

Ethiopian Law of Agency

Teaching Material

Developed By:

- 1) **Awet Hailezgi (Mekelle University, Faculty of Law)**
- 2) **Addisu Damtie (LL.B, LL.M) (Bahir Dar University, Faculty of Law)**

Sponsored by the Justice and Legal System Research Institute

2009

Table of contents

Chapter One

1. Concept of Agency: Preliminary considerations

Definition

Why law of agency

1.1 Genesis and Aevelopment of the Law of Agency

1.1.1 Theories and development of the law of agency under the common law legal system

1.1.2 Theories and development of the law of agency under the civil law legal system.

1.2 Sources of Authority

A. Authority derived from a contract

i. Internal contract

ii. External contract

B. Authority by judicial act

C. Authority derived from the law

2. Authority by Virtue of Contractual Agency

2.1 The common law approach

2.2 The civil law approach

2.3 The Ethiopian approach

Chapter two

Agency by Virtue of Contract under Ethiopian Law.

Introduction

2.1 The internal contract

2.1.1 Formation requirements

2.1.2 Offer and acceptance for the formation of contract of agency

2.1.2 Scope of authority

2.1.2.1 General

2.1.2.2 Special

2.1.3 Authorities of an agent

2.1.3.1 Actual Authority

2.1.3.2 Apparent authority

2.1.4 Modes of representation

2.2 The External contract or contract of representation

A. Formation

B. Complete or actual authority

i. Express actual authority

ii. Implied actual authority

C. Unauthorized agency and ratification

- Unauthorized agency or agency of necessity
- Ratification

Chapter Three

Effects of Agency

3.1 Establishing a relationship between the principal and the third party

3.2 The obligations of agency relationship

3.2.1 Duties of the agent

3.2.2 Duties of the principal

3.3 The liability of the principal, agent and third party

3.3.1 Liability upon ratification of an act unauthorized

Chapter four

Agency in Trade (business and commerce)

4.1 Commission Agent

- Commission to buy or to sell

- Del Creder commission agent
- Forwarding agent

Chapter Five

- Extinction of Agency Relationship
- Agreement of parties
- Unilateral declaration by the parties
- Revocation
- Renunciation (Repudiation)
- Termination by the operation of the law
- Liability to one another and to a third party

Course Introduction

One may not be able to perform a given task by oneself for several reasons. Or one may not be at different places at the same moment to perform a certain deed, Hence if a task has to be carried out in his absence or without his involvement, there has to be some other individual who can undertake the task on his behalf.

This course is meant to Assess the agency law in two broad categories. That is, agency in non-commercial activities and agency in trade (commerce) Accordingly, the first chapter provides the preliminary concepts on the law of agency, introductory remarks, genesis and development of the law of agency, and sources of authority.

The second chapter deals with the Ethiopian context, with great emphasis on the contractual agency. This chapter is also categorized into two major topics that is the internal contract and external contract. Under the former topic, the formation requirements for internal contract, scope of authority and modes of representation are discussed, and then discussions on the external contract follows.

Agency relationship has its own effect on parties, beyond establishing relationships between the principal, agent and the third party. Hence the liabilities of the agent, principal and third party, and the liabilities that exist upon the ratification of an unauthorized act are discussed under this chapter.

The second part of this course deals with the agency in trade or commerce, hence the concepts of commission, del credere agent and forwarding agent are discussed exhaustively.

Lastly, this course deals with the extinction of agency relationship. It also encapsulates summary questions and short hypothetical examples in order to make the concepts clearer and visible for students. Discussions on real and hypothetical cases are made in order to make the course more practical and achieve its objectives.

Chapter One

The Concept of Agency: Preliminary Considerations

After reading this chapter students will be able:

- To define the law of agency from different perspectives
- Analyze the problems in defining the law of agency
- Discuss the rationale behind the institution of the law of agency or representation
- Appreciate the genesis and development of the law of agency in the common law and civil law legal systems, as well as from the Ethiopian perspective
- Discuss the different theories of representation adhered to by the common law and civil law legal systems.

Definition

The Law of agency is in most cases defined as the relationship between two persons, where one (the agent) may act on behalf of the other (principal) and bind the principal by words and actions. It is also defined as the relationship in which one person acts for or represents another by the latter's authority, either in the relationship of principal and agent, master and servant, employer or proprietor and independent contractor. The law of agency could also be defined as the judiciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so as to act. (Black's law dictionary, 1991)

Paul Mc Carthy has tried to partially capture the essence of agency by saying:

The law of agency deals with the ways in which one person, physical or juridical, can deal with other persons through the medium of intermediary. Of course one person may deal with another directly, without any assistance. However a person can perform only one thing and be in only one place at one time. The complexity of modern life, particularly in the commercial area, is such that the law must permit a person to make contracts and perform other juridical acts by a means of the representative. (Paul Mc Carthy, Materials

for the study of the law of Agency and Business organizations, Faculty of Law, Haileslase I University, p.1)

In addition to the above, one writer, *Mulgeta Mengist (2005)* states the following; The concept of Agency is recognized in all modern legal systems as an indispensable part of the existing social order. It fulfills the most diverse functions in the public and private law of today; in particular it assists in organizing the division of labor in the national and international economy, by making it possible for a principal to extend his individual sphere of activity. By its aid spanning space and time, he is able to have one or more persons act for him, on his behalf, if necessary (the advantages of Agency) for the institution of modern life based on the division of labor, predominate to an extent that agency is every where prevalent .An agent is appointed when an individual is unable to act himself on account of his manifold occupations, absence, illness, advanced age, etc. Or a representative may be designated in order to take advantage of his special capacity, knowledge, and experience even for the mere desire, such as not to appear personally in order to avoid hostility, controversy, etc or similar considerations.

