then is to preserve the things belonging to the seller.

If the expenses of preservation a party makes to the things in his possession are not paid by the owner of such goods the party who has been preserving may not be compelled to surrender the goods. He has the right to retain them until the owner reimburses the expenses (Art.2320(2) and Art. 2321(3).

Another point is if the things being preserved are of perishable by their nature or that their preservation expense in disproportionate to their value, the party in possession of such goods may effect are of such things (Art.2322).

4.2 Transfer of Risk

When is risk said to be transferred to the buyer? _____

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Risk refers to the possibility that something harmful or undesirable may happen to the thing forming the subject matter of the sale contract. Thus, risk negates to lose, alteration, a destruction, damage or deterioration of the subject of the sale contract.

As a general rule, risk of the loss of goods is primate in the person in whom ownership resides. Thus, when ever ownership passes to the buyer (from the seller), he will pay the purchase price though anything harmful of undesirable happens to the thing sold (Art.2323.) In other words, the goods remain at the seller's risk until the ownership there in is transferred to the buyer, but when the ownership there in is transferred to the buyer the goods at the buyers risk whether delivery has been made or not. That is, the buyer will pay the price whether the things are damaged or destroyed. Thus, if after the contract the goods are destroyed, cost, their value altered, damaged or deteriorated the question who is to bear the conciseness is to be decided not on the bases of possession of the goods at the time of occurrence of undersirable consequences but on the basis of ownership of the goods. That is who so ever is the owner of the goods at the time of occurrence of harmful or undersirable consequences must bear the result.

According to Art 2324, risk transfers up on delivery, i.e., risk is transferred to the buyer from the day when the things are delivered to him. But the seller must deliver the things agreed and such things must be free from warrntable defects. (Art.2324(1).) Other wise, if the things are defective or not in conformity with the letter of agreement, the buyer has the right to refuse or reject them and, if he does so, the seller will not be deemed to have delivered the goods to the buyer ever if the latter has actually received the goods (Art.2290(2).). Again, even if the buyer is late in taking delivery or paying price (when payment and delivery are concurrent conditions,) the goods are deemed to have been delivered to the buyer (Art 2325(1).) It should also noted that even if the things are defective or not in conformity with the terms of agreement, if the buyer has not rejected them the things will be deemed to have been delivered to him (Art.2324(2).). These, once delivery is effected risk is also effectively transferred to the buyer. But, before delivery, risk remains in the account of the seller.

Self Check Exercise

Part I: Short answers

1. Discuss the common obligations of seller and buyer. _____

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2. Discuss on the instances in which a seller may be forced to preserve a thing sold and a buyer's obligation to preserve it when the thing is delivered. _____

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3. Nahusenai sold a “bajaje” wheel to Mosisa and on the date of delivery Mosisa could not come and take the “Bajaje”. In the night of the date of delivery Nahusenai’s shop was robbed and all the bajajes in the store were taken away. Will Mosisa be responsible for the payment of the price? Justify?

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4. What is custom duty? How does it involve in the sales contract?

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5. How is the obligation of parties to preserve the good/ thing when it is in one’s possession will be described? Relate the case according to the respective civil code?

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CHAPTER FIVE

REMEDIES FOR BREACH OF SALES CONTRACT

What are remedies for non-performance?

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It is not always that parties to a contract form a contract and follow through the performance with out problems. Occasionally, one of the parties to a contract fails to perform his obligations. When this happens, the injured party has a variety of remedies for non-performance (breach) of contract. The objectives of these remedies are to put the injured person in the same position as if the contract has been perfumed.

Breach of the sale contract here refers to non-performance of the sale contract, which pertains to the failure of a party to discharge the obligations that he has assumed in the contract. Thus we can speak of non-performance when the seller or the buyer, as the case may be, fails to perform the contract totally or when he performs apart leaving the other or when he performs improperly or when he performs lately.

Remedies for non-performance are simply the solutions that are made available bylaw to the party who has entered in to a contract but could not get wou of the contract the end result desired because the other party has defaulted.

