## UNIT ONE: INTRODUCTION

### A Brief Account of Ethiopian Law of Traders and Business Organizations

- ✓ Business organizations had gone through various stages throughout the centuries before they came to acquire characteristics which have made up distinct organizational forms prevalent in Ethiopia today. They grew from a single individual to a group of individuals organized, first in some sort of partnerships, then in a more refined type of partnership and finally to a corporate form.
- ✓ The era of Emperor Menelik II witnessed the first business organization- the Franco- Ethiopian Railway Company. And the company came about by virtue of an imperial concession granted to Alfred Il in 1894 with a view to constructing a railway from Djibouti to Ethiopia via Harar to Entoto and then to the White Nile. Since it was incorporated in France in pursuance of French company law, coupled with the fact that its head office was in Paris, it remained a French company for all practical purposes, nonetheless. In exchange for the concession, several shares had been assigned to the Emperor. The concession was for 99 years and, upon expiry, ownership of the company was to be conveyed to the Imperial Ethiopian Government.
- ✓ The second company to appear was the Bank of Abyssinia which was formed in 1905 as a branch of the National Bank of Egypt. This company came into being, like the Franco-Ethiopian Railway Company, by virtue of a concession granted by the Emperor. Its total subscribed capital was $500,000 of which $100,000 was to be paid after the company commences business. With respect to share in the profits, the Imperial Ethiopian Government was entitled to 20% while the other shareholders were entitled 70%. The legal existence of the company was fixed at 50 years from the date of its formation, without any stipulation as to the company□s fate upon its expiry. Nevertheless, in 1931, the government of Ethiopia bought the company and renamed it as □Bank of Ethiopia□.
- ✓ The next company that was formed in Ethiopia was the Agricultural and Commercial Development Company of Ethiopia. Unlike its predecessors, the company was incorporated in Ethiopia, and thus, it was the first Ethiopian company, though its incorporation had not been made in compliance with no existing law other than an imperial decree issued to that effect.
- ✓ The formation of the afore mentioned companied and the general trend would seem to have prompted promulgation of the following commercial laws: the Law of Loans of 1924, the Decree of Concessions of 1928, the Law of Bankruptcy of 1931, and the Company Law of 1933.The Company Law of 1933 provides for various forms of business organizations, namely, share companies, joint stock companies, private limited companies, ordinary partnerships, and limited partnerships. It also contains several provisions pertaining to the formation, operation, and dissolution of companies.
- ✓ In 1960, a more comprehensive commercial code was enacted. With respect to the drafting history of this code a few words were in order. Having accepted an invitation from the Imperial Ethiopian Government to draft a Commercial Code and a Maritime Code for Ethiopia, Professor Jean Escarra made several trips to Ethiopia in 1954, during which time he consulted with the Codification Commission and submitted to it the bulk of the texts later promulgated as Books II, IV, and V of the Commercial Code together with their exposes des motifs. Unfortunately, the work on the Commercial Code was interrupted due to the death of Professor Escarra in 1955. Then, the Imperial Ethiopian Government sent an invitation to Professor Alfred Jauffret to complete the unfinished draft Code by preparing the texts of Books I and III as well as to revise Prof. Escarra□s work. Prof. Jauffret submitted his draft texts along with a Final Report on March 1, 1958. The Amharic version of these texts was then submitted to the parliament, which in early 1960 approved the draft with several amendments. The final draft text of the Commercial Code was promulgated on May 5, 1960 and the Code came into force on September 11, 1960.

### General Orientation of the Commercial Code

- ✓ One of the crucial issues that the draftsperson had to resolve before he set out to work on the project was as to whether the Commercial Code should be subjective or objective. **A subjective Commercial Code** is one which regulates a community of persons designated as □traders□. It considers above all the traders, but in order for the legislature to decide which persons have the status of a trader he must take into consideration the profession or activities which she deems to have a commercial character. Whereas, **an objective commercial code** regulates acts known as □acts of commerce□, as opposed to persons. The scope of application of such commercial code is determined entirely by the enumeration of these acts.
- ✓ In this regard, it has to be pointed out that the expert draftsperson opted for the subjective system to be the basis upon which he would build the 1960 Ethiopian Commercial Code. The distinctly subjective features of the Code can be gathered from Articles 5 and 10, i.e., the definitional provisions of traders and commercial business organizations respectively, although Article 5 incorporates a list of commercial activities secondarily.
- ✓ The subjective features can also be discerned easily from the logical organization of the Law of Trades and Business Organizations. The Law of Trades and Business Organizations, as found in Books I and II of the Commercial Code, regulates a group of persons called traders and business organizations.
- ✓ The commercial law can be built upon certain acts known as □acts of commerce□ or certain persons known as □traders.□ The first belongs to the objective system while the second belongs to the subjective system.

## UNIT TWO: TRADERS AND BUSINESSES

### 1. Traders

- ✓ Businesses are operated by persons, whether physical or juridical. However, sole businesses or sole proprietorships can only be run by physical persons. Physical persons who operate a sole business are referred to as traders. Article 5 defines the trader. This provision has two key elements: the general condition and the special condition. The **general condition** consists, in the existence of an enterprise or business, of a profession, and the goal of realizing profits while the **special condition** is such that the person carries out any of the activities enumerated in article 5 as her business object. Traders, pursuant to Article 5, are persons who professional and for carry on any of the activities stated from 1-21

- **Positive Definition**

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

✓ The second requirement of the general condition says that one who operates a business has to do so professionally. The profession requirement refers to something different from the standard lexical meaning of the word "profession" or "professional". It is in the sense of a principal calling, vocation, or employment that the Code makes use of it. To say that the business that is being operated by a certain person has to be his principal calling is, in effect, to say that he who operates a business as a pastime or in his leisure does no be counted as a trader.

✓ The third requirement is that one who starts a business and engages himself in such business professionally does not become a trader unless he does so for profit.

✓ According to the special condition, a person does not become a trader the moment he runs a business professionally and for gain. According to the special condition, the business objects of such person has to be carry out one or more of the activities listed in Article 5 of the Commercial Code.

- **Negative Definition**

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

✓ At this juncture, it is instructive to compare and contrast the proposed revision of the law concerning traders under the Draft Revised Commercial Code prepared by the Ministry of Justice. Article 5 of the Draft provides: Any person who as his regular profession and for gain, carry on any production and service activities is a trader. In particular:

1. Purchase of movable or immovable with a view to reselling or letting them for hire either as they are or after alteration or adaptation;
2. Warehousing activities;
3. Exploitation of mines and other resource deposit;
4. Exploitation of marine resources;
5. Construction, repairing, maintaining and similar activities;
6. Transport and communication activities;
7. Printing, publishing, engraving, binding; cinematography, photography and computer activities;
8. Producing, distributing, and supplying water, electricity, gas, compressed air, heating and cooling;
9. Operating radio and television stations, or places of entertainment;
10. Operating hotels, restaurants, bars, inns, public baths, hairdressing and beauty salon establishments;
11. News, information and advertisement activities;
12. Operating travel agencies, safaris, and tour operations;
13. Operating business as a commission agent, broker, stock broker, or commercial agent;
14. Operating banking, money changing and bank related activities;
15. Operating insurance activities;
16. Operating health, education and kindergarten activities; and
17. Any consultancy service;

**1. Businesses**

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

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

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

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

- ✓ According to Art 128, the corporeal elements that make up a business include equipments and goods.
- ✓ In a nutshell, the term "business" embraces **tangible** and **intangible assets**, including **tools, equipments, raw materials, goods in stock, good will, trade name, trade mark, patent, copy right, and the right to lease of the premises.** But, immovable properties cannot form part of the business (fonds de commerce). Hence, the land or buildings which form of the business premises and the fixtures on such premises are no part of the business even though they are owned by the trader himself. To a greater degree, the business is regarded as an entity distinct from its constituent elements, as long as the whole is more valuable than the sum of the constituent parts. In this sense, the business is a ***res*, thing, or object over** which a person can exercise property rights, including **ownership, usufruct, and lease.**

**Goodwill and Its Protection by Unfair Competition**

- ✓ Since the definition of goodwill in Art.130 of the Commercial Code is defective, it is of little help to us. This is so, precisely because it fails to tell us the essence or nature of goodwill. Instead of doing the proper job of a definition, it gives you an extra piece of information concerning its origin and the obvious thing that goodwill has a value. Art. 130, reads: The goodwill ***results from*** **the creation and operation of a business** and *is of a value* which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services.
- ✓ Definitions of the term as found in the Black's Law Dictionary and the Oxford Dictionary of Law respectively. (1) A business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. ▯ Because an established business's trademark or service mark is a symbol of goodwill, trademark infringement is a form of theft of goodwill. By the same token, when a trademark is assigned, the goodwill that it carries is also assigned". "[Goodwill] is only another name for reputation, credit, honesty, fair name, reliability." ▯ "Good will is to be distinguished from that element of value referred to variously as going-concern value, going value, or going business. (2) The advantage arising from the reputation and trade connections of a business, in particular the likelihood that existing customers will continue to patronize it.
- ✓ Unfair competition law is nothing but one of the devices designed to protect or preserve the goodwill of a business. As per Art.131, two alternative courses of action have been put at the disposal of a trader in the hope of enabling him to effectively safeguard his goodwill. The first course of action available to such a trader is **to bring an unfair competition claim under Art.133 of the Commercial Code**. The second is **to institute a proceeding based on the legal or contractual prohibitions specified in Art. 30,40,47,55,144,158,159,204 and 205 of the Commercial Code.**

**Commercial Unfair Competition**

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

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

- ✓ Implicit in the notion of commercial unfair competition are two ideas: **unfairness** and **competition.** Competition presupposes the existence of competitors. Competitors are traders who are trying to reach the same customers. In other words, competitors are traders who offer products or services in the same market. Thus, inherent in the idea of competition are three elements: they must be **selling similar products, in the same area**, and **at the same time.**
- ✓ Art.133 gives us two standards whereby we can designate certain acts of commercial competition as unfair. The first, or the **general standard**, is provided for in sub-art (1). The second, which might be called the **specific standard**, is provided for in sub-art (2). The specific standard can further be broken down into two alternative requirements: **likelihood of confusion and false discrediting statements.** In connection with the scope of these standards, the first, by contrast, is broader than the second in that it is difficult, if not impossible, to figure out, at a given point in time and space(i.e., now and here), all possible situations of unfair competition that it covers.
- ✓ Unfair competition, as defined in sub-art.(1), expresses the idea that a particular act of competition is to be condemned as unfair because it is inconsistent with the community's currently accepted standards of honest practice. Thus, unfair competition depends upon commercial custom in determining what acts are honest and what are not.

**The Specific Standard**

**1. Misleading Commercial Practices**

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

- ✓ A likelihood of confusion exists when there is confusion as to the enterprise undertaking business, products and services, or commercial activities. More particularly, confusion may occur with respect to any of the following:
  - (a) trade-names
  - (b) distinguishing marks
  - (c) the appearance of a product,
  - (d) the presentation, including advertising, of products or services

**2. False Discrediting Statements**

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

- **Effect of Unfair Competition**

- ✓ Article 134(1) provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act. The orders may in turn take the form either of an order for corrective publicity under Art.2120 of the Civil Code or an injunctive order Art.2122 of the Civil Code. Sub-art (2) of Art.133 stipulates: The court may in particular:
  - (a) Order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful act in accordance with Art. 2120 of the Civil Code.
  - (b) Order the unfair competitor to cease this unlawful act in accordance with Art. 2122 of the Civil Code.
- ✓ The courts, while entertaining a claim for damages arising from unfair commercial competition, must stick to the rules and principles of the Civil Code governing extra-contractual liability.

- **Trade Practice Proclamation**

- ✓ The Trade Practice Proclamation, which entered into force on 17th of April 2003, contains 31 articles under 4 Parts.
- ✓ A closer perusal of the above legislation reveals that it prohibits two types of commercial behaviour: **anti-competitive** and **no-competitive behaviours**. The former comprises of three categories of acts, viz. **anti-competitive agreements, unfair competition, and abuse of dominance** while the latter consists of non-compliance with the legal requirements pertaining to indications of prices, labels, price lists of goods and services subject to regulation; conditions of distribution, sales and movement of same; orders for replenishment of stock of same; and the issuance and keeping of receipts.
- ✓ The proclamation applies to all commercial activities except such activities that are, according to investment proclamation, exclusively reserved for the Government
- ✓ The declared aim of the Trade Practice Proclamation, in keeping with the free market economic policy of the country, is maximizing economic efficiency and social welfare by promoting competition and regulating anti-competitive practices. In particular, the proclamation has **two objectives**: **to secure fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices**, on the one hand and **to safeguard the interests of consumers through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services,** on the other.
- ✓ According to Article 10 of the Trade Practice Proclamation No.329: Unfair Competition

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

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

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

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

(d) Any act of *disclosure, acquisition or use of information* without the consent of the rightful holder of that information in a manner contrary to honest commercial practice ;
(e) Any *false or unjustifiable allegation that discredits, or is likely to discredit* with respect to another enterprise or its activities, in particular the products or services offered by such enterprise;
(f) Any act that directly or indirectly *restricts, impedes or weakens the competitive production and distribution* of any commercial good or the rendering of any service;
(g) Any act that *restricts or debars the timely or economic means of producing or distributing* any good or rendering of any service;
(h) The importation of any goods from any foreign country into Ethiopia *at a price less than the actual market price or wholesale price of such goods in the principal markets of the country of their production with the intent to destroy or injure the production of such goods in Ethiopia or to restrict or monopolize* any part of trade in such goods;
(i) Trading in any manner in *goods imported into Ethiopia for humanitarian purpose without authorization* by the Ministry

- **Trade Practice Investigation Commission**

✓ In 2003, through the enactment of the Trade Practice Proclamation No.329, the House of Peoples Representatives created the Trade Practice Investigation Commission and charged it with the duty **to prevent and eliminate anti-competitive and unfair trade practices** [and] any **restraints on the efficient supply and distribution of goods and services**.
✓ The five-member commission, representing the public sector, the private sector, and consumers association and being appointed by the Prime Minister upon nomination by the Minister of Trade Industry, is empowered to conduct appropriate investigations and hearings and to take against violators administrative measures and penalties. Sub-art (2) of Article 15 provides the following.