With regard to the concept and significance of the law of agency, two other writers stated as follows:

The purpose of the law of agency and the need to employ agents, to perform certain tasks which their principals have neither time; nor knowledge nor experience to perform by themselves scarcely requires explanation in the highly commercial and industrialized world. Commerce would literally come to a standstill if businessmen and merchants could not employ the services of factors, brokers, forwarding agents estate agents auctioneers and the like and were expected to do everything by themselves. These specialized middle men, whose main purpose usually is to make contracts on behalf of their principals or to dispose of their principal's property, are to be found in all advanced societies and, whether one accepts or deplors some of the economic consequences of this phenomenon, the fact is that the agent's activities are an inevitable feature of a developed economy. Hence the growth of the law of agency, both in volume and sophistication, has matched the growth in importance of commerce, as we know it today'

(Markesinis and Munday, pp.3-4)

Defining the concepts in the law of agency in the above way may not be enough and appropriately reflect the whole concept of the law. Two writers provide the inconveniences with defining disciplines or concepts in very few words in the following manner:

They argue that definitions may be of use and, at times are quite necessary when contracts or statutory enactments have to be construed, for in such cases they can help define the terms used in the documents. But they are of doubtful validity in books or lecture courses, they can also be misleading, especially if they attempt to compress the entire subject under consideration into a single sentence, which is intended to be both concise and meaningful. This is also true with the law of agency where academics have been quick to criticize each other's definitions and find in them errors and omissions. There is, therefore, no justification for yet other definitions, which, more likely than not, will prove unsatisfactory.

In ancient Roman law, for a contract to exist between two persons, both of them should be personally and physically present. Conclusions of contracts were like a ceremony, which was made by adhering to certain formalities and including some words to say repeating. So many reasons have been given to justify the absence of the concept of representation (Agency) in the Roman law. One of the explanations attributes to the roman conception of the personal nature of obligation. The personal nature of obligation under this legal system is closely related with the strict formalities of the Roman law. With regard to the formation of legal relationships, the Romans attached special significance to formal ceremonies in which certain acts were performed and solemn words repeated. Owing to this reason, the law refused to grant rights and duties on a person who did not actually participate in such ceremonies and fulfill the required formalities. Hence the Maxim, **alieri stipulario nemo potest**, excluded stipulations in the name of third party and stipulations for the benefit of a third party. The other view that holds for the absence of agency in the Roman law was owing to the patriarchal economy of the Romans. This economy was least developed, and almost all business transactions were limited within the family. Hence it is possible to infer that there was no need for the institution of agency.

The above principle had served the then society of Rom. However, as time went by, situations forced the Romans to recognize the principle of “one who acts through another acts for himself.” As a result, contracts were started to be formed between individuals, even in the absence of the contracting parties in certain places. (B.S. Markesinis and R.J.C Munday, pp.3, 1986.)

Nowadays, one who could not appear personally to conclude a contract could appoint a delegate or representative. Hence what the representative performs could be taken as an act done by the person representing the former. Agency in this case is hence stated as the relationship between two persons in which one of them (the representative or the agent) has the power or authority to represent and act on behalf of the other (the principal) in legal transactions. This partially captures the essence of agency.

We have been discussing the definition and some concepts related to the definition of the law of agency or representation. And now let us see the rational behind the institution of the law of agency.

Why law of Agency?

The concept of agency reduces the cost of contracting. Though it increases the number of parties and transactions, it has made possible for individuals to utilize the services of others in accomplishing, for more than could be done by their unaided efforts. By contracting through an agent, the principal may reduce the cost of spatial and cultural distances, the need to acquire expertise, and the inconvenience of having to deal personally with all contracting parties. In the same manner, agency reduces the cost of internal organization and so indirectly the costs of contracting by facilitating specialization of function and expanding the scares resources of time, energy and knowledge available to the principal. In here not only does the principal benefits, but so does his contracting partner (The third party in agency law) who would otherwise bear some of the principals higher contracting costs in a less favorable contract price. In this case, the agent also benefits from the principal through compensation.

In a nutshell, the following points can best elaborate the need for having an agent acting on behalf of someone.

1. The need to overcome time and space limitation: one person may wish to perform several transactions at the same time. However, he could be in a position where he is unable to run these several activities by himself at one instance, for he is at one specific place (space) at one time. He cannot be at different places (spaces) at one instance (time); for this reason, he/she may want another individual to act on his behalf. In this case the concept of representation comes into view. The inability of a person to be at different places at the same time can thus be solved by agency representation.