For the parties are bound by the terms that they have entered in to, a party who fails to discharge his obligations is sanctioned by the law. Accordingly, the seller or the buyer who has performed or is performing his obligations properly is entitled to invoke and apply the remedies provided in Arts. 2329-2367, in addition, but prior to, i.e, Arts. 1776-1805. But, before resorting to these remedies, the party claiming non- performance must observe the provisions on default notice, i.e., Art. 1772-1775, when necessary.

Art 1772

A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract.

The notice may be made in a written or any other form which has the effect of reminding the defaulting party that his obligations are due. Obviously, notice can not be given before the due date since the party has not defaulted before the expiry of the due data (Art 1773)

The party, after putting the other party at default may fix a date after which he will not accept performance as long as it is reasonable considering the circumstances of the case and the nature of obligation (Art.1774).

What are the merits of the legal requirement to put a non-performing party in default?

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If a party, with out giving any notice to the defaulting party takes the latter to court, the defaulting party may plead that he just forget to ;perform and say that he is willing to do so now. The other advantage is to the parties themselves since they will refrain from spending unnecessary time and costs at the court when the party who has non-performed is willing to do so. Technically, the very purpose of default notice, therefore, is to remind the defaulting party that the obligation has matured and that he should act towards fulfilling it. If this party, despite this knowledge doesn't move towards performance, then it would not be a waste of time of the court and that of parties to go to court to seek legal remedies.

5.1 Rights of the Buyer to Non-performance of the Sale Contract

When we say the rights of the buyer to non-performance of the sale contract, we are referring to the failure of the seller to carry out his obligation under the sale contract as agreed.

Previously we have listed the obligations of the seller under the provisions of the law as to the following.

- The Obligation to deliver the thing sold
- The obligation to transfer ownership
- The obligation to warrant against certain defects, and
- The obligation to warrant against non-conformity

Another important point is that before the buyer claims to raise non-performance on the ;part of the seller, he must observe the rules on default notice. A default notice is a notice demanding the seller to perform his obligations According to Art 1772, non-performance can be invoked only after having placed the nonperforming seller in default. Thus, in the absence of a notice it is not possible to consider that the seller is not ready to carry out his obligations and this remains true even when the obligations fall due.

5.2 Forced Performance

Forced performance, as the name implies, is the discharge of obligations ordered by the court of law. So, in such cases, a party, after putting the other in default, will get the performance of the obligation. There are requirements that will be considered cumulatively in order to make the defaulting party give a forced performance.

In the general contract requirements can be referred to as

A. Special interest of the non-failing party and
B. Liberty of the defaulting party

Special interest of the non- failing party is simply an interest that can not be enjoyed from other sources. For example, if a person has made a contractual agreement with meter Artist afework Tekle in which the latte has agreed to sell one of his paintings and doesn't perform his obligations, the buyer may claim the has a special interest in the performance since there

is only one Afework Tekle and the painting can not be found else where (Art.2329). But, would the court grant forced performance based solely on this fact? Not really, rather there is another condition which has to be cumulatively fulfilled for the defaulting party to be forced to perform and this is one personal liberty. But, under the contract of sale, looking at Art. 2329 which reads as follows, this element does not seems to be included.

> ***Art . 2329****- Non-performance of obligation to deliver Where the thing has not been regularly delivered, the buyer may demand the forced performance of the contract where it is of particular interest to him*.

Accordingly, the only thing that can be gathered is that there has to be special interest of the in no cent party. The question is, if the contract is a contract of sale, then though the personal liberty of the defaulting party is affected, the court may guarantee specific performance? This does not seem to be tenable. What should be done rather is resort to the general rules of contract to inject this requirement since ignoring it may have very negative implications on the defaulting party.

The above right- Art.2329- to claim forced performance has few limitations. These are, first, when forcing the seller to deliver the thing, we may not affect the seller's personal liberty (Art.1776). This is probable when the sale relates to things, which the seller under takes to produce or manufacture on his own by providing the necessary materials (Art.2269). In such cases we may not force the seller to produce or manufacture the things under the contract for that violates his personal liberty.

The second provision (necessary) condition, the buyer must satisfy to demand forced performance of the sale contract (delivery of the things), is the requirement of particular interest (Art.2329).

When can we say the buyer has special (particular) interest in the forced delivery of the thing under the contract?