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

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

Article 25 stipulates four distinctive administrative measures which are:

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

✓ The Proclamation imposes fines upon defendants who have been proven to have violated any provision thereof by way of penalty. Article 26 reads: Without prejudice administrative measures that may be taken pursuant to Article 25 of this Proclamation, the Commission may impose the following penalties where any person violates the provisions of this Proclamation or Regulations, Public Notice or Directives issued for the implementation of the same.
   1. Fine up to 10% of the value of the total assets of the violator or 15% of yearly total gross sales of the violator, alternatively.
   2. Fine from 5,000.00(five thousands) up to Birr 50,000.00(fifty thousands) where the direct or indirect cooperation of any individual in any prohibited practice is proven.

✓ The Proclamation, in its Article 27, sets forth factors that the Trade Practice Investigation Commission should take into account while assessing the amount of fines. As a result, the Commission is expected to take stock of such factors as the extent of the damaged caused the market share of the violator, the size of the market affected, and the financial status of the violator.
✓ According to Article 17(1), any party may appeal to the Federal High Court against any administrative measures or/and penalty decisions within 30 days from the date that he was aware of the approval of the execution. Besides, sub-Art.(2) of the same prohibits the Ministry of Trade and Industry from executing any decision before the expiry of the 30 days period

- **Criminal Unfair Competition**

✓ In addition to the civil and administrative remedies discussed above, the Ethiopian legal system affords victims of unfair competition a criminal remedy. Although Article 719 of the Criminal Code defines criminal unfair competition, Articles 720 and 721 also criminalize such specific cases of unfair competition as

infringements of intellectual property rights. In connection with Article 720, it has to be noted that it is essentially a form of unfair competition, in that it emphasizes the misconduct of the wrongdoer in misleading the purchasing public. But its scope is both broader and narrower than Article 133 of the Commercial Code.

- ✓ The major differences between Article 674 and Article 133 are that Article 674 *may* apply even if the offender and victim are not competitors and that it will *not* apply unless the offender actually intended to imitate the victim's mark in such a manner as to deceive the public.
- ✓ Article 719 stipulates: Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:

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

**UNIT THREE: BUSINESS ORGANIZATIONS**

- ✓ Most, if not all, of the business organizations with which lawyers are concerned are legal entities which have firm-names and head office; they can acquire rights and incur liabilities, and can sue and be sued under their firm names.
- ✓ Business organizations, from a legal viewpoint, are undertakings with **more than one member**, having assets distinct from the private assets of the members and a formal system of management, which may or may not include members of the organization.
- ✓ The first feature, initial plurality of membership, distinguishes the business organization from the business owned by one man; in the latter case the trader can do as he pleases with its assets, since he is personally liable for debts and obligations incurred in connection with the business, no special rules are needed to protect its creditors beyond the ordinary provisions of bankruptcy law.
- ✓ The second feature, the possession of **distinct assets**, is essential for two purposes: **to identify the assets to which creditors of the organization can resort to satisfy their claims** (though in the case of some organizations, such as the partnerships they can also compel the member to make good any deficiency), **and to make clear what assets the managers of the organization may use to carry on business for the member's benefit**. The assets of an organization are brought in directly by its members by way of contribution. Contributions may be made in cash, kind, and service in all forms of business organizations other than the Share Company or private limited company.
- ✓ The third essential feature, a system of management, varies greatly. In a simple form of business organization the members are entitled to participate in the management, and each member has an equal voice in management decisions.
- ✓ Business organizations are affected by the legal environment in which they operate. Accordingly, two aspects of the Law of Business Organizations should be noted. First, the law facilitates various combinations of labor, capital and management. Certain business or economic goals may be better served by one organizational form than another. The second noteworthy feature of the Law of Business Organizations is that each form of organization imposes varying degrees of legal formalities on its participants. Further, one's business relationship may have different legal consequences, depending on which organizational form is selected.
- ✓ Article 210 of the Commercial Code defines a business organization as "any association arising out of a partnership agreement." A partnership agreement, pursuant to Article 211 of the Code, is "a contract where by two or more persons who intend to join together and to cooperate undertake to bring together contribution for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out there or ,if any."
- ✓ According to article 210 a business organization is an association stemming from a contract known as "partnership agreement." Article 223 suggests that even if a business organization emanates from a partnership agreement, the mere fact of concluding a valid partnership agreement is not enough to create a business organization at law. There is more to the formation of a business organization *de jure* than the conclusion of a partnership agreement.
- ✓ A business organization is a contractual association of two or more persons who undertake to bring in contribution with a view to carrying out an economic activity. It is an essential character of a business organization that it should have a profit motive, this being the feature which distinguishes it from an association.

- **Distinguishing Between Business Organizations and Associations**

- ✓ Article 404 of the Civil Code defines an association as " a grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits. " What transpires from this definition is the most important distinctive feature of associations, namely profit. If profit is considered to be the underlying motive for the formation of a certain organization, then it is said to be a business organization. Associations are always formed for non-profit purposes.

- ✓ Associations are expressly prohibited from engaging in any of the commercial activities listed in Article 5 of the Commercial Code. Article 25(1) provides that associations may not carry on any trade.

- **Cooperative Societies Distinguished**

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

- **Classification of Business Organizations**

**1. Partnerships and Companies**

- ✓ This classification is according to the general characteristics they share in common.

**Partnerships:**

- ✓ Is an aggregate or collection of individual members. Thus, in a partnership firm, of paramount importance is personality of the individual partner. Partnerships are suitable for small business involving a relationship of mutual trust and confidence.
- ✓ The partners are agents for each other. Therefore, they are normally jointly and severally liable fort the acts of each other and the liability of each partner to third parties is unlimited, although they are liable to contribute to each other s liability and entitled to claim to an indemnity from the partner at fault.
- ✓ In the absence of a contract to the contrary, comes to an end when a partner dies or becomes insolvent. Hence, the length of existence of the partnership firm is generally considered as contingent.
- ✓ A partner cannot transfer or assign his interest in the firm to an outsider or third party and make the transferee or assignee a partner without the consent of all the other partners. In other words, a partner can transfer his share in the firm, but the assignee does not thereby become a partner and is merely entitled to the assigning partner s share of the profits.

**Companies:**

- ✓ A company is an aggregate or collection of shares or capital. As a result, of capital importance is legal personality of the company. Thus, the company may own property, make contracts, and sue and be sued under its name. Also, it is entirely distinct from its members.
- ✓ The company has perpetual succession. As a result, death or insolvency of a shareholder does not affect its existence.
- ✓ Shares in a company are freely transferable unless the company s articles of association otherwise provides. Thus, a shareholder can transfer his share and ordinarily the transferee becomes a member.
- ✓ Members of a company are not entitled to take part directly in the management of the company unless they become directors. That is to say, a shareholder of a company acting in his individual capacity cannot bind the firm by his acts.
- ✓ A company is managed by a board of directors, general manager, shareholders meetings, and auditors.

- **Forms of Business Organizations**

- ✓ Though the main classification is between partnerships and companies, partnerships can be further broken down into four legal forms: ordinary partnership, joint venture, general partnership, and limited partnership. Companies comprise of two legal forms, namely, Share Company and private limited company. Totally, there are six legal forms of business organizations provided for in Article 212 of the Commercial Code:
  1. Ordinary partnership
  2. Joint venture
  3. General partnership
  4. Limited partnership
  5. Share Company

6. Private limited company

- **Distinguishing between Commercial and Non-Commercial Business Organizations**

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

✓ Generally, this distinction rests on two criteria. The first is the same as that which determines whether or not an individual is a trader just as the trader is a person whose profession is the doing of acts of commerce, so a business organization is commercial which devotes itself, either under its memorandum of association or in fact, to commercial operations specified in Article 5. However, in the case of business organizations, the general rule for determining the commercial character by reference to objects has been made subordinate to two exceptions. On the one hand, for whatever its objects, any business organization will be regarded as commercial as long as it adopts either of the two legal forms for commercial business organizations, namely the share company or the private limited company. On the other hand, ordinary partnerships are prohibited from engaging themselves in the commercial activities listed under Article 5.

✓ The general distinction between commercial and non-commercial business organizations entails several legal consequences. Accordingly, business organizations are subject to differential treatment of the law depending on whether they are commercial or non-commercial.

- **Formation**

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

1. **A Partnership agreement is a contract:** The partnership agreement, being a contract, is subject to the Civil Code provisions governing contracts in general, in addition to the pertinent provisions of the Commercial Code. Accordingly, in order for a contract to be a valid partnership agreement, the parties to it must fulfill the substantive and formal conditions set down by Article 1678 et seq of the Civil Code.
2. **Persons Incapable Under the Civil Code:** The validity of a partnership agreement is affected by the incapacity of a party to it in the same way as in any other contract. In this regard, the Commercial Code contains a few provisions that supplement the Civil Code. **Article 11(1)** prohibits persons incapable under the Civil Code from carrying on any trade. Sub-article(2) of the same provides that if an incapable person carries on a trade, any of his acts related to the trade may be invalidated in accordance with the pertinent civil code provisions. The provisions of article 11 also apply mutatis mutandis to the incapacity of a party to become a member of a business organization in which one has the status of a trader. A general partner in a commercial general partnership or commercial limited partnership is deemed to be a trader. Article 12 prohibits the tutor of a minor or an interdicted person from carrying on a trade in the name and on behalf of the minor or interdicted person, except in the cases provided in article 288 of the Civil Code. The effect of this provision is to preclude the tutor from joining, in the name of a minor or an interdicted person, a business organization which would make the minor or interdicted person a trader. According to Article 288 of the Civil Code, a tutor may carry on commercial, industrial or other enterprises forming part of the estate of the incapable if is so instructed by the family council. Also under article 276 of the Revised Family Code, the tutor shall do so if is enjoined to do that by a court. The family council or the court, as the case may be, must instruct the tutor whether to liquidate or to keep them going, having regard to the time for which the tutorship is to last, the abilities and potentialities of the tutor, and the interest of the incapable. Article 13 provides that emancipated minors may not carry on a trade unless authorized in writing by the family council. Pursuant to Article 14, minority cannot be set up against third parties where a minor who carries on a trade got himself entered in the commercial register as though he were of age. According to Article 15, judicial interdiction does not affect third persons unless notice of the incapacity is entered in the commercial register.
3. **Spouses**

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

4. **Two or more persons, physical or juristic, can be parties**

- ✓ Generally, nothing prevents a business organization from becoming a member of another business organization. An association may not become a general partner of a commercial general partnership or commercial limited partnership, since, pursuant to Article 25, it  may not carry on any trade. Whether it may become a member of another business organization depends on whether it thereby acquires as one of its purposes the making of profits. If it does, it may not become such a member. Nevertheless, noting seems to prevent an association from joining a share company or private limited company as a means of investing extra funds or acquiring more funds to carry out its legitimate purposes.
- ✓ The minimum requirement of two persons is true for all business organizations except the share company, for which there must be at least five. The automatic effect of the operation of the rule on the minimum number of persons who can enter into the partnership agreement is the exclusion of sole proprietorships from the Law of Business organizations. But differently, one person cannot form a business organization by himself.
- ✓ There is no general limit on the maximum membership size of business organizations, except in the private limited company where it is fixed at fifty.

**5. Intent to Join Together and Cooperate**

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

**6. Contributions**

- ✓ The parties must undertake to bring in contributions in order that a contract subsists as a valid partnership agreement. Contributions can be made in cash, kind, or services. In all business organizations, except in a share company or private limited company, they should be made in cash or kind. Capital contribution includes intangible property.

**7. For the purpose of carrying out economic activities**

- ✓ The objective of the parties to a valid partnership agreement must be to engage in economic activities. The formulation under article 211 which stipulates that activities of an economic nature is so broad that it would appear to cover almost any profitable human endeavor, provided that it is possible, moral and lawful. All non-economic activities are excluded outright by virtue of the above-mentioned requirement.