2. The need to overcome limitations of knowledge and skill

Performing one or more activities may demand certain skills or knowledge. Hence one may lack the required knowledge in performing a certain activity. Hence, another individual who has the required skill may act on behalf of the person who has no such expertise in performing the duty.

3. The need to represent legal persons

Legal personality is endowed to non-living entities. Thus, after acquiring the legal personality these entities will have the right to exercise all activities that a legal person can do. For instance, they can sue and be sued, administer property etc, to conclude a valid contract and to transact with 3rd parties etc. However, these entities don't have mental capabilities to analyze the cost and benefit of their transaction because they don't have minds like human beings. Hence, they need an agent to act on behalf of them. The manager of a business organization, for example, is considered as an agent through which any dealings with a third party is concluded.

From the above discussion, we can understand that an agent can act on representing legal persons to exercise rights and duties that a certain legal person enjoys. It is through the agent (human being) that a certain legal person enjoys its rights and performs its duties.

4. The Need to overcome incapacities

The Ethiopian civil code provides that capacity is required in order to perform a juridical act. Certain category of people like minors (below the age of 18) and interdicted people can not have the appropriate analytical capacity in order to enter into a juridical act. Hence they may

fail to analyze the cost and benefit of the transaction. Hence some one else who can act on behalf of them is appointed.

Questions for discussion

1. Can you explain the importance of agency relationship?
2. How can you define the concept of law of agency?
3. What impediments can you find in defining the law of agency like any other discipline?

1.1 Genesis and Development of the Law of Agency

The concept of agency representation in the sense it is understood now emerged around the twelfth century (A.D) along with the slave and slave owner's relations. Since the early time, slaves were considered as a mere chattel without any rights. It was logical to hold the owner legally liable for the acts of his slave, especially if the acts of the slave were done based on the direction of the slave owner. Hence this slave and slave owner relationship paved a way for the creation and the concept of representation. And during this time, the responsibility of a principal for the acts of his agent or servant was commenced.

The concept of agency developed independently in the civil and common law legal systems. However, the rudimentary rules of agency representation as it is understood today became visible in both legal systems around the end of the twelve-century and early thirteen centuries.

Although, the concept of agency representation appeared around the end of the 12th century, its rules came to be arranged and significant, in order to facilitate commercial centers in the 19th century. Where business activities widely spread in most parts of the world especially in Europe commercial transaction was highly developed in volumes. Owing to this reason the rules of agency started to be organized and collected from the various fields over which they were distributed. (Law of agency, Am. J: comp. law vol.6 (1957) pp.165)

In spite of its high development, the Roman law did not outgrow an overall theory of agency in their law of contract, and even “it was utterly unknown in the early law of contracts and never in the entire history of the Roman law did it reach the importance it has attained in the English law. During the time where the Romans were unaware about the theory of Agency, the English law of contract developed the theory in a complete manner and businessmen used to carry out their business activities through intermediaries or agents.

One among the main reasons why the Romans failed to develop a complete theory of agency representation in their contract law as that of the English law was that “the Romans never acknowledged a general rule of their private law which declared that a person acting as an intermediary should be capable of creating valid contractual or commercial relations between the principal and the third party.”(W.Muler-Freinfels, Legal Relations in the Law of Agency: Power of Agency and Commercial certainty Am. J. comp.law V.13 1964 pp.195)

With respect to the importance of commercial activities in the Roman Empire and the distance between commercial centers and slow means of communication, the notion of agency representation was not well developed in their contracts law. Among the basic governing principles that was expressed in the roman contract law which has created the major obstacle for the rapid development of the modern concept of agency law was that “rights and liabilities were acquired or incurred only by the persons making the contract; third parties are not considered. To the old contracts like *Manicipatio*, *cessio injure*, and *stipulatio*, the doctrine of agency never applied. The formal ceremonious words employed to create such obligations bound only the persons who actually uttered them. It was the act of the individual, his solemn declaration that bound him, and according to the theory of the old Roman law one could not speak for another but only for oneself. (William L. Burdick, The principles of Roman Law and their relation to Modern Law, 1938, pp.424)

While the Roman law of agency representation was in its lower stage, the English law of agency contract was found in a higher stage and it was well developed. In relation to this, in the English law of contracts, the doctrine of principals and agent was based upon three elemental propositions. These were:

1. The creation by contract, express or implied of the relation,
2. The non liability of the agent for contracts made in the name of his principal, and
3. The liability of the principal for contracts made by his duly authorized agent.

According to this, when it is compared with the English law of contracts, the Roman law of contracts never developed the theory of agency to such an extent as the English law of contracts had achieved.

In order to have a broader concept on the genesis and development of the law of agency, let's discuss the genesis and development of the law of agency in the following legal systems.

1.1.1 Theories and Development of the Law of Agency under the Common Law Legal System

The up-to-date concept of agency in the common law legal system is the outcome of many influences in its history. It is believed that agency was not part of the common law until the 13th century. However, owing to the master and servant relationships which emerged around the end of the 12th century and beginning of 13th century.

While we discuss the historical development of the theory of agency in the common law legal system, we can observe that, three main standards gave raise to the effective development. These factors are:

1. The emergence of the class of attorneys in legal matters. Which were regulated by ordinance 1292
2. The impact of cannon law: and
3. Custom of merchants, which at that time was already engaged in lively trade in Europe, created the introduction of some concepts of agency.