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The buyer may be said to have a special interest in such cases when the seller is the only supplier of the goods. Thus remedy of forced (specific) performance when the seller failed to deliver the thing may be granted only when damages would not be an adequate remedy.

The third precondition, which the buyer must satisfy, is that he must prove that there is no possibility of purchase in replacement or that is not customary even when there is the possibility, if it involves extraordinary in convenience or expense the buyer will be entitled to the right to demand forced delivery of the goods. More over, when it is not customary practice to purchase from other dealers, if it is possible to obtain the thing from another dealer with no extra ordinary inconvenience or considerable expense, the buyer may mot claim particular interest.

The fourth prerequisite that the buyer must satisfy is the rule of immediate notification to the seller that the buyer will demand forced delivery of the goods unless the seller discharges his duty of delivery as agreed unless the buyer informs the seller, with in a short period after he has ascertained the delay in delivery, of his intention to demand forced delivery; the buyer will lose the right to demand forced delivery (Art.2331(1).) Especially, where the data fixed for delivery of the goods is a compulsory date the term “immediate” will be interpreted against the buyer (Art.2331(2).)

Why do you think the law sets that many restrictions to the right to demand forced performance?

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The rule of forced delivery elaborates in accordance with the seller fails to carry out his duty of delivery. How about when the seller delivers goods that are not free from warrantable defects or are not in- conformity with the terms of agreement? Can he claim forced correction of the goods that are defective or replacement of the non- conforming items? See the following provision.

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Art.2332-Non-conformity or defects

1. The buyer who has regularly given notice of the defects may require the seller to deliver new things or the missing part or quality of the thing where the forced performance of the contract may be demanded

2. He may require that the defects be made good by the seller with in a reasonable time where the sale related to a thing which the seller has to make or produce on the specifications of the buyer and where such defects can be made good.

Thus, as you can see the buyer has the right to demand forced correction of the defective things or their replacement as well as the substitution of the non-conforming items except that he has to ensure that the above prerequisites are met. That is if such forced performance does not go against the seller's personal liberty, if there is no purchase in replacement commanded by the custom or if purchase in replacement entails consider able expense and inconvenience, if the buyer proves that he has a special (particular) interest, and the buyer regularly gives notice, then the rule says" the forced performance of the sale contract may be demanded.

5.3 Cancellation of the Contract

Cancellation is yet another remedy for non-performance of the contract; be it general or special. As the name implies, cancellation is the cessation of the obligations of the parties before they are began. The stage at which cancellation can be considered is of course at the time where performance is sought but there is non-performance of the same. At this time, cancellation can be effected in two ways; there can be judicial canculation which implies the involvement of courts in the processor it can be unilateral, in which case the aggrieved party can independently cancel the contract and omit obligations there in. Like forced performance, calculation, be it judicial or unilateral, has to meet certain conditions to be effected.

5.3.1 Judicial Cancellation

The nomenclature is associated with the organ that has the right to cancel the contract, which is the judiciary that would be the courts. Art. 1784 of the civil code tells us about judicial cancellation by stating "a party may move the court to cancel the contract where the other party has not or not fully or adequately performed his obligations with in the agreed period of time." So, obviously non-performance is the basis of cancellation.

? Does non-performance always quarantine calculation? _____

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No, rather there are criteria to be met in order to move to the courts for cancellation Art.1785 of the civil code clearly fells us of the conditions laid down for judicial cancellation.

The requirements of interests of the parties and good faith are the first criteria and the reason for this is obvious. As we all know, a contract can not be cancelled unless there is a good enough reason and in this case, Art. 1789 (2) of the civil code says that "the fundamental principles of the contract have to be breached in order to cancel the same. So, it is not just any non- performance that quarantines cancellation but fundamentally is a criterion. And, it is worth mentioning Art. 1785(3), which says, "No contract shall be cancelled unless its essence is affected by the non-performance and it is reasonable to hold for such reasons that the party requiring cancellation of the contract would not have entered in to the contract with out the term which the other party has failed to execute being included."

5.3.2 Cancellation by the Buyer or at the Buyer' Request

When can a buyer uni-laterally cancel a contract of sale? _____

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Cancellation may also arise when the seller fails to deliver the thing at the time or place agreed up on. If there is a compulsory date of delivery, and this date is not respected, then it automatically guarantees the right to unilateral cancellation, which would mean that the buyer would not even need to go to court to dement cancellation of the contract.