**8. Participating in the profits and losses arising out thereof**

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

- **Publicity**

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

- **Legal Personality**

- ✓ Only when an entity has legal personality can it have legal rights and duties. A human being has legal personality from the beginning to the end of his life. Article 1 of the Civil Code provides that the human person is the subject of rights from its birth to its death.
- ✓ In addition to individuals, groups of people can have legal personality. They are broadly called business organizations, and they allow the law to treat the group as separate from the individuals who operate or own it. Article 210(2) of the Commercial Code stipulates that any business organization other than a joint venture shall be deemed to be a legal person. **Legal personality**, therefore, is a device whereby groups of people such as business organizations become the subject of rights and duties.

- **Attributes of Legal Personality**

1. **Capacity:** The fundamental importance of legal personality is that an entity with legal personality is capable of enjoying, as opposed to exercising, rights. Business organizations are, pursuant to Article 22 of the Commercial Code, expressly invested with the capacity to carry on any trade in accordance with the provisions regulating such trade. Business organizations with legal personality should be capable of performing all the acts of civil life consistent with their nature unless declared incapable by law. Since a business organization is basically a combination of individual members and initial capital, the members would be co-owners of the property if the organization does not have a separate legal existence. Any liability incurred, in the normal business practice, by one or more

of the members in their name shall rest with them. However, if the law bestows upon the organization legal personality, it may acquire right of ownership over the property and incur liability in its name. Furthermore, it can litigate legal proceedings in its firm-name. Also, it is primarily liable on its property, income & taxable activities.

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

**UNIT FOUR: ORDINARY PARTNERSHIP**

- ✓ An ordinary partnership is one of the various forms of partnerships. The major distinction between an ordinary partnership and other partnership forms is that commercial business organizations cannot adopt this form of business organization. Article 213(2) provides that where a commercial business organization is created in the form of an ordinary partnership or where the form of the organization is not specified, the commercial business organization shall be deemed to be a general partnership. The ordinary partnership, as business organizational form is a partnership which lacks in legal characteristics that make it a commercial partnership. (Art.227) Therefore, even if it cannot engage in commercial activities (i.e., those listed in Art.5), it can carry out any other economic activities which the ordinary partnership may legitimately carry out are virtually unlimited.
- ✓ Article 228(1) of the Commercial Code excludes application of the Code provisions regulating ordinary partnerships to a case of joint ownership in which property is held by several persons for reasons outside their control. The only case in which the provisions governing ordinary partnerships are applicable is where the joint owners have entered into a partnership agreement for the management of the property jointly owned [Art.228 (2).] The purpose of Art.228 is nothing but clarification, insofar as it does not alter the barest minimum condition for the existence of any business organization, including ordinary partnerships, i.e., concluding a partnership agreement. What is conclusive, however, is the making of a valid partnership agreement. For instance, co-heirs of a deceased trader are co-owners of the hereditary estate until partition. It is only when they enter into a partnership agreement concerning the hereditary estate that they can form an ordinary partnership, and, hence, the provisions dealing with ordinary partnerships apply. But, here we should not lose sight of the special formality that the heirs of the deceased need to comply with. Article 113 reads:
  (1) The heirs of a deceased trader shall apply for the registration to be cancelled within two months from the death.
  (2) Where the heirs carry on the trade under joint ownership, they shall apply for a new registration to be entered.
  (3) Where the joint ownership is dissolved, the entry made under sub- art. (2) shall be cancelled and the person to whom the business is assigned shall apply for a new registration to be entered.

- **Contributions**

- ✓ Every partner must make a contribution, which may be in money, debts, other property or skill.
- ✓ Where contribution is made in kind, the use only of such property may be contributed. In the absence of a contrary agreement, contributions are deemed to be equal and of the nature and extent required for carrying out the purposes of the partnership [Article 2229].
- ✓ In cases where contribution is made in kind, the contributor must extend to the co-partners warranty against defect and dispossession in a manner a seller does. If the use only of a property has been contributed, the contributor must perform the duties owed by a lessor.
- ✓ Where a partner contributes a debt, he guarantees only the existence of the debt and not the solvency of the debtor, unless otherwise agreed [Article 230]. With regard to transfer of risk, the risk passes to the partnership by delivery in case the contribution has been made in kind. However, the risk shall remain with the contributing partner in case where the use only of a property has been contributed. [Art.231]

- **Partnership Capital**

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

- **Partnership Property**

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

- **Ownership and Possession of Partnership Property**

- ✓ Partnership property, pursuant to Article 245, belongs to the partners in common under the terms of the partnership agreement. Partnership property is held by the partners as joint owners. Every partner is a co-owner with all other partners of specific partnership property, such as office equipment, office supplies, and vehicles. Article 245(2) provides that "every partner may use partnership property in accordance with usual partnership practice." This normally means every partner has equal rights to possess partnership property for business purposes or in satisfaction of firm debts, but not for any other purpose without the consent of all the other partners. Sub- article (3) of the same provides that "No partner may use partnership property against the interests of the partnership or so as to prevent his co-partners form using such property in accordance with their rights."

- **Creditors of the Partnership**

- ✓ Article 255(1) stipulates that "The creditors of the partnership may claim against partnership assets." Sub-article (2) of the same bestows upon the creditors of the partnership the right to "claim against the personal property of the partners who shall, unless otherwise agreed, be jointly and severally liable to them for the obligations of the partnership."
- ✓ Sub-article (2) of Article 255 further stipulates that "a partner who is sued on his personal property may require, as though he were a guarantor, that the creditor first distrain the property of the partnership." That is to say, a partner who is sued on his personal property for the debts of the partnership can invoke the benefit of discussion pursuant to Articles 1934-1935 of the Civil Code like a simple guarantor.
- ✓ Sub-article (3) of same provides that "Any provision relieving the partners or some of them of joint and several liability may not be set up against third parties unless it is shown that such parties were aware of such provision." It goes on to stipulate that "Notwithstanding any provision to the contrary, the partners who acted in the name of the partnership shall always be jointly and severally liable." The net effect of these two provisions is such that partners can invoke a statutory clause relieving them of joint and several liability against third parties as long as they can make a showing of awareness on part of such parties of the existence of such clause on condition that they did not act in the name of the partnership.

- **Creditors of the Partners**

- ✓ According to Article 256 (1), personal creditors of the partners may not attach any of the partnership property; however, a partner may assign his partnership interest to a creditor or to anyone else in pursuance of Article 250. This entitles the assignee to receive that partner's share of the profits. It does not give the assignee a right to any information about partnership affairs or a right to look at its books.
- ✓ A creditor who gets a judgment against a partner may obtain from the court an order against the partner's interest in the firm. The court may appoint a receiver to look after the creditor's interests. If profits are insufficient to pay off the creditor, the court may order that the partner's share be sold [Art. 256(3)]. The purchase may dissolve the partnership if it is to exist for an indefinite time. If it is for a term of years that has not expired, the partnership will continue as originally agreed. The purchase will not be a partner, nor can he exercise any of the partner's rights except to receive the share of the profits [Art 260(2) and (3)]

- **Management**

1. **Statutory managers:**

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

powers of a partner appointed under the partnership agreement by a decision of the other partners amounts to varying the partnership agreement by any vote short of unanimity. Indeed, a valid variation of the terms of the partnership agreement may be made by a majority vote on condition that a clause to that effect is inserted therein. According to Article 240, a partner statutory-manager whose management powers have been revoked can challenge his revocation before a court on the ground that the reason for such revocation does not constitute good cause.

2. **Subsequently appointed managers:** These are managers appointed by decisions of the partners at any point in time subsequent to the making of the partnership agreement.
3. **Managers at law:** Every partner, as per Article 236, has the right to act as a manager in the absence of both statutory and subsequently appointed managers.
4. **Sole manager:** It refers to a situation where a single individual has been appointed a manager. Where a single individual has been appointed a manager, he will act alone.
5. **Several managers:** It refers to a situation in which two or more persons have been appointed managers and their duties have not been specified or where it has not been specified that they act jointly. In such cases, they may each carry out acts of management. Each manager may object to dealings contemplated by other managers. And the objection shall be decided on by a majority vote of all the partners [Art.237].
6. **Joint mangers:** In cases where joint managers have been appointed, decisions shall be taken by consensus. However, where an act of management is of an urgent nature and the other joint managers cannot be consulted, one of them may act alone as if he were a sole manager [Art. 238].

- **The Authority of Managers**

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

1. **Express Authority:** The authority which acts as specified in the partnership agreement and as stipulated in the contract of employment.
2. **Implied authority:** The authority to bind the firm which arises, by operation of the law, from the fact of partnership. This is in line with 2179 of the Civil Code, which provides that "the authority to act on behalf of another may derive from the law or a contract." As per article 2202(1), the scope of partner's implied authority is to be determined "according to the nature of the business to which it relates." Thus, the business purposes/objects clause of the partnership agreement serves as a starting point in deciding the scope of the partner's implied power of attorney. As a contrario reasoning of Art. 235, discloses a partner has an implied authority to carry out any act which is within the "normal partnership practice." It would follow that implied authority is influenced by customs and usages of the particular partnership and those of similar business in the area.

- **Relationships among Partners**

**1. Rights and Duties of Partners**

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

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

- **General Duties.** Partners are bound to:
  - Exercise the **diligence and skill** which they use in conducting their private affairs [Art 243(1)].
  - Act in the "strictest **good faith**" **or** "**utmost good faith**" towards the partnership [Art 2208(1), 2263(1),Civ.C.].
  - Exercise the same **diligence** as a *bonus pater familias* [Art.2211 (1)].
  - Be with the same **care** as a *bonus pater familias*.

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

- **Specific Duties** These are duty to:

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

✓ In fine, subject to any agreement to the contrary, the **mutual rights and duties of the partners** are as follows:
  - A partner is not entitled to receive remuneration for taking part in the conduct of business;
  - The partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm [Art.251&252].

- A partner making, for purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe is entitled to interest thereon at the rate of 9% per annum [Art. 247(1)].

- Receiving payments from the debtors and issuing receipts against them
- Engagement and dismissal of employees of the firm.
- Accepting, drawing, and issuing negotiable instruments on behalf of the firm.
- Borrowing money and pledging the firm's goods or chattels as security. If the firm's chattels or goods are pledged for a purpose not connected with the ordinary course of business, the firm is not bound unless specific authority has been given.

- **Mode of doing act to bind a firm**

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

- **Liability of Partners to Outsiders**

1. **Liability of a partner for acts of the firm:** Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner [Art. 255].
2. **Liability of the firm for wrongful acts of a partner:** Where by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authorities of his partners loss or injury is caused to any third-party, or any liability is incurred, the firm is liable therefore to the same extent as the partner [Art.2222].

- **Dissolution, Winding up, and Termination**

✓ The extinguishment of a partnership consists of three stages:
(1) Dissolution
(2) Winding up or liquidation, and
(3) Termination.

✓ Dissolution occurs when the partners cease to carry on the business together. Upon dissolution, the partnership is not terminated but continues until the winding up, unfinished business is completed, receivables are collected, payments are made to creditors, and the remaining assets are distributed to the partners. Termination occurs when the process of winding up has been completed.

1. **Dissolution**

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

- **Grounds of Dissolution**

a. **Grounds of Dissolution Applicable to All Forms of Business Organizations:** The grounds of dissolution which are a set out in Articles 217-218 can be grouped into three categories as follows:

**i. Legal Dissolution**

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

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

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

**b. Grounds of Dissolution Specific to Partnerships**

**i. Dissolution by Notice:** Partnership may be dissolved at any time by any partner by giving six months notice, especially in conditions where:

- No period time is agreed on (or where a partnership agreement is entered into for an undefined period); or.
- A partnership agreement is entered into for the life of one of the partners; or
- The power to dissolve on notice is provided in the P/P agreement. (Art 258).

**ii. Dissolution due to Death, Incapacity, and Bankruptcy of a partner:** Article 260(1) provides that the partnership shall be dissolved where one of the partners dies or is no longer able, under the law, to be a partner. Sub-article (2) of the same stipulates that a partnership shall be dissolved where partner is declared bankrupt or where one his personal creditors causes his share to be disposed of under art 256(3).

- **Continuation upon Dissolution**

✓ Even if a partnership is to be dissolved, the partners can prevent dissolution by various ways. One such way is that the **partners may agree at any time that the interest of the indebted/insolvent Partner shall be purchased by another partner.** Another way is that **they agree to take in an additional**

**partner or they may agree to permit the partner to sell his interest to another and to accept that person as a substitute partner**. These agreements are called buy-out agreements in American legal system. The two situations in which continuation is possible in Ethiopia are:

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

**2. Winding up (Arts 264-270)**

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

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

- **Duties and Responsibilities of Liquidators**
  - In the absence of a contrary clause in the partnership agreement or by law, the liquidators shall have the same duties and responsibilities as managers. ( Art.265)
  - Draw up an inventory of the assets and liabilities of the partnership (Art. 266)
- **Powers of Liquidators**
  - The liquidators shall take all steps necessary to complete the winding-up of the partnership.
  - The liquidators may sell the property of the partnership, represent the partnership in legal proceedings and may compromise or refer to arbitration any matters in issue.
  - The liquidators may not undertake new business in the name of partnership but may complete business already started. [Art. 267]

✓ The purpose of the winding up is to liquidate the assets at their highest value and bring the affairs of the partnership promptly to an end. This may involve completing contracts of the partnership. In order to finish these jobs, the liquidators would have authority to enter into new contracts with subcontractors, with material supplies, and with workers. As a result, it may be necessary that the liquidators borrow money on behalf of the partnership in order to complete these contracts.