Owing to the influence of mercantile law by which commercial activities were developed in volume, the common law developed the principle that a principal was in direct contractual

relation with third parties in which such principle laid down the foundation for the theory of agency. The development of such principle makes the principal liable to third persons. This liability was with regards to the goods bought or acquired by the agent, on the basis of which the principal had thereby obtained the use and benefit of the goods.

The genesis of such principle, which makes the principal in direct contractual relationship with third parties in a contract made by his agent, emerged from the case of Costace V. Forteye, which was decided in 1389 by the major and elder men of the city of London. Under this particular case, an apprentice and attorney of a London merchant bought wine from a French merchant for his master (Fortenye); and when he failed to satisfy the full payment to the seller, the agent was committed to prison. However, the agent (apprentice) i.e. Costance, alleged that it was his master who sent him to buy the wine and then the master approved the bargain. The Mayor then ordered the master (defendant) to satisfy the full payment to the French seller and set the plaintiff free from prison. The decision of the Mayor was based on the ground that the apprentice bought for the use and benefit of the master. -(Willam Holdsworth/sir/, A History of English Law vpl 8, 1966, pp223)

The point that we can understand from the above case is that, a direct claim by a third party was admitted against the principal for contracts made by his agent for the benefit of the principal.

The trend of being represented through an agent spread somehow readily in the course of the 12th and 13th centuries owing to the allied influence of mercantile necessity and cannon law. In addition to this the development of trading companies, which must necessarily act through agents, helped its further development.

In the medieval period, the idea that it is possible to make a contract through an agent, and that it is possible for a man to ratify for a contract made on his behalf through an agent was recognized by the common law. The common law also, accordingly, recognized that on such contracts by an agent on behalf of his principal, it was to be held that the principal and not the agent was liable ‘’ not only when the agent had express authority to do the particular acts, but also when he acted

within the scope of an authority to do acts of a particular kind.” (William Holdsworth/sir/, A History of English Law vol 8, 1966, pp223)

During the 17th and 18th centuries two classes of agents emerged in Europe as a result of the influence of mercantile law, which was closely related with commercial law. These were brokers and factors.” Brokers were intermediaries, through whom two persons were brought into contractual relations, and in which they were also independent persons.” However, “Factors were essentially employees of their master who deal more faithfully for their masters in buying and selling of all commodities or in moneys by exchange.”

In line with the wide recognition of agency contracts in the common law, which grew in line with the rapid development of trade, a clear distinction between the relations of master and servant was made in order to distinguish from the relations of principal and agent. Accordingly, the agent does not work for the principal physically, nor is he subject to the control of the principal in his physical actions. (William Holdsworth/sir/, A History of English Law vol 8, 1966, pp223)

The servant, on the other hand, was recognized, as one who, by agreement, whether gratuitously or for reward, gives his service to another. He “has no power to bind the master in contract and he works physically for another, subject to the control of the master.”

1.1.2 Theories and Development of the Law of Agency under the Civil Law Legal System

(Law of Agency, Am. J: comp. law vol6 1957, pp135)

In comparison to the common law concept of agency, the institution of the modern concept of **contractual** agency emerged and developed slowly in the civil law legal system. While “the Roman law of contract was, of course, found in its high scientific level, it never developed a complete theory of agency.

As it is mostly stated, among the major impediments that hampered the rapid development of the modern agency principles in the Roman law was “the nature of commercial contract which involves only two persons.” This principle which emphasized a strict personal tie between the

contracting parties was the governing rule of the old Roman contract law which did not admit the triangular relations of principal, agent and third party in business transactions.

In addition to the above factor, the reason that hindered the development of the evolution and the inadequacy of the outcome may have been due to the fact that, “business agents were often slaves and that within the family the law yielded family satisfaction results at quite an early stage of its history.” (Barry Nichlisa, An introduction To the Roman Law, 1965, pp.201) Owing to this condition, any benefit or property accrued to the pater familias (father or head of family)

The concept of agency started to develop in the Roman law, however, in the 15th and 16th centuries and slowly had to recognize the activities of the procurator in connection to these two classes of persons.

What is a procurator? A procurator was a free man, often a freed slave who acted as agent for the interest of a noble family, while an instate was normally a slave who sold his master’s goods “ (F.H.Lawson, The Roman Law Reader,(1969)p.103)

The pressure of mercantile needs in the middle ages, the influence of the canon law contributed a considerable importance in the contractual agency development. And the remarkable feature resulting from the principal and agent liability in the early Roman law was that, “ The freeman who acted as an agent, usually known as a procurator, became invariably liable to the third party and the agent with no connection between the principal and the third party.

In the earliest times, as stated above, owing to the personal nature of the Roman law, a master or parent acquired the benefit of contracts entered into by slaves or sons, whether they contract in their own name or in his own name. But, even though he received the benefits derived from such contract, he was not held liable to the contacting third party. Nevertheless, at a certain point, in the historical development of the Roman’s the agency concept, holding masters liable for acts of their slaves or agents was observed.