Article 2340

1. Where the seller delivers the thing at another place than that where he is bound to make delivery, the court shall not cancel the contract on the application of the buyer unless the manner in which the contract was enforced constitutes a fundamental breach of the contract

2. The contract may not be cancelled where the breach can be made good by the seller with in such period of time as is by the contract or by law.

As is described above, the divergence from the place of delivery is not as a principle a ground for cancellation of the contract unless, as described by sub article 1, the place of delivery in the contract affects the basis of the contract.

Also, the second sub- article seems to be a continuation of the first one and tells us that cancellation will not be allowed if the mistake or otherwise breach in relation to the place of delivery can be made good with in a period fixed by agreement or law.

Seller's failure to transfer ownership may also be another ground to demand cancellation of the contract. It is clear from the definition of a contract of sale that the primary obligation and therefore, goal of a contract of sale is the delivery of the thing and transfer of ownership by the seller for a purchase price.

5.4 Cancellation by the seller

When do you think the seller can cancel or require cancellation of a contract?

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Basically the same rules concerning judicial and unilateral cancellation apply here in that the seller may in principle demand cancellation from the courted. (Art.2347).

The first reason, as can be prefixed, is the non-fulfillment of the primary obligation of the buyer, which is payment of purchase price.

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The civil code under Article 2348, tells us of instances where in the seller can unilaterally cancel the contract of sale, which is an exception to the rule envisaged under Article 2347 of the civil code. The three situations under Art 2348 are laid down as follows

1. *If the right to cancel the contract has been expressly given to the seller. The seller shall serve the buyer with a written declaration to declare cancellation of the contract.*
2. *Up on expiry of a reasonable period, after having expressed the notice to the buyer indicating that he is in default of payment, but he can only in three limitative situations cancel the contract; the sale relates to a thing quoted on a stock market, thing with a current price or where the right has been expressly given by the contract.*
3. *Up on expiry of the period of grace granted by the court under Art.2338(3) of the civil code.*

The other reason for can collation by the seller is attributed to delivery of the thing and failure On the side of the buyer.

Article 2349

Where the buyer fails to take delivery of the thing on the conditions laid down is the contract, the seller may require the cancellation of the contract where the failure of the buyer justifies the fear that he will not pay the price or it appears from the circumstances that taking delivery was an essential stipulation of the contract.

The provision is self-explanatory but one may ask when taking delivery is not necessary stipulation in a contract of sale. It is a bit unclear since the obligation to deliver a thing is on the seller, which would mean that in order for the delivery to be referred to as delivery, there has to be the buyer on the other end to actually take the delivery.

Failure to make specification as to weight, measurement, etc, would also give rise to the right of the seller to demand cancellation.

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5.5 Reasons for Cancellation by both Parties

This calls for common grounds to cancel a contract. The first situation is where the contract involves successive deliveries. In such contracts the seller is obliged to deliver the goods every week, every ten days, every month, etc. what is wrong in such delivery is that it may happen that among the successive deliveries in that it may happen that among the successive deliveries one may be not as agreed because the goods delivered are defective. Also, the seller may fail to deliver any on the agreed date, though he delivered the first, second, and third deliveries. In such cases the buyer can cancel the future deliveries, if the sellers failure creates a reasonable conclusion that he will do the dame in the future. Other wise he may not.

For example, Nahom Agro Industry may agrees with Addis Ababa University to deliver two hindered kilos of tomato every Friday for a year and successfully delivered every week for six months but failed to make it on the six month, Addis Ababa university may not cancel the future deliveries unless the seller's failure justifies the fear that the seller will fail for the future too, may be because the tomato is from one stock. Other wise the only reason the seller failed at one point should not lead that the seller failed at one point should not lead to the cancellation of the future deliveries.