- **Distribution of Assets**

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

✓ Article 268-270 of the Commercial Code stipulates:

(1) The liquidators shall pay the creditors of the partnership, where necessary calling upon the partners for contributions.
(2) They shall settle with the partners debts which they hold against the partnership and restore to partners property whose use only was contributed to the partnership.

✓ Art. 269. □ Restitution of contributions.

1. A partner who has contributed property may not claim it back in kind.
2. He shall have a claim to the value of his contribution as accepted in the partnership□s accounts.
3. If the value has not been so fixed, restitution shall be made on the basis of the actual value at the time the contribution was made.

✓ Art. 270. □ Distribution of profits and losses.

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

✓ The liabilities of a partnership are to be paid out of partnership assets in the following order:

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

✓ The partners may by agreement among themselves change the internal priorities of distribution (number 2, 3, & 4) but not the preferred position of third parties (number 1)

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

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

**UNIT FIVE: Joint Venture**

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

✓ The joint venture is the simplest form of business organization.

✓ Although joint ventures can hardly be adapted to industrial enterprises, commercial transactions in which great amount of capital are involved are often dealt with by joint ventures. Large organizations often investigate new markets or new ideas by forming joint ventures.

✓ Joint ventures have the following merits:

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

- **Characteristics of joint ventures**

✓ It is subject to the general principles of law relating to partnerships [Art.271]. Exceptions to the application of partnership principles to joint ventures include the following:

1. A joint venture is not made known to third parties. What is more, a joint venture agreement need not be in writing and is not subject to registration (Art.272)
2. A joint venture does not have legal personality [Art.272 (3)]. Thus, it is not going to be considered as a legal entity. That is to say, a joint venture may not have a firm-name; may not enjoy ownership right over the capital; may not incur liabilities; may not have a head office; cannot sue or be sued in its firm-name; cannot be declared bankrupt.

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

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

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

- **Management**

✓ A joint venture may be managed by one or more managers, who need not be venturers. Many times, the manager is a venturer.

✓ In the absence of an appointed manager, each venturer shall have the status of a manager.

✓ Where there is a statutory manager, his/her powers should be specified in the memorandum of association. But, a statutory clause restricting the powers of the manager, may not be set up against third parties. This is so, because the memorandum of association, otherwise known as joint venture agreement, is not required to be registered. And, as such, third parties are divested of the opportunity to have access to such information. Furthermore, a statutory manager may not be revoked without good cause (Art. 275)

✓ The manager enters into legal relationships with third parties in his own name. Acts of the managers can be set up against the venturers themselves. For instance, if he sells for his own benefit a good given him by a venturer, the sale of the good cannot be challenged unless the purchaser knew the manager was exceeding his powers. But even in this case the burden of proof will be on the venturer-owner to show that the manager knew of the situation. If he cannot show this, the venturer-owner only has an action for damages against the manager.

✓ With regard to the venturers, the managers are duty-bound to act within the scope of powers specified in the joint venture agreements. As for the rest, he acts in his own name and not in the name of the joint venture because the organization does not have legal personality.

✓ The venturers who are not appointed to be managers enjoy the right to supervise the work of the manager. They may not actively participate in the external management, but in case they do participate they are jointly and severally liable with the manager.

✓ Venturers who are not managers and who deal with third parties can only do so in their own name.

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

- **Dissolution**

- ✓ Article 278 sets out various grounds for the dissolution of joint ventures. These are:
  a) The expiry of the term fixed by the memorandum of association unless there is provision for its extension;
  b) The completion of the venture:
  c) Failure of the purpose or impossibility of performance;
  d) A decision of all the partners for dissolution taken at any time;
  e) A request for dissolution by one partner where no fixed term has been specified;
  f) Dissolution by the court for good cause at the request of one partner;
  g) The acquisition by one partner of all the shares;
  h) Death, bankruptcy, or incapacity of a partner, unless otherwise lawfully agreed;
  i) A decision of the manager, if such power is conferred upon him in the memorandum of association.

- **Expulsion of a partner in lieu of dissolution**

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

**UNIT SIX: GENERAL PARTNERSHIP**

- ✓ A general partnership is the typical partnership form.
- ✓ Partners in a general partnership, as per article 280(1) of the Code are, "personally, jointly, severally and fully liable as between themselves and to the partnership for the partnership firm's undertakings." The same sub-article further stipulates that "Any provision to the contrary in the partnership agreement shall be of no effect with regard to third parties." Thus, it can be argued that a statutory clause relieving the partners or some of them from joint and several liabilities, if any, may only be effective as between themselves.
- ✓ Partners in a commercial general partnership have the status of traders [Art. 280(2)].
- ✓ General partnerships shall have firm-names. The firm-names must contain at least the names of two of the partners accompanied by the phrase "General partnership". The firm-names may not contain names of persons who are not partners [Art. 281(1)]. Sub-articles (2) and (3) of Article 281 regulate situations in which a person whose name is mentioned in the firm name ceases to be a partner and or ,without being a partner, allows his name to be mentioned in the firm-name. In these cases, the person is going to be liable as a partner.

- **Contributions**

- ✓ The partners must make contributions, which can be in cash, kind, debt, and skill. If a partner wishes to make property (corporeal) contribution, he can either convey the corporeal good or its use only, while retaining his title. This has to be specified in the partnership agreement. In the absence of such stipulation, the issue will be resolved according to the circumstances, having regard to the partners' opinion as well as the usual partnership practice, so long as the law does not provide for a presumption.

- **Transfer of shares**

- ✓ In principle, a unanimous vote of the partners is required in order that a share belonging to a partner is assigned or transferred to an outsider and thereby he becomes a partner of the general partnership firm. Nonetheless, a share may be transferred or assigned to a third party and thereby the latter is rendered a partner in the strictest sense of the term by virtue of a decision taken by a majority vote of the partners to the same effect [Art. 282(1) and (2)].
- ✓ In the absence of a contrary agreement by the firm's creditors, a partner whose share has been transferred or assigned, as the case may be, is going to be liable for the firm's debts up to the date of assignment or transfer [Art, 282(3)]. But differently, the transferee or assignee has limited liability for whatever debts and obligations the firm incurred prior to the transfer or assignment.
- ✓ Beneficial interests in shares may be assigned or transferred, in exchange for a value or for free, to a third party without the partners' unanimous or majority vote requirement as the case may be. The transferee or assignee, for example, being creditor or the partner, is entitled to receive only the share in the profits belonging to the debtor partner. Since such transfer or assignment does not render the transferee or assignee a partner he "has none of the rights of a partner." [Art.283].Such rights include the right to check the state of the firm's business, to consult the books and papers of the partnership and to draw up a statement of the financial position." [Art.248] In addition, a partner has the right to require the management report to be prepared in accordance with Article 249 of the Code.

- **Memorandum of Association and Registration**

- ✓ A general partnership arises out of a partnership agreement, otherwise known as memorandum of association. In order for the memorandum of association to be valid, it must be reduced into writing.
- ✓ Also it must meet the legal requirement as the minimum contents listed in Article 284, which include the name, address and nationality of each partner; the firm-name; the head office and branches, if any; the business purpose of the firm; the contributions of each partner, their value and the method of valuation; the

services required from persons contributing skill; the share of each partner in the profits and in the losses and the agreed procedure for allocation of the same; the managers and agents of the firm; and the period of time for which the partnership has been established.

- ✓ The firm is presumed to be formed as between the partners, insofar as the memorandum of association has been drawn up and signed and comes into legal existence only when an entry into commercial registry and deposit of two copies of the memorandum of association along with all complementary documents are made, without the need to have notice published in a newspaper empowered to publish legal notices [Art.8(1) of Proclamation No. 67/97, as amended]
- ✓ Accordingly, once the partners in a general partnership have gone through the registration and deposit procedures, the firm is said be a legal person, which has to do with the enjoyment of rights and obligations. For instance, it enjoys ownership right against the partnership property; has the right to sue and be sued in its firm-name [Art. 286].

- **Powers of Managers**

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

**1. Scope of the Powers of Statutory Managers**

- ✓ More often than not, there will be a stipulation in the partnership agreement specifying the powers of the manager. Through registration, third parties become aware of the scope of the powers of the managers appointed in the partnership agreement. Also, any restriction on the powers of a manager should be entered in the commercial register. [Art 289(2)]. In view of the foregoing, a problem arises where the manager exceeds his powers. The title regulating general partnerships does not incorporate an express solution to the above problem, unlike Article 242 of the code, which stipulates that: □□where a manage exceeds his power, the rules relating to unauthorized agency shall apply.□

- **Where the Partnership Agreement Fails to Specify the Powers of the Manager**

**i. Implied authority**

- ✓ The managers, whether employees or partners, are agents of the firm. Hence, there exists the typical agent-principal relationship between the manager and the firm. Article 2202(1) of the Civil Code stipulates that □where the scope of the agency is not expressly fixed in the contract, such scope shall be fixed according to the nature of the transaction to which it relates.□ To apply this provision to the instant case, it can be re-read as follows: □ where the scope of the powers of the manager is not expressly fixed in the partnership agreement, such scope shall be fixed according to *the nature of the business* to which it relates.□]
- ✓ Article 295 renders Article 235 applicable to general partnerships. A contrario reading of Article 235 reveals an important standard that enables us to determine the power of the manager whose scope is not specified in the memorandum of association, normally the standard of the normal partnership practice. Therefore, a cumulative reading of articles 2201(1) of the Civil Code and 235 of the Commercial Code would seem to suggest that the powers of the manager can be determined by implication from the nature of the business according to the usual or normal partnership practice of the locality in which it is situate.
- ✓ Accordingly, the business purposes clause of the memorandum of association constitutes a good starting point. For instance, if the business purpose of a general partnership firm is warehousing, the firm□s usual/normal business activities cannot be carried out unless the manager has the power to issue warehousing receipts. The extent of implied authority is generally broader for partners than for ordinary managers. The character and scope of the partnership business and the customary nature of the particular business operation determine the scope of implied powers. For example, each partner in commercial general partnership that has goods in inventory and makes profits buying and selling those goods has a wide range of implied powers to borrow money in the firm-name.
- ✓ In a general partnership, partners can exercise all implied powers reasonably necessary and customary to carry on that particular business. Some customarily implied powers include the authority to make warranties on goods in the sales business, the power to convey real property in the firm-name when such conveyances are part of the ordinary cause of partnership business, and the power to enter contracts consistent with the firm□s regular course of business.
- ✓ If a partner acts within the scope of authority, the partnership is bound to third parties.

**ii. Apparent authority**

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

- **Several Managers**

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

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

- **Employee Mangers**

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

- **Liability of Partners**

- ✓ Article 294 provides that "No action may be taken against individual partners for debts due by the partnership until after payment has been demanded from the partnership." The proviso clause allows the creditors to bring a direct action against partners for the repayment of fictitious dividends which they have received. The concept of good faith, as can be seen, has no place in the case of the general partnership. This is so, because, in the general partnership, which is a business organization with few members, it is difficult to believe that partners could receive fictions dividends when the accounts are constantly at their disposal and when the members are both judge and parties when determining the distribution of the profits.

**UNIT SEVEN: LIMITED PARTNERSHIP**

- ✓ A limited partnership consists at least one general partner and one or more limited partners. The general partners assume management responsibility of the partnership and, as such, have full responsibility for the partnership and for all the debts of the partnership. In other words, the general partners, unlike limited partners, are personally liable to the partnership's creditors. Thus, at least one general partner is necessary in a limited partnership so that someone has personal liability. [Art. 296 and Art 300]
- ✓ The formation of a limited partnership must be by a written memorandum of association signed by the partners and registered by the official in charge of the commercial register.
- ✓ The memorandum of association, in addition to the particulars required by article 284, must contain a clause indicating the identity of the general partners as well as the limited partners.
- ✓ [Arts 298 and 299] A limited partnership shall have a firm name, which must contain the names of the general partners accompanied by the words "Limited partnership". In case a limited partner allows his name to be included in the firm-name, he shall be liable to third parties in good faith as he were a general partner. [Art.297]
- ✓ Article 30(1) provides that the creditors of the partnership may have a direct action against the limited partners to require them to pay up any part of their contribution which they have not yet paid. Sub-article (2) of the same exempts the limited partners from having to repay fictitious dividends received in good faith on the basis of an approved balance sheet. The concept of good faith has a prominent place here, as long as limited partners remain in the dark, without a voice in the management and being likely to be misled by the managers, and being without the means to check any of the statement made by them. When the balance sheet is prepared regularly they can legitimately believe that the profit shown is a real profit and that the dividends they receive are not fictitious.
- ✓ Sub-articles (3).(4), and (5) of the same provide that limited partners may never take part in external management and give third parties the illusion that they are dealing with partners who are fully, jointly and severally liable. The reason why a limited partner is prohibited from acting as a manager even under a power of authority is that it is dangerous to allow them to act as a manager, because it leads to confusion as to the legal status of the partner in his relations with third parties. Sub-article (4) provides us with a list of acts which the legislature deems to be not acts of management and, as such raise no question as to the status of the limited partners. Consequently, limited partners can conduct the following activities without forfeiting their privilege of limited liability. These are:
    - (a) Consultation with co-partners
    - (b) Dealings with the firm
    - (c) Investigation of managerial acts
    - (d) Advising and counseling to the firm
    - (e) Giving permission to do acts outside the manager's powers

- ✓ Subject to the limitations that have been discussed, limited partners have essentially the same rights as general partners, including the right of inspection of the books of the firm and may call for the accounts; they may be employed in the firm and bind themselves by contracts of employment [art.301 (5),(6)]Sub-article (7) stipulates that "unless of otherwise agreed, nothing affecting limited partners shall be a ground for dissolution." That is, in the absence of a contrary agreement death, incapacity, or bankruptcy of a limited partner does not constitute a ground for dissolution.