Questions for Discussion

1. Can you distinguish between the theories of agency law under the common law legal system and the civil law legal system?
2. Explain the genesis and development of agency representation under
 - A. *The common law legal system?*
 - B. *The civil law legal system?*
3. What were the main impediments in the development of the agency representation under the civil law legal system?
4. What were the principles on which the agency relationship in the early common law was based?

1.2 Sources of authority

Introduction

Obviously, an agent is a person who has the authority to act in the name and on behalf of another person called the principal. In other words, it is an authority given to the agent to perform juridical acts as a medium of an intermediary with another person called the third party. By juridical act, we mean acts having effects before the law. These acts performed within the scope of the authority granted, will bind the principal directly. That means the rights and obligations of the contract are that of the principal and the third party. The agent there is only to facilitate the formation of the contract and hence cannot be held liable for the non-performance by both the principal and the third party.

Here the main question to be raised is: what is mean by the authority of the agent.

There is no single whole definition of authority in the existing written materials. Different writers have given different definitions of authority based on the intended purpose of focus. In ordinary words authority is the right to exercise powers.

Authority, as regards the law of agency, means an ability on the part of the agent to execute certain acts in the name and on behalf of the principal, in accordance with the latter's manifestations of consent to the agent.

It is believed that every relationship may be created having some purposes behind its inception. As agency is one form of relationship, it cannot escape from such facts. Consequently, it is one of the most common legal relationships that enable one to make numerous lawful acts at a time with different persons in different places. That means an agency relationship is created with a view to develop transactions in the absence of a person who wants to stretch his hands to various legally binding acts at the same time. In a nutshell, such agency relationship is introduced in order to avoid transaction barriers that might be result due to time and place limitation.

Having the aforementioned facts in mind, we now proceed towards discussing the concept on source of authority. Thus, as provided under art. 2179 of the civil code, the authority to act on behalf of another may derive from law or contract. Accordingly, the authority of an agent is the power of agency which the agent acquires by the operation of the law or by a contract concluded between the agent and the principal to this end. The details will be discussed as fuscous.

A. Authority derived from a contract.

Agency which is derived from a contractual relationship is the most usual kind of agency. Accordingly, for many authors consent is the basis of the law of agency and it explains why the agent can represent the principal.

Under this topic, we would like to point out that we are referring to the agency arising out of bilateral agreements between principal and agent as articulated under art.2199 of the civil code.

“Agency is a contract where by a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts”

As we can see from the above provision, an agency is a contract, which is formed between the agent and the principal.

Obviously, under such agency relationship, which arises out of a contract, we find two independent contracts. These are regarded as

- ◆ Internal contract [subordinate contract]
- ◆ External contract [main contract]

I. Internal contract [subordinate contract]

Internal contract is a contract that exists between the principal and an agent. Under this contract the principal concludes a contract with an agent under the auspices that the agent could play an important role in the formation of the main contract. That is the agent could enable the principal to transact with a third party through an intermediary or an agent. This contract is essentially concerned with the rights and duties of such parties. In most cases, this internal relationship is created by contract, although there are cases where it could be created by the operation of the law, to determine the respective duties and rights of the parties. In any manner, one has to basically rely on the terms of the agreements of the parties in order to distinguish their respective duties and rights.

II External contract [main contract]

External contract is a contract that exists between the principal and a third party. This relationship is the most crucial aspect as far as the law of agency is concerned. It is concerned with the rights, duties and liabilities that could be created as between a principal and a third party through the intermediary of an agent. In this regard, for a direct relationship to be created between the principal and the third party, in principle, the agent must have acted in the name and on behalf of the principal within the scope of his power. Once these elements are fulfilled, as regards the effect of the contract, the agent steps out and only the principal and the third party remains to be parties to the contract concluded. Consequently, the rules of an ordinary contract,

which could operate between two contracting parties, will be applicable to the principal and third party relationship.

Furthermore, it must be noted that agency is one of the special types of contract and thus, the rules applicable to the formation of a valid contract, are of necessity, applicable to the agency relationship. Accordingly, the elements required under the law for the formation of a valid contract as enumerated under art. 1678 of the civil code are required in agency contract as well.

These elements are

- A. The parties must be capable of contracting and give their consent sustainable at law.
- B. The object of the contract must be sufficiently defined, possible, and lawful.
- C. The contract must be made in the form prescribed by the law, if any.

Therefore, the formation of a valid agency relationship requires the existence of certain essential elements. If these elements are not satisfied, the agency relationship becomes invalid. Accordingly, parties to the agency relationship must have the capacity to enter into the contract, their consent must be sustainable at law, the object of the contract of agency relationship must be sufficiently defined, possible and lawful, and finally the contract of agency must be made in a prescribed form if any.

For the sake of clarification, we need to see the basic elements of contract agency under the following subtopics.

- **Capacity**

The first essential requirement for the validity of a contract is the capacity of the parties. The literal meaning of capacity is the ability to do something. Since agency relationship is a special type of contract the party who wishes to enter into an agency relationship must have the capacity to do so. Thus, capacity to a contract means competence to enter into a legally binding agreement.