The other situation where both the seller and the buyer are allowed to cancel the sale contract is when performance of the contract becomes impossible (Art.2352.) For instance if dadush agrees to sale a horse to kassa but the horge died before delivery both the buyer and the seller may cancel the sale of the horge. Also, Art.2353 speaks of a situation where the seller as well as the buyer is allowed to cancel the sale contract. This article makes reference to Art.1789 which narrates of refusal of performance by one party as a ground of unilateral cancellation. Art 1789.(1) on the other hand, authorizes the party to transform his measure or remedy to a final one by unilaterally declaring the contract cancelled even before the other party's obligation falls due. However, if the other party's refusal of performance is not made in writing, the aggrieved party's right of unilateral cancellation can be exercised only up on giving a default notice If the party in default produces with in 15 days securities ensuring his performance at the agreed date, the other party's right of unilateral cancellation will be lost in accordance with Art. 1789(2). Also where both the seller and buyer, as the case may be, being late in the performance of an obligation which constitutes essential stipulation of the

contract, asks the other party whether he still consent to the execution of the contract, the contract may be cancelled as of right where the party asked does not answer with in a short time (Art. 2354.)

When do you think both parties can demand cancellation of the contract?

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5.6 Effects of Cancellation

What do you think will happen when there is cancellation of a sale contract?

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When there is cancellation of a contract of sale parties are relieved of their mutual obligations. But, we have to remember that when this happens, the parties may have already executed one or more of their obligations under the impression that they are contractually bound. In such a case, restitution will come in to the picture.

What is restitution?

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Art.2355

1. Where a contract is cancelled, the parties shall be released their obligations under the contract, their obligations under the contract, with out prejudice to such damages as may be due.

2. Where a party has performed his obligation in whole or in part, he may claim the restitution of what he has supplied including the expense incurred

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3. Where both parties have performed their obligations, each of them may refuse the restitutions due by him until the other party has effected his

The restitution may be simultaneous; in the case of difficulty, a right of retention is provided, which simply means that one party may refuse to perform the restitution until the other party does. Some times, the parties may have benefited from keeping the thing or money with them until the time of restitution; here it is stated in Article 2356 that this benefit shall be restituted along with the main obligation. Some times, a thing can not be returned in its previous condition, but if this has happened outside the fault of the buyer or a person for whom he is responsible, the cancellation shall still be allowed. However, if the buyer has assigned or transformed the thing or it has become damaged or has perished by his act, then he may not avail himself of the cancellation. This is clearly stated by Article 2357 of the civil code.

There are three exceptions to the rule leading to non-cancellation.

a. The contract may be cancelled though the thing has perished or been damaged toally or impart, with out there being no fault on the side of the buyer or any person for whom he is responsible.
b. If the damage is infect due to the normal customary examinations (art 2291 and 2357 (2)), then cancellation still can be sought.
c. The buyer can also cancel the contract where there transformation of the thing was made before the defect appeared (Art. 2358(1))

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5.7 Damage When Sale Contract is Breached

What do you understand by damages?

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Damage is monetary reparation that may be permitted to avoid economic harm that may result from the failure to comply with the terms of contract. The principle is that damages will be due to an injured party independent of whether the contract is cancelled or not.

In order to be warded damages, the aggrieved party must be able to show that he has suffered damage and that this damage has resulted from the non-performance of the contract. Here though the non-performance is not caused by the fault of the other party, he may still be held liable (Art 1791(1)) unless he proves that his non-performance is caused by force-majeure (Art.1791(2).) Here the term force-majeure refers to a superior force or term force-majeure refers to a superior force or event, which makes performance impossible

The other crucial issue related to payment of damage is the extent of compensation to be paid to the aggrieved party. In cases where the sale contract is not cancelled (i.e) performance ordered) the extent of damage will be assessed based on general rules of contracts, i.e.) Art. 1790-1805. Accordingly, the measure of damages shall be the seller's or the buyer's branch or the contract (Art.1799(1).) In case of delay in the payment of price, the buyer shall pay interest at a legal rate (Art.2361(3).)

In cases where the contract is cancelled in addition to the general rules on the determination of damage we have specific rules under the law of sales, i.e., Arts, 2362-2367. Thus, these special rules must first be observed before we resort to the application of the general rules.

When the sale relates to things having current price, in principle the extent of damage shall be equal to the difference between the price fixed in the contract and the current price as on the day when the right to declare the cancellation of the contract could be exercised or on the day following that when the contract was cancelled by the court or as of right.