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

**UNIT EIGHT: Share Companies**

- ✓ The sole proprietor and partnership have certain limitation and disadvantages which make them unsuitable for large scale business operation with business opportunities growing at a faster pace as a result of discovery and exploitation of natural resources.
- ✓ The company form is the right answer to over come the short comings or limitations of the sole proprietorship and partnership both of which can not be expected to exploit the vast business potential thrown up by the tremendous technological progress in all fields of human activity.
- ✓ Share Company is defined as (a) one which does not have restriction on maximum number of members (b) inviting public to subscribe for shares or debentures of the company (c) transferability of shares are free.
- ✓ A minimum of five persons are required to form a share company.
- ✓ On the other hand, private limited company is one which, by its status: (a) restricts the right of its members to transfer their share is (b) The number of members limited to 50 and (c) No invitation to the public to subscribe for any shares or debentures of the company. A minimum of two members are required to form a private limited company.

- **Distinction between Private Limited and Share Company**

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

- **Some Merits of Company**

1. **Financial Resource**: - If a business venture is to be promoted on a large scale, none of the partnership or sole proprietorship form of business organization can prove equal to the task of raising funds to the required level. It is only the company forms both private limited company and share company, which can mobilize huge funds, required by big business. This is possible mainly because of the large number of members who can own the company by subscribing to its capital in small and affordable quantities. Another favorable point is that a share company can collect money from numerous small investors by issuing securities (Share and debentures) in smaller denominations and with different but with attractive features. Thus, a share company and private limited company are much more capable of raising large capital than any of the rest. In fact, the Share Company and private limited company are comparable to an ocean and a sea respectively while the rest all like a small river or canal in so far as the financial resources and catering to the needs of society are concerned.
2. **Limited liability: -** company became more popular with investors these days it is largely because of its limited liability clause only. Other factors like profitability of the business venture and confidence in the management etc. also, play their part. In such companies the shareholders is not liable to pay anything more than the face value of the shares held by him. Even when the company becomes insolvent he will not be called upon to pay from his personal property to service the debts of the company. So, when compared with the partnership or sole proprietorship where the liability in unlimited, the company form is far more preferable for small investor because of the low-risk and high return factor.
3. **Scope of growth:** - unlike the partnership and sole proprietorship forms of business organization, where the growth is stunted for lack of adequate funds, the company form of organization need not suffer for lack of financial resources with a huge capital at its disposal, collected from investors spread all over the country and even abroad also, the company can grow and expand at a rapid pace and reach the break-even point faster than expected.
4. **Professional management:** - in order to achieve the targeted rates of growth and expansion of a company, competent and professional management of the company is no less important than the availability of adequate finance. One great advantage of company form of organization is that it allows for insulation of management from ownership. The management of the company can be left to a group of professionals who, with their competence, specialized knowledge or skills, qualifications of training, can show better results in production, distribution or marketing etc. the over all performance of the company and the profitability of the business venture can greatly improve with professional management of the company.
5. **Stability of the company:** - for the success of any business venture, continuity and stability of business are equally important and neither can be self-supporting without the other. With its perpetual succession of ownership theory, only the company form can ensure both continuity and stability whereas the partnership or sole proprietorship form may have to close the shop due to the death of sole trader, a partner or die to any other reason including the internecine

quarrels amongst the partners it is mainly because of these twin factors (continuity and stability ) that the company enjoys the confidence and support of a large number of investors and creditors who look forward to a fruitful association with the company for a pretty long period.

6. **Positive social benefits: -** a company is beneficial not only to its members, creditors and employees but also to the public at large. It supplies goods and services at a competitive rates by introducing new and sophisticated technologies and by exploiting the natural resources in a most efficient and economic manner. That part, it provides employment opportunities both direct and indirect to the needy and competent persons in the society. It also helps channellise the small savings of people into productive investments there by serving the twin objectives of diffusing the business risks and democratizing or socializing the business ownership. It contributes to the exchequers also handsomely by way of direct and indirect taxes and duties. These social benefits make the company form far more desirable than the partnership and sole proprietorship form of business organization

❖ **Share Company**

- **Nature**

1. **Limited liability**: - limited liability of members is one of the most common characteristics of Share Company. Share company is a separate legal entity. It is the owner of its assets and liable to pay its liability (Art 304(1)). In other words liability of the members is limited. No member is liable to contribute anything more than the nominal value of the shares held by him. The privilege of limited liability for business debts is one of the important advantages of doing business under Share Company since the liability will not extend to the private property of the member, unlike that of partnership.
2. **Perpetual succession: -** unlike partnership Share Company will not be dissolved by the death or incapacity of its members. It is an entity with a perpetual succession. Its life is not measured by the life of any member. It is independent of the lives of its members. Members may come and members may go, but the company continues its operation unless it is wound-up.
3. **Transferability of shares: -** Even though it is possible to restrict free transfer of shares in the articles of association (Art. 333(1). As a general principle shares of Share Company are freely transferable and can be sold or purchased in the share market. Transferability of company shares is an added advantage both to the institution of the share company as well as to the investor. The share company□s share capital becomes a permanent and stable feature of the company because the shareholders can not with draw any thing out of it. The shareholder gets a marketable security.

- **Founders (Art. 307)**

✓ Before a share company can be formed, there must be some persons who have an intention to form a share company and who take the necessary steps to carry that intention into operation. Such persons are called founders.
✓ The founder is a person who brings a share company into existence. He/she is one who undertakes to form a share company with reference to a given object and to set it going and who takes the necessary steps to accomplish that purpose. The founders decide the scope and business of the share company. They prepare the necessary documents. They make arrangements for advertising and circulating the prospectus..
✓ Share Company may have several founders.
✓ A founder may be an individual or body corporate. One existing body corporate may be founder of new share company.
✓ A person who is not member of the newly formed share company, but acts in a professional activity (such persons being solicitor, engineer, accountant or valuer) for the founding of the company are also founders of the share company.
✓ Founder under Art. 307 are the following:
  - Founders are persons who sign the memorandum of association and subscribe the whole of the capital or.
  - where the company is formed by issuing shares to the public, founders are persons who sign the prospectus, bring in contribution in kind persons who are allocated special shares in the profit or
  - Any person outside of the company who initiated the plans of facility the formation of the company

- **Roles, Rights and Liabilities of Founders**

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

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

**Liabilities: -** concerning liabilities of the founders the law does not stat transfer of such liabilities as stated under Art 309/1/. The violation of those acts may lead into the violation of stated provision and this in turn may result into criminal liability and criminal liability is borne by the doer personally not to be transferred to third party. If the required capital and subscription is not fulfilled (Art 309/1/a/) it is violation of law.

- **Memorandum and Articles of Association**

**i. Memorandum of association**: -

- ✓ It is a document which sets out the constitution of the business organization and is really the foundation on which the structure of the business organization is based.
- ✓ It contains the fundamental conditions upon which alone the business organization is allowed to be incorporated.
- ✓ Its five clauses provide the basic features of the business organization's constitution. Business organization may pursue only such objects and exercise only such powers as are conferred expressly in the memorandum or by implication there from, i.e., such powers as are incidental to the attainment of the objects. A business organization can not depart from the provisions contained in its memorandum, however, great the necessity may be. If it does, it would be ultra virus the business organization and therefore wholly void.
- ✓ It defines its relation with the outside world and the scope of its activities. It defines as well as confines the powers of the business organization; it not only shows the object of its formation but also the at most possible scope of its operation beyond which its actions can not go. Inside that area the shareholders may make such regulations for their own government as they think fit.
- ✓ After registration of the business organization, the memorandum becomes a public document (Art 92) while the memorandum must comply with the provisions of the commercial code, all other documents of the company must comply with the memorandum.

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

1. The intending partner/ shareholder, who contemplate the investment of his capital shall know within what field it is to be put at risk. Thus, he can find out from the memorandum the field in, or the purpose for which his money is going to be used by the company and what risk he is taking in making the investment.
2. Any one who deals with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects. In short, the memorandum enables the shareholders/ partners, creditors and all those who deal with the company/ to know what its powers are and what the range of its activities is.

- **Contents of memorandum**

1. **Name clause: -** A company being a legal person, must have a name to establish its identify. The general rule is that a company may be registered with any name it likes. But no company registered by name which in the opinion of the registration office is undesirable and in particular which is identical with or which too nearly resemble the name of an existing company. A company which carries on or proposes to carry on business under a name calculated to deceive the public by confusion with the name of an existing concern commits civil wrong of unfair trade computation and can be restrained by injunction from doing so. Every company must write the word, Share Company, "Private Limited Company," "limited partnership" after its name
2. **Registered office clause: -** this clause states the name of the state where the registered office of the company is situated. The registered office clause is important for two reasons. Firstly, it ascertains the domicile and nationality of the company. This jurisdiction of a court is also determined with reference to the registered office of the company. Secondly, it is the place where various registers relating to the company must be kept and to which any communications and notice must be sent. A company need not carry on its business at its registered office. There is no bar to having a registered office of a company in regional state and carrying on business in different state or in overseas countries.
3. **Object clause**: - this clause is the most important clause in the memorandum of association of a company, because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the company can exercise in order to achieve the object or objects. Stating the object of the company in the memorandum is not a mere legal technicality but is a necessity of great practical important. It is essential that the public who purchase its share should know clearly what are the objects for which they are paying and which they want to encourage. To give this information the statement of the objects should be clear. It must not be too vague and too general and too wide for in that case it will defeat its very purpose and object. The object clause in the memorandum is construed positively and negatively. Objects not mentioned in it are not the object of the company. But this clause should not be construed too strictly and the company may do any thing which is fairly incidental to the main objects specified in it
4. **Liability clause**: - This clause has to state the nature of liability that the members incur. In the cause of a company limited by shares, the members are liable only to the amount unpaid on the shares taken by them. If his shares are fully paid up his liability is nil. By this clause member knows the extent of his financial liability to the company as long as he remains as members. Any alteration in the memorandum compelling a member to take up more shares, or which increases his liability would be null and void.
5. **Capital Clause**: - The memorandum of a company limited by shares must state the prescribed and paid-up capital and nominal value of each share. The usual reason to state the capital in the memorandum is "the capital of the company is birr 100,000 divided into 1000 shares of Birr 100 each" this amount lays down the capital of the company beyond which the capital can not be reduced without altering memorandum of association. The memorandum has to be signed by each subscriber in front of officer of notary office.

❖ **Articles of association**

- ✓ Are the rules and regulations of a company framed for the purpose of internal management of its affairs. It deals with the rights of members of the company inter se.
- ✓ The articles are framed for carrying out the aims and objects of the memorandum of association.
- ✓ The articles are subordinate to and are controlled by the memorandum of association. The memorandum of association contains only the fundamental conditions up on which alone the company is allowed to be incorporated. The memorandum is as it were, the area beyond which a company cannot go, inside that area; the shareholders may make such regulations for their own government as they think fit.
- ✓ Though the articles are subordinate to the memorandum, yet if there be any ambiguity in the memorandum, the articles may be used to explain it. Articles must not contain any thing the effect of which is to alter a condition contained in the memorandum or which is contrary to its provisions.
- ✓ The articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter, of incorporation of the company and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company.
- ✓ The articles should also not authorize the company to do anything which contravenes the provision of commercial code of Ethiopia. If they do, they would be ultra virus the memorandum of the law and will be null and void. The articles must be signed by each subscriber to the memorandum in front of officer of notary office.

❖ **Articles in relation to memorandum: -**

- ✓ **T**he memorandum of association is the charter of the company and an extremely important document in relation to the affairs of the company.
- ✓ The articles are subject to the memorandum and cannot confer wider powers on the company than those given in the memorandum. The memorandum contains the most important provisions setting out the sort of activities which the company can carry on.
- ✓ The articles contain rules governing the internal management of the company and for carrying out the objects of the company as defined in the memorandum. Thus the memorandum is, as it were, an area beyond which the actions of the company cannot go, inside that area, shareholders may made such regulations for thus own government as they think fit. The memorandum is of interest to outsiders who wish to deal with the company, while the articles are of interest mainly to shareholders and directors.
- ✓ Where there is a conflict between the memorandum and articles the provisions of the former shall prevail. However, if the memorandum is ambiguous, or silent on any point, reference may be made to articles to explain the ambiguity or to supplement where it is silent. Where, however, there is no ambiguity or lacuna in the memorandum, its terms can not be controlled or modified by the provisions of the articles.