All persons do not have the same legal capacity to make a contract. In some cases; the legal capacity of a person has no relation to the individual's actual ability. That is, there is a distinction between natural capacity and legal capacity. For instance, natural capacity may itself be either the capacity to own property or the capacity to exercise rights over a property. When dealing with legal, contractual capacity, we mean the capacity to exercise rights, not the capacity to own the property. This is so because, under Art 1 of the civil code, it is provided that "*Human person is the subject of rights from its birth to its death.*" Once born, a human baby can acquire rights, even a child merely conceived is considered born and acquires rights wherever his interest so requires provided he is born alive and viable. Therefore, legal or contractual capacity requires only the capacity to exercise rights. That is, the mere possession of rights and duties does not presuppose the capacity of a person to enter into legally binding agreement.

As a rule every physical person is capable of performing acts of civil life unless he is declared incapable by law. That is, every party to a contract is presumed to have a contractual capacity until the contrary is shown. Notwithstanding that, every physical person is presumed to be capable, the law for one reason or another, declares some member or group of society incapable. There are two types of disabilities recognized under the civil code. These are: *general disability* and *special disability*. General disability may depend on the age (minority), mental conditions (insanity of persons) or on a sentence passed upon persons (legally interdicted persons). On the other hand, special incapacity may result from the nationality of a person or from functions exercised by him [her].

When we come to the special agency contract, all the parties involved in such contract have to possess capacity, to effect the agency contract. Specifically, as regards the third party, as a party to a contract, it is obvious that he [she] has to possess the legally required capacity if he wishes to create a legally valid relationship. Likewise the principal must be legally capable for the very reason that when he [she] authorizes an agent to perform a certain juridical act on his behalf, he should necessarily be legally capable of performing such acts. That is to say for a juridical act to be valid; the parties must have the necessary legal capacity. On the other hand, one can not enlarge his capacity by appointing an agent to act on his behalf, that is, the principal can not be

entitled to a better right by merely authorizing the agent beyond whatever right he can personally exercise.

The question is whether or not an agent must have the legally required capacity to act on behalf of a principal. Let us consider the concept on this issue encapsulated under [American Commercial Law Series](#) ", by Alfred W. Bays,

Sec. 9. 'Power To Act As Agent'

Any person, though without power to contract in his own right may act as an agent for another.

A person must be capable of acting in his own right (sui juris) to be principal, for the simple reason that what he has no power to do personally he cannot acquire power to do by doing it through another. But what one may not do for himself because he lacks capacity he may do for another who has the capacity⁹ He may not, of course, bind himself upon a contract of agency if he lacks capacity to contract, but he may, if he chooses, actually perform the function of an agent. Thus, minors may act as agents and the contracts made by them in the name of the principals and pursuant to authority are binding upon such principals. The reason is that the agent does not bind himself but acts as a mere intermediary through which the minds of the contracting parties meet, whereupon the agent has performed his office.

Example 4. Mebrahtom sends his office boy to buy supplies on Mebrahtom's credit from Zeneb. The boy orders the supplies according to his authority. This makes a contract between Mebrahtom and Zeneb as binding as though they had contracted personally.

The Ethiopian civil code, under the agency law nowhere specifically provides that an agent has to possess a legally required capacity to act on behalf of the principal. Thus it is far from being clear whether our law requires capacity of an agent. However one argument could arise that the

Ethiopian civil code quite exceptionally requires that an agent shall have the legal capacity pursuant to art. 2182 [1] and art. 2230[1] of the civil code. The latter article for example states as follows,

“Unless other wise agreed a contract of agency shall terminate by the death of the agent or where he is declared absent, become incapable or is adjudicated bankrupt.”

Reading into this article envisages that the article refers only to an agent who had capacity at the time of authorization but declared incapable at a latter time in which case a principal should not be denied the right to terminate the agency relationship where his agent becomes incapable. Hence, to construe the stated article, as it requires the agent’s legal capacity may be inconsistent with the intention of the drafter of the civil code. Admittedly, what is provided under art.2182 is not different from the above mentioned. Therefore, the requirement of the agent’s capacity even under the Ethiopian law is apparent.

▪ **Consent**

Consent is an agreement that is free from any defect. The freedom of contract is expressed in consent. There are two aspects to consent. First, there must be an agreement on each detail (identity, price mode and day of delivery and payment etc), and secondly consent is the willingness of the parties to be bound by the agreement. If the contract is affected by a defect in consent, it may be invalidated at the request of the party who invokes the mistake.

Many authors believe that consent is the basis of the law of agency, and it explains why the agent can represent the principal. For example agency is defined as the relationship which exists between two persons, one of whom expressly consents that he should impliedly act on his behalf. Similarly, one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act defines an agency.”

However, it is mostly stated that too much emphasis on consent should be avoided. In many cases consent is the basis of the agent’s power and determines its ambit. But there are many

cases, notably the cases of apparent and presumed authority in which the relationship may arise irrespective of or indeed contrary to the real wishes of the parties and to speak of consent in such cases is only to distort the real and usual meaning of the word.

Great emphasis on consent should also be avoided for another reason: namely that it may suggest that all the courts have to do is to look at the facts before them and mechanically determine whether or not they are faced with agency relationship. This is not necessarily the case for the courts have to look at the facts and construe them in a legal manner. The vices of consent for a contract are covered by art.1696-1710 of the civil code. Like any other contracts, if the consent of either the principal or the agent is vitiated by any of these vices, the contract of agency becomes voidable. The party whose consent has been vitiated can have the voidable contract invalidated according to art.1808 [1] of the civil code.