Some times, if may be that the buyer purchased from other sources when the seller fails or the seller sold to other purchasers when the buyers fails. In such cause, we will take in to

account the price charged by the seller or the price paid by the buyer when dealing with other people and calculate the extent of damage payable. We can look at Art.2360 which generally looked at damages.

Art.2360-Damage

1. Where the non-performance of one of his obligation by his contracting party is detrimental to him, the seller or the buyer may claim that the damage thus caused be made good by way of damages

2. Damages may be claimed whether the contract is cancelled or up held, where the contract has not been regularly and exactly performed.

The most important issue here is how damage is to be calculated. The general rule of computing damages is that it has to be equal to the actual damages caused. For the purpose of computing the exact amount to be paid, damages are grouped in to two; general and special damages. The former one is the type of damage, which is the normal consequence of breach to be computed using a reasonable man standard while the latter, as the name implies, is damage greater than normal damages and depends up on communication of special situations which make the damage greater. Article talks of this as the following

Art.2364

1. Damages shall be equal to the prejudice actually caused where the party that suffered such prejudice show that, at the time of the making of the contract, he had informed the other party of the special circumstances by reasons of which the prejudice caused in greater

2. The provisions of sub-article(1) shall also apply where the party shows that non-performance is due to the other party's intention to harm or gross negligence or grave fault.

Thus, from the above we realize that where a special situation that would make the damage more than normally expected is known to the other party, the non-performing party may be compelled to pay damages that would compensate the whole damages actually caused by the non-performance.

Self Check exercise

Part one_ True/ False Questions

_____ 1. Damage is not allowed if the buyer manages to purchase the goods for the same price as stated in the sale contract

_____2. When the buyer fails to take delivery the buyer may demand forced performance

_____3. There is no possibility of affecting the personal liberty of the seller when the buyer demands forced performance

_____4. The buyer may not be required to pay damage unless the seller proves that he has lost due to the non –performance by the buyer

_____5. Reasons for cancellation by both parties can be referred to as common grounds to cancel a contract.

_____6. One situation where both the seller and the buyer are allowed to concel the sale contract is when performance of the contract becomes impossible.

_____7. There is no cancellation where the seller delivers the goods at another place than the place agreed for delivery unless such is fundamental breach.

Part Two: Choose the best answer

_____1. As a rule damage is equal to

a. Reasonable loss b. actual loss

c. Depends on circumstances of the case

d. Extra ordinary expectation

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_____2. Only the buyer may cancel when

a. There is impossibility of performance
b. There is failure in delivery
c. There is anticipatory breach
d. All of the above

_____3. Which one is necessary for the buyer to demand forced delivery?

a. Particular interest b. Notice

c. Personal liberty of the seller

d. absence of purchased in replacement e. all

Part Three- Short answer

1. What is default notice and what are the instances in which it can be ignored?

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2. What do we mean by anticipatory breach?

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3. What is judicial cancellation and what are the instances in which it is allowed?

4. What is unilateral cancellation and when can parties unilaterally cancel a contract of sale?

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5. If the thing may not be returned to the seller in its previous position the sale contract may not be cancelled? Discuss?

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6. How is damage calculated when there is anticipatory breach of the sale contract?

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7. Do you think that damages are always due when there is a breach of a contract? If yes or no why?

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CHAPTER SIX

SECURITY DEVICES

Security devices are referred to as examination and application of provisions of the civil code that deal with personal guarantee.

The debtor's assets or properties are securities for third party creditors who have some claim on the debtor. The third party creditors are entitled to this right with out the need to conclude any other agreement with the debtor. Once they exercise their right against his personal properties. When surrounding circumstances require, the creditor can get his peronsl properties attached while the court is handling the case

6.1 Advantages of Security Device

The development of Security device in linked with the development of credit business. The nature of these fields of business that they do not demand simultaneous performance as opposed to the cash transactions. Thus, one advantage of security devices is that it boots economic development through the medium of credit. This is because creditors credit if they are given security.

The availability of security devices encourages those with money and lends it to other to whom they might not land with out greater security of repayment. This increases economic activity by putting the other wise dormant (inactive) money to produce use in the flow of commerce. Thus, encouraging people to enter in to transaction and create societal beneficial principal obligation is perhaps the main reason fort he existence and expansion of security device Law.