**Articles and Memorandum Distinguished:** -

- ✓ Memorandum and articles are public documents. They are interring linked and required to be registered for the formation of the company. The two documents differ from one another in the following respects.
  - Memorandum of association is the charter of the company and defines the scope of its activities. Articles of association of the company are documents which regulate the internal management of the company. These are the rules made by the company for carrying out the objects of the company and set out in the memorandum.
  - Memorandum of association defines the relation of the company with outside world, whereas articles of the association deal with the rights of the members of the company inter se and also establishes the relationship of the company with the members.
  - Memorandum is a supreme document of the company where as articles are subordinate to the memorandum; they can not alter or control the memorandum.
  - A company cannot depart from the provisions contained in its memorandum, and if it does, it would be ultra virus the company. Anything done against the provisions of articles, but which is intra virus the memorandum, can be ratified.

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

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

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

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

(d) **Company to the outsiders: -** Articles do not constitute, any contract between the company and outsider. This is because an outside is not a party to the contract, and therefore, cannot sue on it. An outsider is not entitled to enforce the articles against the company for any breach of right that is enforced on him by the articles. The term insider means a person who is not a member of the company. Even a member will be regarded as an outsider and he will not in a position to enforce a right against the company if he enjoys the right in the capacity of a solicitor or director and not in the capacity of a member. The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as individual.

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

- ✓ The memorandum and articles of association of every company are required to be registered with registration of office. The office of the registrar is a public office and consequently the memorandum and articles on registration become public documents. They are open and accessible to all. These documents are open for public inspection against payment. Every one dealing with the company, whether a shareholder or an outsider is presumed to have read the two documents. This deemed knowledge of the two documents and their contents is known as the constructive notice of memorandum and articles.
- ✓ The parties dealing with the company must be taken not only to have read these documents but also to have understood them according to their proper meaning. When a person deals with a company in a manner which is inconsistent with the provisions of the memorandum or articles, or enters into a transaction which is beyond the scope of the powers of the company, he must take the consequences in respect of such dealings.
- ✓ The doctrine of constructive notice of the memorandum and articles, however, is not a positive doctrine but a negative one. It does not operate against the company. It operates only against an outsider dealing with the company. It prevents him from alleging that he did not know that the memorandum and articles rendered a particular act ultra virus the company.

**Doctrine of indoor management: -** The doctrine of indoor management is an exception to the rule of constructive notice. If A person dealing with a company enters into a transaction with the company which is ultra virus of the memorandum or articles, he can not treat the transaction as binding on the company. On the other hand, if the transaction appears to the proper one, when compared with the memorandum and articles, it would be grossly unfair if the company could escape liability under it by showing that there was some irregularity in the conduct of the company s affairs leading into the transaction, when the other party did not know of the irregularity and had no means of discovering it. This rules is described as the Doctrine of indoor management. Persons transacting business with the company are deemed to have notice of what they would have discovered by making a search at the office of the registrar of companies, and they would be stopped from asserting that they had not read the documents. But such persons are not deemed to have notice of, nor are they under a duty to inquire into the internal proceedings of the company. Thus the outsider is presumed to know the constitution of a company, but not what may or may not have taken place within the doors that are closed to him. The doctrine of constructive notice protects the company against outsiders; the doctrine of indoor management seeks to protect outsiders against the company.

**Deposit and Registration** (Art 323)

- ✓ The following documents must be deposited at the office of registrar that is Ministry of Trade and Industry at Federal level and Trade and Industry Bureau s at regional level.
  1. The memorandum of association
  2. The articles of association
  3. The prospectus, if any
  4. The minutes of the subscribers meeting and all complementary documents.
- ✓ These documents are accompanied by an application demanding the registration of the company in the books of commercial register. The registration is of capital importance, for the company does not require legal personality until it has been entered in the registry of commercial registration. So, company acquires legal personality as soon as it is entered in the registry of commercial registration. This means that it is there up on it acquires the legal capacity as provided by Law. These include:-
  - A name specified in its statutes
  - A registered office, which is the main address where the management of the company is located. This registered office must be specified in the statutes.
  - The power to do acts with legal effect: - In that it may acquire property and may acquire or become subject to rights and liabilities. The assets of the company are therefore separate from the assets of its members, and the latter have rights in the company but not directly in its assets.
  - The power to sue and to defend legal proceedings against it.

**Amendment**

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

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

- ✓ For the amendment of the nationality and increase of the shareholder□s investment in the company a rigid procedure is to be followed and strict compliance of the procedure is demanded by law. So, such amendment can only be adopted where the holders of all shares are personally present or represented and the vote is unanimous.
- ✓ Thus, a company can amend its statute at any time by passing special resolution. The basic requirement is that the power of alteration must be exercised in good faith in the interest of the company. Therefore, the company exercises its power of amendment subject to the following limitations.
  - Must not be against the provisions of law. The amendment must not authorize any thing expressly or impliedly forbidden by the commercial law. For example, the amendment cannot authorize a company to pay dividends out of capital
  - No increase in the liability of members no amendment may be made in either the memorandum or the articles compelling a person who is a member at the date of the alteration to take or subscribe for more shares or increase his liability to the company unless he agrees to such amendment.
  - Amendment by special resolution only. Amendment will be made only by a special resolution of extraordinary meeting as stated in Art 422-425 of the commercial code.
  - Should not cause breach of contract. A company can not make by amendment its statute escape liability for breach of contract into which it has entered. It can not plead its altered statute as a defense in an action for a breach of contract. The rights which have already accrued under the contract can not be disturbed by its amendment.

**Securities**

- ✓ Share Company can issue two kinds of securities, equity securities and debt securities
  1. **Equity securities**
- ✓ Are described as the counter part of the shareholders contributions to the capital of the company and could include common stocks preferred stocks etc.
- ✓ They give to their holders pecuniary rights which usually depend on the financial situation of the company and mainly consist of the right to receive dividends, liquidation profits (if any), to exercise preferred subscription rights in the context of capital increase.
- ✓ It also give to their holders personal rights which allow the shareholder to be informed on the management of the company and to participate in shareholders□ meetings. Equity securities are in real sense shares that are issued by the company.

**Shares**

- ✓ It is the interest of a shareholder in a definite position of the capital.
- ✓ It expresses a proprietary relationship between the company and the shareholder. A shareholder is proportionate owner of the company but he does not own the company□s assets which belong to the company as a separate legal entity.
- ✓ It is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second but also consisting of series of mutual covenants entered into by all the shareholders interest.
- ✓ It is a personal estate capable of being transferred in the manner laid down in the articles of association.
- ✓ It is movable property which can either be mortgaged or pledged.
- ✓ It is in corporeal in nature and it consists of bundle of rights and obligations.
- ✓ The nature of share can be summed up:-
  1. Share gives rights and liabilities to the holder
  2. Shareholders is not part-owner of the company or property of the company
  3. The share is movable property. The movable property of person can be a □chose in action or□ chase in possession□
  4. Share is goods

**Issuance**

- ✓ When a company is formed, an application for issuance of shares is made by prospective shareholders.
- ✓ It is an offer by prospective shareholders. When application is accepted it is an issuance of shares.
- ✓ Issuance creates a binding contract between the parties. Till such issuance is made, shares as such do not exist.
- ✓ A company issues a share certificate, a document, stating that the person named therein is registered holder of specified number of shares of certain classes and that they are fully paid-up or paid-up to a stated amount.
- ✓ A share certificate has to be issued whether the shares are partly paid-up or fully paid-up. The share certificate enables the shareholder to deal more easily in the market.
- ✓ Particulars that are indicated on the share certificate are the following
  1. The name, head office and period for which the company is established.
  2. The amount of capital and par value of the share

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

**Forms /Art 325 & 326/**

- ✓ Forms of shares are either registered in the name of a shareholder or the bearer. Where the bearer shares are not prohibited the holders have always the right to require that their shares be in registered form.
- ✓ The main difference between shares in the bearer form and shares in the registered form is that in the first instance, the issuer does not know the identity of the persons holding its shares and can communicate with them only by way of press releases, whereas, in the second case the issuer has full access to the shareholders list.
- ✓ Particularly, the shares that are issued in Ethiopia are registered shares, statutes of share companies prohibits bearer share from the very beginning and therefore, it is very difficult to find bearer shares in circulation.
- ✓ Shares are issued in their par value. They may not be issued in less than their value. When it is permitted by the statutes it may be issued in greater than par value and the difference in known as premium.

**Classes /Art 335/**

- ✓ The law empowers the company to issue several classes of share with different rights.
- ✓ Mainly there are two classes of shares. They are equity and preference shares.
- ✓ Equity shares are shares which are not preference. Equity shareholders get more if the company is prosperous or get nothing if the business of the company flops.
- ✓ Preference share /Art 336/ typically confer up on this holders a priority on annual profits in the form, cumulative or non-cumulative preference dividends, of a preferential repayment right upon liquidation of the company or the right to receive a liquidation bonus. The terms of the preference shares can be established either in the initial statutes or after words by a decision of extraordinary meeting.
- ✓ Preference share, therefore, should fulfill the following
  1. It shall carry a preferential right as to the payment of dividend at a fixed rate and
  2. In the event of winding up, there must be a preferential right to the payment of the paid up capital

**Rights and duties of shareholders**

**Rights:** When once a person becomes a member of Share Company he or she is entitled to exercise all the rights of member until he/she ceases to be a member in accordance with the provisions of the commercial code or statues of the company. Such rights can not be taken away from members unless they give their consent. Some of these rights can be exercised by single shareholder individually and others along with other members. Rights of members of shareholders can be divided into two categories namely (1) individual rights (2) corporate member rights.

1. **Individual rights: Include members rights to:**
   - Participate in annual net profit
   - Share in the net proceeds on a winding up
   - vote except preference shares
   - Preferential right of allotment of new shares based on shareholders holding of share /or preferential right of subscription of cash share in proportion to number of shares held.
   - transfer shares subject to any restriction
   - inspect the registers, indexes, returns and copies of certificate etc. Kept by the company and obtain extracts or copy thereof
   - obtain copies of memorandum and articles on request and payment of the prescribed fee.
   - receive a copy of statutory report
   - remove directors by joining with others
   - obtain a copy of the profit and loss account and the balance sheet with the auditors report
   - attend meetings of shareholders, receive proper notices and vote at the meeting
   - receive a share in the capital of company and the surplus assets, if any, on the companys liquidation
2. **Corporate membership rights:-** Members have also certain rights as a group. These rights can be exercised only by the majority and not by the single shareholder or minority shareholders. Corporate membership rights are rights which the member has agreed to submit to the will of the majority provided that the will is expressed in accordance with the law and statutes. Thus, the shareholders in majority determine the policy of the company or exercise control over the management of the company. With respect to these rights the principle of supremacy of the majority applies (Art 416(1)).However, if and when the decision is contrary to the statute or law Art 416/2/ confers right to apply to the court to set aside the majority decision within three months from

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

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

**Temporary Warrants /Art 343/**

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

**Joint Holdings /Art 344/**

- ✓ It is possible to hold certain capital of one Share Company by another.

**Debt Securities**

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

**Debentures /Art 429/**

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

**Characteristics of a debenture**

- It is in the form of a certificate, like a share certificate. In other words, it is an instrument in writing
- The certificate is an acknowledgement of indebtedness
- It is usually under the seal of the company but it is not necessarily
- It usually provides for the repayment of a specified principal sum at a specified date
- It provides for the payment of interest at a specified rate until the principal sum is paid back. But this is not essential. Interest may be made payable subject to contingencies of uncertain nature.
- The debentures carry no voting rights at any meeting of the company

**Issuance**

- ✓ Debentures are issued in accordance with the provisions of the articles, usually by a resolution of Board of directors. Once a decision is taken by the board of directors to issue debentures, the next step will be to draft prospectus relating to the issue.
- ✓ Debentures may be issued at par, at a premium, or at a discount if permitted by the articles of the company. Debentures unlike shares may not be issued at a discount without any restriction. The reason is that they do not form part of the capital of the company. But all sums allowed by way of discount must be stated in every balance sheet of the company until written off.
- ✓ Debentures may be redeemable at par, at a premium but their redemption at a discount is not permitted.
- ✓ As it is stated under Art 429 of commercial code, it is issued by Share Company provided Company□s capital is fully paid and if a company has issued a balance sheet in respect of its first financial year.
- ✓ The content of debenture is stated under Art 432. They are the following
  - (a) The company□s name, its objects the head office of the company, and the place where the company was registered
  - (b) When the company was formed and for how long
  - (c) The paid-up capital on the date of issue
  - (d) The date of resolution of the general meeting and its entry in the register

(e) The serial number and nominal value of the certificate, the rate and date of interest payments and the terms for redemption
(f) The amount of the issue and the special guarantors, attaching to the debentures and date of deed setting up such guarantees.
(g) The amount of debentures or loan stock issued previously and not amortized, indicating the guarantees attaching thereto. -Where appropriate the period or periods of time within which debentures may convert their debenture into shares and the provisions for such conversion.