With regard to the main contract entered into by the agent with the third party, in the name of the principals, art.2189 [2] of the civil code gives the principal the right to avail himself of the defect in the consent of the agent. Likewise, sub article [3] of art.2189 of the civil code entitles the third party to set up the fraud of the agent against the principal. Hence the principal can demand the invalidation of the contract between the third party and himself in accordance with art. 1808 [1] of the civil code on the ground that the consent of his agent has been vitiated during the making of the contract. In the same way the third party that has been defrauded by the agent can request the invalidation of the contract pursuant to art.1808 [1].

Article 2189 of the civil code seems to favor the principal in that it gives more protection to him than to the third party. Under sub art [2] of art. 2189 the principal can avail himself of any defects in the consent of the agent. This sub art does not put a restriction as to the type of defect, which the principal can employ, as a ground for invalidating the contract. On the other hand, under sub art [3] of art 2189 the only defect that the third party can raise against the principal is the fraud of the agent. The defect that the third party can invoke for the purpose of invalidating the contract is limited to only one kind of defect. This means that he cannot invoke mistake, duress, false statement, etc, as a defense against the principal. Therefore it is clear that art. 2189 of the civil code provides less protection to the third party than to the principal.

▪ **The Object of Agency Relationship**

The object prescribed in the general provisions of the contract is not the object that can be seen or touched, but the obligations undertaken by the parties. So the object of the contract may be positive or negative. The obligations to give something or to do something are positive obligations whereas an obligation not to do something is a negative one.

Under art.1711 of the Ethiopian civil code, contracting parties are free to determine their obligation but their freedom is not an absolute one-it is subjected to such restrictions and prohibitions as is provided by law. On the other hand, under art.1678 (b) of the civil code, the law imposes on the contracting party to engage in a defined, lawful and possible obligation.

The object of the contract must be defined with sufficient precision. A contract shall be of no effect where the obligations of the parties or of one of them cannot be ascertained. An obligation that is not defined by the parties cannot be defined by courts of law. As art. 1714 of the civil code stipulates, the court may not make a contract for the parties under the guise of interpretation.

The object of the contract must be lawful as provided under art.1716 of the civil code, where the obligations of the parties or one of them are unlawful or immoral, the contract ends in invalidation.

Moreover, the object of the contract must be possible of performance. A contract shall be of no effect where the obligations of the parties or one of them relate to a thing or a fact that is impossible and such impossibility is absolute and insuperable, as provided in Art 1715.

As far as the contract of agency is concerned, there is special problem on the question of lawfulness or possibility of its object. However, problems are usually faced with the requirement of the sufficiently defined object. This is especially true with the extent of the power given to an agent. It is extremely difficult to exactly fix the limits of such power. Since the agent deals with

third parties usually in the absence of the principal, he has nothing to rely on in determining whether the interest of the principal would best be served by performing a certain juridical act except the power of attorney given to him by the principal in advance. As a matter of fact, it may not be possible to enumerate in the power of attorney all the acts whose performance by the agent would further the interest of the principal. On the other hand, if the principal authorizes the agent to do everything that he thinks promotes the interest of the former, there is the danger of abusing the power on the part of the agent.

In view of this problems, it was necessary to find a solution somewhere in between the two extremes. Consequently under the French law, power given in general terms is construed to include only acts of administration. Under this law, the performance of transaction other than acts of administration, calls for an express power. Hence, an agent cannot alienate or mortgage property without express authority.

The Ethiopian civil code has adopted the same solution similar to the French for the problem. As provided by art. 2203 of the civil code, authority granted in general terms includes only acts of management. Naturally, a question would arise here regarding what are acts of management are Art. 2204 gives the answer to this question. Acts done for the preservation or maintenance of property, cancellation of debts, discharge of debts, sell of perishable things and goods intended to be sold, interalia, are acts of management under art.2204. Art 2205 of the civil code explicitly states that express authority is required for the performance of the transactions other than acts of management. Sub-art two of this article particularly forbids the agent to alienate or mortgage real state property without special authority. Thus an agent with the general power of attorney cannot sell the property of the principal. For this purpose, he needs a special authorization. But if he sells one of the properties of the principal without such authority, the latter will not be bound to the third party. Unless the principal ratifies the act of the agent, the agent will be liable towards the third party in the contract.

▪ **Form of Agency Contract**

As a general rule, for the formation of an agency contract no special form is required unless the law provides that the contract of agency be made in a specified form (article 1719(2) and 2180 of

the civil code), or the parties stipulate that their contract be made in a special form (article 1719(3) of the civil code).

There is no special requirement for the form of agency contract. It can be made in any form. But if the law for the contract that the agent concludes in the name of the principal prescribes a special form, the authority to make such a contract should be given in the same form. As provided under art 2180 of the civil code, for instance, art.1725 of the civil code provides that a contract of insurance shall be concluded in writing. Supposing principal (P) authorizes the agent to make a contract of insurance for him, the authority for this purpose must be given in writing. Apart from this, the contract of agency can be expressed, that is, written or oral, or it can be implied, that is, it can be inferred from the conduct of the parties as provided under art.2200 [1] of the civil code.