6.2 Types of Security Devices

6.2.1. Personal Security

According to planeol the security of the creditor may come either from another person who obliges him self to pay in place of debtor, if the latter fails to do so, in which case we call it personal security or from the property of the debtor subject either in mass or individually to his particular security to the exclusion other creditors in which case we call it real security.

Personal security, other wise called real security, then refers to a case where some third party gives a legally enforceable promise to pay the debt or to perform the duty or to perform the duty of another in case the debtor fails. In this case, it is the person that is dealt with as a subject matter of security.

The Ethiopia civil code deals with personal security in a greater detail (from articles 1920-1951). Here we shall not repeat the same discussion that you made in your 'contract' courses. Suffice here to remind you to recall your discussion and compare and contrast it with real security which is the main concern of this module.

Under normal circumstances, security ship is conceived by the close relationship between the debtor and personal guarantor. Always the debtor will ask his close friend or family to be his surety on the obligation he assumes to the creditor. But, this does not mean the surety ship is not established between persons who are not close friends or families. Under normal circumstances, the surety will not get any benefit from the debtor ort he creditor by his being a surety. That is why surety ship is usually called gratuitous contract. If we also look at the law Art.1290, it simply states that "**Who so ever guarantees an obligation shall undertake towards the creditor to discharge the obligation should the debtor fails to discharge it"** As it is dear from this provision of the civil code, the kind of relation ship between the debtor and surety is not specified. More over, whether or not the surety will ask something the creditor is not specified in the civil coue.

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Pursuant to Art-1921, a guarantee may be given with out any request from the debtor form whom it is undertaken or with out his knowledge. This tells us that surety ship is formed even with out informing the original debtor and with out getting his request. In this case, through the surety ship is formed or established with out the consent of the debtor or with out informing him, once the personal guarantee or surety ship has given his conserd to the creditor the debtor assumes towards the creditor, the surety will be bound to discharge his obligation in case the debtor fails to discharge the obligations of the debtor.

Though this is the general principle in the law of surety ship, however the debtor and the surety can make the arrangement between themselves on consideration. The law does not prohibit such an arrangement. In this case, we can say that three kinds of contracts are established. The first kind of contract is established or concluded between the creditor and the debtor. The second kind of contract is that established between the creditor and surety. This is the contract which the surety guarantees to the creditor that the surety will discharge the obligation of the debtor when the debtor fails to discharge it himself. The third category of contract is that established between the debtor and surety. This is the contract which says the debtor will pay to the surety and the surety will get the right to ask payment from the debtor. Here we should always bear in mind that the contract established between the debtor and the surety will not have any kind of effect on the contract concluded between the creditor and the surety. The creditor will have the right to ask the surety to discharge the debtor's obligation when the debtor fails to discharge him self irrespective of the kind of contract that is concluded between the debtor and the security.

6.2.2. Security of property

Security of property, sometimes called real security, refers to an arrangement where by an assurance is given in the form of property to the creditor so that he can depend an such property for repayment or performance his debt in case the oliger (debtor)fails to discharge his obligation. Here the subject matter the security is some identified property as opposed to persons in the case of personal security. Real security can further be divided in to pledge, mortgage and antichresis

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6.2.3. Real versus Personal Security

In the case of real security the property which is the subject matter of the security device may come either from the debtor him self or some other third party. In the case of personal security, the surety, as he is personally bound for the debt or debtor, responds with all his property, where as the third party who has given his some particular property as a security for the debt of another does not have personal liability. The liability if third paity pledgor / mortgagor is limited to at most the total value of a pledged or mortgaged property. The creditor does not have any right what so ever other properties of third party, pledgor or mortgagor. So viewing it from the side of the third party, better it to give some particular property as a security than to bound one self to pay or perform the debtors' obligation in case the latter fails.

When we compare real security and personal security from the point of view of the creditor; real securities are preferable to personal securities in that the creditor can easily liquidate the secured property. Most advantages of the security devices that we discussed are attributes of real security. No doubt that in the case of personal security too, the risk of losing the money or facing al the predicament of post non- performance by the debtor to the creditor is minimized. A part from this advantage through, the creditor whose claim is guaranteed by personals security may face all the troubles that he may encounter in the absence of surety ship.