✓ Debenture that is issued by the company may not exceed the amount of paid-up capital shown in the last adopted balance sheet. But such amount may be exceeded if the company's immoveable property is mortgaged and the debentures issued do not exceed two thirds of the value of the mortgaged or where the excess over paid-up capital is guaranteed an introductory statement is missing.
- By registered securities or security issued or guaranteed by the state and the date of redemption is not earlier than that of debenture, or
- By government or public authorities annuities

**Forms**

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

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

**Debenture holders' meeting**

✓ Debenture holders' meeting can be called at any time by the debenture holders' representatives, by the board of directors of issuing company, or at lest 20% of the debenture holder of the same class (Art.436). Debenture holders' meetings are called and held under substantially the same conditions as to form and time as shareholders ordinary meetings (Art. 432)

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

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

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

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

**Corporate Management**

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

**Shareholders' meetings**

✓ The proper functioning of any association of persons, large or small, requires that the members of the association come together from time to time to discuss matters of common interest and to take decisions by common consent or by a majority as may be possible. Like any others association, a company must also hold meetings for its proper functioning. A company meeting may be defined as an assembly of persons connected with the company who wish to discuss and decide matters related to it.

**Distinguishing between various types of meetings /Art 39./**

The meetings of shareholders are classified into general and special

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

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

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

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

**Procedural rules common to all meetings**

**Calling of meetings**

- ✓ The rules governing of calling of the meetings are laid down in the statutes of the company but subject to the rules of commercial code.
- ✓ Meeting may be called by the board of directors the auditors, the liquidators or by officer of the court (Art 391/1/).
- ✓ In the case of urgency shareholders holding at least one-tenth of the share capital of the company, can also apply to the court for the appointment of an officer of the court to call a meeting (Art 391/2/).
- ✓ Meetings can be called by publication in a legal newspaper notice setting out the name and form of the company, date, times, place and nature of the meeting and the agenda. In practice, where the companies share are registered the publication of notice in legal newspaper is often replaced by individual notice of meeting sent to each shareholders by normal postal service sent by registered letter at the company expense. Any shareholder may also demand notice to be sent to him by registered letter against payment of an expense.
- ✓ At least 15 days must elapse the day when the notice of the meeting is published and the date of meeting if a quorum is not present at the first meeting, and at least eight day must elapse between the dispatch of the notice for a new meeting and the date on which such meeting is held /Art 395/.

**Setting of agenda** /Art 397/

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

**Voting by proxy** /Art 398/

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

- **Substantial rules common to all meetings**

**Right to information**

- ✓ Shareholders are entitled to be given relevant information in advance of any meeting in order to enable them to take fully informed decisions /Art 406/ Before any annual shareholders' meeting, shareholders are entitled to inspect the company's balance sheet, profit and loss accounts, reports of directors and auditors in the three preceding financial years, minutes and attendance sheets of these meetings etc.The shareholder's inspection rights can be exercised by any shareholder at the company's registered office or main place of business with the assistance of any expert selected

**Right to vote**

- ✓ Basically each share carries one vote, and the number of votes which any shareholder may cast at general meetings is calculated accordingly (Art 407) However, there are certain exception to this rule.
  1. A company can not vote on shares issued by it which it has purchased (Art 400)
  2. The statutes may limit the number of votes which any shareholder may cast, provided that the limitation applies equally to all shareholders (art 408)
  3. Where the interest of shareholder conflicts with the interest of the company, such shareholder may not exercise his right to vote (Art 409/1/)
  4. Directors may not vote on resolution relating to the directors duties and liabilities (Art 409/3/)
- ✓ Every shareholder is free to vote as he wishes. Agreements or resolution restricting the free exercise of the right to vote shall be null and void (Art 389/2/). Shareholder must exercise their voting rights in the collective interests of all the members of the company, and not in order to promote individual is interest.
- ✓ Resolution of the meeting binds all shareholders whether absent, dissenting or having no right to vote. (Art 388/2/). Courts may decide to nullify a decision of the shareholders meeting when there is evidence that the decision was detrimental to the interest of the company (Art 418/2/) or to the minority or majority shareholders' interests and was dictated only by the self-interest of certain shareholders.

. **Meetings** /Art 390/

**1. Ordinary general meeting**

- ✓ Ordinary general meeting can be held only if the shareholders present or represented represent at least one-quarter of the shares of the voting shares. If this quorum requirement is not met, the meeting must be called a second time, and on that occasion no quorum is required. Resolution is passed at ordinary meeting by a simple majority of the voter held by the shareholders present or represented. Accordingly, a shareholder who abstains is disregarded (Art 421)
- ✓ Ordinary general meetings may take all decisions within the competence of the shareholders, except those which are required to be taken by an extra ordinary meeting. Decisions made by ordinary meeting mainly concern financial questions (other than alteration of the capital) and matters concerned with the

administration of the company. (Art 419) The most important kind of ordinary meeting is, of course the annual meeting, which must be held within four months after the end of each financial year (Art 418)

**2. Extraordinary meetings** /Art 425/

- ✓ Extraordinary meetings are subject to stricter rules as to quorum and majority than ordinary meetings. At least half of the holders of all shares having voting rights of the company must be represented at the meeting by shareholders or their proxies, if such quorum is not present the meeting must be called for the second or third time, and the quorum is reduced to one third, or one tenth respectively. Resolutions are passed at extra ordinary meetings by two-thirds majority of the votes held by shareholders present or represented.
- ✓ An extra ordinary meeting may alter any provision of the company statues. Provided it does not increase the financial obligations of the shareholders, take away the basic rights of the shareholder, such as the right to transfer his shares of the right to vote at meetings or change. The change of the nationality of the company or shareholder to increase investment in company needs the present of all holders of all shares having voting right and unanimous voted.

**3. Special meeting** /Art 426

- ✓ Unlike meetings which may be attended by all shareholders of any class, special meetings may be attended by only the holders of a particular class of shares. For example, the holders of preference share, special meetings must be called to approve decisions of general meetings modifying the special rights attached to shares of the class in question. The decision of the meeting becomes effective only if the special meeting has given its approval. The rules as to quorum for special meeting and majority required to pass resolutions are the same as the rules governing extraordinary meeting.

**Distinguishing between Various of Resolutions**

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

It passes resolution on

**Financial matters: -** In this regard it approves the annual accounts and the management report. At the end of each fiscal year the board of directors must prepare annual accountant and management report for submission to the general meeting. The annual accounts which the board of directors must prepare are balance sheet, profit and loss statement and notes on the accounts. The management of the board of directors must describe the company□s financial condition

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

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

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

**Directors** /Art 347/

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

**Appointment** /Art 350/

- ✓ The first directors may be appointed in the statute. Their appointment shall be submitted to the first meeting of subscribers for conformation. If the meeting does not conform the appointment, other directors may be appointed.
- ✓ Subsequent directors are appointed by ordinary general meeting of shareholders.
- ✓ The term of office of the director can not exceed three years provided that he can be eligible for re-election.
- ✓ Directors may appoint new directors to replace departing or resignating directors during a financial year /Art 351/. Such replacement of directors is effective only for the remaining duration of the replaced director□s term of office and must be ratified by the next ordinary meeting of shareholders in order to be valid. If the replacement is not conformed, general meeting may appoint other directors. However, when a director□s appointment is considered void, the decisions and acts carried out by the person are appointed (or replaced) by the directors remain valid. When there is no surviving director, auditors must call a shareholders

meeting in order to appoint directors. Where the surviving directors are less than half of the number of directors they call shareholders meeting in order to appoint additional directors.

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

- ✓ The board of directors has power given to it by the law of statute and decision of general meeting of the shareholders.
- ✓ In general, the board of directors posses the power to act in all circumstances on behalf of the company subject to the limit of the company business purpose and to the powers which are expressly reserved by law to meetings of shareholders (ie mainly approval of the annual accounts amendments of statute) In practice, however, the business of the company is taken care of by the chairman and general manager and the board of directors merely defines the general policies to be followed by the company; takes or approves strategic decisions and controls the chairman of the board.
- ✓ A company is bound by all business arrangements entered into by its board of directors provided these businesses are within the scope of business purpose of the company, provisions of the statutes restricting the powers of the board may not be invoked against a person who deals with the company, whether such person knows of them or not. Provision in the statute limiting the company□s purpose or restricting the powers of the board of directors merely enable the company or its shareholders to claim damage against a director if such provisions are not complied with but does not affect third party with good faith.
- ✓ The following are some of the duties of the board
  - Organizing management and meeting records
  - Keeping of accounts and books
  - Calling shareholder□s meeting each year after closing of the fiscal year in order to approve management report, account and allocation of profits also meeting should be called where three quarters of the capital are last.
  - Establishing reserve fund required by the law and statutes
  - Applying to the court where the company is unable to pay debt with the view of composition, bankruptcy or winding - up.

**Agreements between company and directors** (Art 355-357)

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

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

- ✓ Directors are strictly prohibited to be partners with joint and several liabilities in rival companies nor do they compete against the company on their own behalf or on behalf of third party.
- ✓ Directors cannot enter any form of loan agreement with the company, be granted an over draft by the company in current account or have their obligations toward third parties guaranteed by the company agreements violating this prohibition are void.The prohibition of entering into contract of loan or guarantee does not apply when the director is legal entity or the company operates a banking business.

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

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

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

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

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

**Directors□ liability** /Art 364-367/

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

- **Liability towards the company** directors are agents and trustees of the company as such they owe certain duties to the company to exercise the duties imposed on them by law the statues and resolutions of the meetings. Breach; of these duties or failure to carry out these duties make directors to be liable jointly and severally to the company and its shareholders. Directors specifically are jointly and severally responsible when they fail to take appropriate measure within their knowledge to prevent or mitigate damage that may happen to the company in relation to general management. A director, who is not at fault while

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

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

**Proceedings against the directors**

- ✓ In the case of proceeding by the shareholder against the directors; no proceeding may be taken against directors unless resolution is passed by general meeting at least voted 1/5 of the capital. In such cases directors may be removed and new directors may be appointed by the same meeting. Where the resolution to institute is passed the company may bring the case to the court within three months and if the company fails to bring the case to the court, shareholders who voted for the resolution may jointly bring the case to the court.
- ✓ Creditors may bring the case to the court specially where the capital of the company is insufficient to cover the debt of the creditors. If shareholders meeting passes resolution not to bring the case against directors, it may not affect the right of the creditors. On the other hand, any shareholder or third party can bring cases against directors is there is damage against them.

**Removal** /Art 354/

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

**General Manager**

- **Appointment**

- ✓ As a general rule, day to day activities are carried on by general manage, under commercial code of Ethiopia.
- ✓ The general manager is appointed by the board (Art 348/1/).
- ✓ It is also general rule that general manager is not member of the board directors (Art 348/4/). This is to avoid potential conflict of interest and to ensure that the appointment of directors may always be freely revoked by the board of directors. However, a close examination of art 362/2/ may lead to different result which is exception to the principle stated above. It states that articles of association of a company may specify that directors or one director may be responsible as a manager.
- ✓ This indicates that one director or more directors can be responsible as a manager. The code further states that they are exercising their power in the name of the company. Manager can be appointed from among the board of directors provided it is stated in articles of association.

- **Duties, powers and liabilities**

**Powers: -** the power of the manager is the power that is delegated by the board of directors. Board of directors decides on substantial policy issues. Such is implemented by general manager. The general manager carries on day today activities of the company. It represents the company in relation to third parties. It enters into contract on behalf of the company. Hire and fire of employee of the company sign on negotiable instruments is day to day activities of general managed.
**Duties: -** general manager has to perform all his activities according to the power delegated to him, and according to the statutes and the law. Furthermore, general manager occupies the position of a trustee for the company and he has to safeguard the interest of the shareholders and the company.
**Liabilities: -** general manager is liable for damage resulting from infringement of his power or violation of law, statutes and from deliberate or negligent acts of mismanagement. Such liability may be incurred to the company or third party as well as individual shareholders. In such case he is liable to the company and third party.

- **Removal**

- ✓ The law empowers the board of directors to appoint general manager for such period as stated in the statues or law. The power to appoint the general manager, conferred on the board carries with it by implication the power to terminate the appointment. The general manager functioning under the law is an employee of the company. However, such power must be exercised for good causes after due enquiry held in accordance with the rules of natural justice. The company will be liable for damages if such removal is breach of contact.

**Accounts and audit**

- **out of capital payment**

- ✓ At the end of each fiscal year the board of directors must prepare annual accounts and a management report for submission to the general meeting (Art 446). The annual accounts which the board of directors must prepare are balance sheet, profit and loss statement, and report on the activities and affairs of the company which should show remuneration of the directors and auditors and proposal for the distribution of dividend, if any,
- ✓ Payment as dividend is only paid where there is profit and such profit is declared to be paid by the general assembly. (Art 458) When there is no profit payment of dividend out of capital is strictly prohibited. If dividend is paid from capital it shall be deemed as a fictions dividend and the persons making the distribution shall be criminally and civilly liable.