The reasons with regard to advantages of security devices such as absence of property, exceptions, bankruptcy, etc implies that the fruit fullness of personal security highly depends on the credit worthiness of the guarantor unlike in the case of real security.

Of course, real securities, too, have some demerits when there are other creditors having security over the same property and have a preferential right a head of the creditor under discussion, and in case where the property pledged or mortgaged is demolished due to the negligence of some other third party. But if one is given the choice real securities are preferable in many accounts to personal securities.

6.3 Pledge and Its Basic Features

Real securities are divided in to three forms based on the kind of property given as a security, manner of formation of the security, the right and duties of the parties, etc. Pledge is one form of real security. Pledge is perhaps the oldest transaction by which movable property is used to secure obligations. In short pledgres may pledge movable property to secure an obligation. In this case pledge can be defined as a bailment of goods to a creditor as a security for the payment of some debt or engagement debt or engagement.

The Ethiopia civit code tries to define what pledge is under Article 2825 as **"…… a contract where by a debtor undertakes to deliver a thing called the pledge to his creditor as a security fort he performance of an obligation."** If one also reads, further, article 2831, he/she is in a position to understand easily that what matters is not whether the creditor possess rather the contract is valid if some third party detains the pledge. So for a better understanding of the definition and the features of it, one needs to, at least, read the above provisions together rather than solely depend on article 2825 which claims to be the definition.

6.3.1. Basic Features of Pledge

In a summarized form pledge constitutes the following basic features.

i. It is a real security

ii. It is a contract

iii, It is applicable on movable properties

iv, The pledge must deliver the possession

a) As a **real security** it is the oldest transaction by which movable property is used to secure obligations. Hence, pledge is one of the three most known real securities.

b) As a **contract**:- unlike in the case of mortgage, the only manner of creation of pledge is via contract. Therefore, you should note at this juncture that the contract general contract.

c). As **Properties to be pledged**, generally the object of pledge is a thing. To this end, Art.2829 (1) states the chattels, a totality of effects, claims or another right relating to movable property that can be pledged.

d), As to its nature of dispossession it is declared that the dispossession of the pledger is a validity requirement for the contract of pledge.

6.4. Mortgage

Mortgage is a security device which belongs to the category of real security. Mortgage in defined in some jurisdictions as non- possessory right which gave the creditor only the option if seizing and selling the property up on default .Mortgage plays an immense role in business. Arranging mortgage is seen as the standard method by which individuals and business can purchase residential and commercial real estate with out the need to pay the full value immediately. In many countries it is formal for home purchases to be funded by mortgage. The case in point here is the emerging trend in our country where by the Ethiopian commercial bank extending loan for condominium home owners by having the building as a mortgage.

6.4.1 How Mortgage is created

The pledge is created by contract unlike in the case of pledge; however, mortgage can be created in different ways.

Art..3041 emisages four ways of creating of mortgage. These are legal, judicial, contractual and mortgage created by Other private agreement. In French version of the article prefers to use the word **"Will"** rather than **"private agreement",** since the latter was believed to be too general and vague by the codification commission.

Legal mortgage is some times referred to as tact mortgage, because the law with out the consent of the parties concerned creates it. The very purpose of legal mortgage is to protect persons who lost possession of their immovable and may be in a difficult position to secure possession of the price or compensation due to them.

Contractual mortgage on the other hand is a kind of mortgage that is created by the consent of the parties. Once again it is to be noted that like any other contract it must fulfill all the basic elements the provisions of the exception due to the special nature mortgage, may found their way in to the contract of mortgage (see-article.1676 for detailed understanding.)

Self Check Exercise

1. Under what situations a guarantor can, even before has paid, bring an action against the debtor and demand securities for him?

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2. Mention the different features of mortgage as a real security.

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3. Mention the basic feature of pledge and discuses each of them.

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4. Compare and contrast real security versus personal security.

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5. Compare the concept of pledge against mortgage.

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6. Mention the advantages and disadvantages of real and personal security?

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7. What are the advantages of security devices?

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