- **Reserve funds** /Art 453/

✓ The legal reserve which is made from net profit mandatory be allocated on a long-term basis to the company's operation.
✓ The first one is **legal reserves required by law.** It is five percent of any annual profit that must be allocated to the legal reserve until the amount of legal reserve is equal at least 10 percent. The amount reserved is not less than one twentieth of the profit. The legal reserve can not be distributed to the shareholders nor be used for the repurchase or redemption of the company shares.
✓ The second type of reserve fund is the **supplementary reserve** which must be allocated to the company's operation on long-term basis by application of the articles of association. They can not be distributed to the shareholders.
✓ The third one is **optional reserves** which correspond to profits allocated to the company's operation by a decision of the shareholders meeting in accordance with the articles of association.
✓ The fourth one is **free reserve** that is created by an ordinary general meeting. Some time it is known as 'revaluation reserve', which unlike the other reserves referred to above, is not extracted from profits realized by the company, corresponds to any difference revealed in the context of an asset revaluation between the historical book value of certain tangible assets (such as immoveable or trade marks) and their real market value.

**Profits and dividends**

✓ The **profit** of the company is the net receipts for the financial year after deduction of general costs and other changes (Art 452/11/). Any profits realized during the fiscal year of which the accounts are submitted to the meeting must be allocated by the meeting. As stated above, first the company must allocate to legal reserve until it reaches one tenth of the capital of the company.
✓ After the legal reserve and if appropriate other reserves have been funded, the annual meeting is free to use any remaining part of the profit by allocating them to the shareholder as dividends.
✓ **Dividend** is the return that a shareholder gets from, the company, out of its profits, on his shareholder. It is the portion of the profits of the company which is allocated to the holders of shares in the company or it is as portion of the distributable profits of the company. It may be a fixed annual percentage as in the case of preference shares or it may be variable as in the case of equity shares. It is only, payable out of distributable profits only distribution of fictitious dividends (it is dividends in excess of available profits) is a criminal offence as well as civilly makes liable (Art 458/2/).
✓ The time and manner of payment of dividends is decided on by the annual meeting (Art 458/3/).
✓ Right to claim dividend arises only after the same is declared by the company in general meeting and unless it is declared, no shareholder has any claim against the company in respect of it. It is usual practice for the board of directors to recommend, and the annual general meeting to declare the dividend. And once the dividend is lawfully declared, the amount due to each shareholder on account of dividend become a debt, and shareholder creditors of the company (Art 458/5/)

**Appointment of auditors**

✓ Auditors are appointed by shareholders and are entrusted with the external control of the company.
✓ Their main functions are to audit the accounts of the company, certify certain information provided to the shareholders, and prepare reports which must be submitted to the shareholders.
✓ Company may elect one or more auditors and one more assistant auditor.
✓ The first auditors of the company shall be appointed by the subscribers of the company and subsequently be appointed by the general meeting of the company (Art 369/1/). The auditors appointed by subscriber shall hold the office until the first annual general meeting. Auditors elected at annual general meeting may hold office for three years (Art 369/2/).
✓ The following person are prohibited to be elected as an auditor (Art 370)
  (a) the founders, contributors in kind, beneficiaries enjoying special benefits /preferred rights/ directors of a company or one of its subsidiaries or its holding company,
  (b) the blood relatives or in-laws of any person mentioned in (a)
  (c) persons who receive from persons mentioned in (a) a salary or periodical remuneration in connection with duties other than those of an auditor,
✓ The law prohibits auditors not to be appointed as a directors or managers of the company which they audit, nor of one of its subsidiaries of its holding company with in three years from the date of the termination of their function.
✓ Art 371 of commercial code states that auditors may be removed by general meeting at any time subject to demand compensation, if they are removed not for good cause. It is to ensure that auditors cannot be removed at will by management or shareholders.

**Dissolution and wind up**

✓ Companies are rarely dissolved. Rather than dissolve a company shareholders usually prefer to sell their shares. In certain cases however, dissolution cannot be avoided.
✓ There are many causes of dissolution of a company /or partnership/, Causes common to all kinds of business organization /Art 217-218/
✓ Dissolution may result from the **application of rules of law**, **from provisions in the statutes of the company**/ partnership **from the common agreement of the members** to dissolve/ or **from a judicial decision** dissolving the companies for just cause.

**Dissolution by a rule of law**

- ✓ In the case of Share Company the minimum number of shareholders is five and if a number is reduced it may not be considered as a company and members will be liable personally, as though it was not a company and be dissolved by the court upon application by any interested party (Art 311)
- ✓ In the case of reduction in member or where organ of the company failed to function Art 311 and 511 regularize the situation. The court may make some provisional arrangements, in which if the companies comply with such arrangement may be survived from dissolution. If the companies complied the provision measures, taken by the court they still exist and retain their corporate personality, but if not complied, the companies may be dissolved by the court.

**Dissolution under provisions of the statues**

- ✓ Causes of dissolution may be laid down in the statues of the company /partnership/ they may relate to its duration or its objects.
- ✓ The members are free to fix the duration of the company or partnership.
- ✓ If the statute of a company /partnership provides that it shall endure for a fixed term, it is dissolved automatically at the end of that term. However, the members may prolong the duration of the company or partnership by modifying its statues /Art 217/e/
- ✓ The dissolution of the company /partnership may be automatic where the company□s/ partnership purpose could not achieve. (Art 217/a/) or where it accomplishes its object for which it was formed.
- ✓ The company may not met its purpose where the assets or undertakings of the company totally ceasing to exist either by being physically destroyed, or by becoming unusable for the purpose originally intended. Generally speaking dissolution takes place only if the loss of the relevant assets makes it absolutely impossible for the company /partnership/
- ✓ The accomplishment of the objects for which the company/ partnership was formed occurs when it was formed to carry out one or series of transactions, which have been completed, a company /partnership may be dissolved for these reasons even if it was formed for a fixed term which has not yet expired.

**Dissolution resulting from the agreements of the members**

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

**Dissolution by the order of the court**

- ✓ The court may dissolve a partnership or (a company) if there is just cause to do so (Art 218/1/) on application of partner only for partnership. When a member fails to fulfill his obligation as such (eg a member fails to his agreed contribution to capital, when prolonged infirmity renders a member incapable of attending the affairs of the partnership) only for partnership (Art 260, 278/1/h/, 295, 303). In carrying on business of the partnership will be seriously harmed, because of this, prolonged infirmity is a cause of dissolution
- ✓ The court□s jurisdiction was created in consideration of the public interest as well as for the protection of private rights, and it can not therefore be excluded by the provision in the statutes of the company or partnership.

**Dissolution of Share Company**

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

**Liquidation of Share Company**

- ✓ Liquidation and its procedure is only stated under Share Company. This procedure can also be applied for all other business organization impliedly,
- ✓ The liquidation comprises all the operations required to complete its current transaction, to collect and realize its assets, to discharge its liabilities and repay its capital and to distribute any surplus of assets among its members.
- ✓ The company continues to exist and has corporate personality for the purpose of the liquidation until liquidation in completed, this rule has general consequences. In the first place, the company continues to be entitled to the exclusive use of its name, although this must be followed by the words □in liquidation□ (Art 497/11/) secondary, the company retains its registered office and the ownership of its assets.
- ✓ The survival of the corporate personality of the company is however limited to the needs of the liquidation is to those operations which will be necessary or useful for winding up its affairs (Art 497(2)).The dissolved company will therefore only be able to complete unfinished current transactions and to enter into new transactions to the extent they are consistent with the object of winding up its affairs (Art 500)

**Appointment of liquidator /**Art 496/

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

**Powers (Art 500)**

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

**UNIT NINE: Private limited company**

- **Nature**

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

✓ May be formed to pursue any purpose or to carry on any activities, however, it may not take banking, insurance and similar activities, such business must be carried out by Share Company (Art 513). The form of private limited company is always of commercial nature even if it intends to carry on civil activities (Art 10(2) and 510(2))

- **Formations**

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

- **Documents to be filed with the registrar**

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

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

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

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

- A name as specified in the statutes
- A registered office which is the main address where the main management of the company is located
- Nationality of the company
- The power to do acts with legal effect acquiring of property and becoming subject to rights and obligations
- The power to sue and to defend legal proceedings against it

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

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

- **liabilities of members for the company's obligation**

✓ The liability of the members is limited to the amount if any, unpaid on the shares respectively held by them. The liability can be enforced during the existence of the company as well as during wind-up. Where the shares are fully paid up, no further liability rests on them.

- **members' meetings**

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

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

- ✓ In company consisting more than twenty members a general meeting of shareholders must be held every year at the date fixed in the articles of association. This date is usually six months after the end of financial year to approve the annual accounts of the company and the managers annual report (Art 532/1/). Other meeting may also be held when called by shareholders numbering more than one half of the capital, or by the manager or auditor (Art 532/2/)
- ✓ Where holding of the meeting is not required by the law or articles of association, managers may send the text of the resolution and demand each shareholder to give vote in written form. However, there appears to be nothing to prevent the statutes providing that certain specified matters shall be decided by written vote and others by general meetings.
- ✓ Decisions of ordinary meetings are taken on the first call by the votes of shareholders more than half of the company capital, and on the second call decisions are taken by simple majority disregarding the capital represented.

**Ordinary resolution and majority**

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

**Extra ordinary resolution**

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

**Voting** (Art 534)

- ✓ The member of votes which each shareholder may cast at general meeting is equal to number of shares he holds. It is not possible to confer multiple voting rights on certain shares, or to deprive other shares of voting rights.

- **Role of management**

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

- **Appointment and dismissal of manager** /Art 526 & 527/

- ✓ Managers of private limited company need not be members of the company. They can be appointed either among the shareholders or outside the shareholders.
- ✓ There are two types of managers.
  - Managers who are appointed in the statues, which are known as **a statutory managers**, and
  - Those who are not appointed in the statues, known as **non-statutory managers.**
- ✓ Members of private limited company may appoint one or more managers. The appointment of the first managers may be made in the statutes of the company, and all other appointments are made by the resolutions passed by the members in general meeting. The majority required to pass such a resolutions must comprise the holders of at least half of the capital of the company (Art 535(1)), but if such majority is not obtained a second poll must be called by registered letter and decision shall be taken by simple majority without regard to the capital represent.

- **Removal of the managers** /Art 527/

- ✓ There are two types of removal.
- ✓ The removal of statutory manager needs minimum of majority vote of the numbers representing three quarter of the capital unless a larger majority is provided in the articles of association (Art 536(2)) Dismissal of the statutory manager needs the amendment of the statute, and amendment of the statute required minimum of three quarter s majority.
- ✓ In the case of dismissal of non-statutory manager it requires a majority of members representing more than one half of the capital and in the second call, decision is passed by simple majority without regard to the capital represented (Art 535).
- ✓ Members may agree in the articles of association that manager may be dismissed at the pleasure of the members irrespective of the types of manager (Art 527(4)). The removal of the manager is for good cause even though the law is silent as to what constitute good cause. Manager, there fore may be dismissed for mismanagement, incompetence or physical disability which may be considered as good cause. If removal is not justified, the dismissed manager may claim compensation.

- **Powers of managers** /Art 538/

- ✓ They may act on behalf of the company in all circumstances, provided that they do not infringe the provisions of its statutes and that they do not act outside the scope of the objects of the company business purpose.
- ✓ Such wide scope powers of managers may be limited by the statues of the company. Thus, the statues may limit the powers of managers by restrictive provision. The statutes may for example prohibit the sale or mortgage of land possessed by the company; forbid the managers to borrow more than a certain amount of money in the company s name.

- **Manager liability** (Art 530)

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

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

- **Managers remuneration** (Art 529)

✓ The remuneration of the managers shall be fixed by the resolution of the members of the company. It may be in fixed salary of share in the profit or both fixed salary and share in the profit. In practices managers are usually paid a fixed salary.

❖ **Shares and transactions in shares**

✓ The contributions of cash or in kind for shares of the company constitute its capital. The capital is divided into shares with the same nominal value, which may not be less than birr ten (Art 512(2).

✓ Unlike the shares of Share Company, the shares of private limited company are not transferable by the normal commercial forms of transfer, and can not be represented by registered and beaver share certificate transferable in the same way as shares of Share Company, shares in private limited company, must be made in writing (Art 523). Shares in private limited company, are freely transferred among the company members (Art 523(1)). However, free transferability may be restricted by a provision in the articles of association.

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

❖ **Transfer inter vivos and mortis cause**

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

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

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

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

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

**UNIT TEN: Conversion and amalgamation of business organization**

**1. conversions**

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

**Mode procedural rules**

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

**Effects**

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

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

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

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

**2. Amalgamation**

- ✓ Is the operation by which two or more, business organizations group into only one business organization and by which the members of the amalgamated business organization receive shares issued by the business organization benefiting from the amalgamation.
- ✓ It may either result in the creation of a new business organization to which one or more business organization contribute their assets and debts or in the contribution of the assets and debts of one or more business organization to another existing business organization (Art 549/1/).
- ✓ In amalgamation, all property and rights forming the assets of the amalgamated business organization are transferred to the beneficiary business organization.
- ✓ The beneficiary business organization must comply with the undertakings and agreements entered into by the amalgamated business origination and all claims and liabilities of amalgamated business organization will be transferred to the beneficiary business organization.

**Mode/procedure/**

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

**Effects**

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