As briefly discussed above these elements of the contract should be fully satisfied before a valid contract of agency can be formed. The absence of any of these elements renders the agency either voidable or void abinitio as the case may be, and it will be subjected to invalidation by the proper authority.

In this case a question would arise what would be the fate of the contract entered into by the agent in the name of the principal with a third party when the agency contract between the principal and the agent is invalidated for the lack of any of the elements of the contract, which we have discussed above? This issue may be resolved in two different ways. First, it can be argued that since the agency contract is the basis of the main contract, the invalidation of the former should automatically cause the invalidation of the latter. This approach renders the position of the third party insecure in that it makes the validity of the contract that exists between the third party and the principal totally dependent on the existence of the contract between the principal and the agent to which the third party has no connection. This problem can be minimized to a large extent by the application of art.1816 of the civil code, which provides that acts done in the performance of a contract shall not be invalidated when the interest of the third party in good faith so requires. Therefore, although the agency contract is invalidated by the principal or the agent or by any other interested parties in accordance with art. 1808 of the civil

code, the main contract, which the agent concluded in the name of the principal with the third party in performance of the agency contract, remains in force as between the principal and the third party where the interest of the third party so demands. This is however subjected to the qualification that such third party must not have been aware of the facts that caused the invalidation of the agency contract. Hence a third party, which contracted with the agent knowing the possible causes of the invalidation of the agency contract cannot invoke art. 1816 of the civil code.

The second solution is based on the doctrine of separation. According to this doctrine, mandate [the relationship between the principal and the agent] and representation [the relation of the principal and the third party] are independent. Thus there may exist mandate without representation and vice versa. Therefore since the relationship between the principal and the agent on the one hand, and the relation of the principal with the third party on the other are separate phenomena, the invalidation of the agency contract should not by itself constitute a ground of invalidation for the main contract.

According to the above arguments, it is better to adopt the second solution in Ethiopia. because, in the first place, the solution is in line with the doctrinal basis of the Ethiopian law of agency, which is the doctrine of separation, and secondly compared to art.1816 of the civil code, it affords more protection for third parties that the protection under this solution is not restricted by the requirement of good faith on the part of the third party. In other words, since this solution maintains the main contract effective, despite the invalidation of the agency contact, third parties who are aware of the fact that caused the invalidation of the agency are protected as well as those who are ignorant of such facts during the conclusion of the main contract. This seems logical because, as the third party has no connection with the contract of agency, the fact that he is aware of the possible causes of invalidation of such contract should not affect the validity of the contract between the third party and the principal.

❑ **Questions for discussion**

1. A principal, "P" assigns an agent "A" for the sale of tires only. "A" sales 180 tires to "Z" transport company. Among the tires the payment of only 120 tires was effected, and

the remaining 60 tires remained unpaid. "A" then instituted a case against the company Z on the basis of agency relationship, but "Z" objected it on the ground of capacity, that is by claiming that "A" has no capacity.

- Can you advise the company?
2. An agent can be assigned to represent the pecuniary interest of minors.
 - What kind of authority can this be categorized in?
 3. Can you distinguish between internal (subordinate) contract and external (main) contract?
 4. Can you elaborate on the theory of separation? What is its difference from the theory which states that the invalidation of internal contract causes the invalidation of the main contract)?

B. Authority by Judicial Act

A different kind of source of agency is authority granted by the court. That is, an authority to act on behalf of another may emanate from the court's decision. Courts, upon evolvments of some conditions, may appoint some other person to do activities pertaining to the other. The provisions governing court authorization are provided here in after:

This situation is not an agency either by a prior agreement of the parties or by the lawmaker. But it arises by the order of the court upon application. This case of agency is governed by Arts 2253-2256. The person appointed by order of the court is called the curator. Thus the parties involved in here are the person represented and the curator. This appointment of curator is usually necessitated when the person whose interest (s) are (is) to be represented is not in a position to appoint an agent by reason of being a way, ill or any similar causes (Art 2255). In these cases only limited persons (relatives, spouse and nobody) shall apply to a court with jurisdiction for the appointment of an agent to protect the interest of the person to whose benefit a curator is required. (Art 2254).

Only relatives and/or spouses have these rights in order to protect the interest of the person represented against misuse of his interest. The person to be appointed is going to carry out those "acts as are of an urgent nature" [Art. 2255(2)]

The curator is expected to work for the interest of the person represented, and the court may give directions on how to carry out the obligations and may impose liability on the curator. The curator has to inform his appointment as soon as possible to the person he/she represent. The curator is a contractual agent for all the rights and duties [Art. 2256]. Because of lack of space and time we cannot write down the relevant provisions of this subsection. Thus, you are advised to refer frequently to the Civil Code provisions, relevant and cited above.

Article 2253 Principle

The authority to do an act or acts of certain kind on behalf of another may be given by the court to a person here in after called a curator.

Article 2254 application for appointment

- 1) *an application for the appointment of a curator may be made to the court by a relative or by the spouse of the person to be represented.*
- 2) *It may be made by no other person*

Article 2255 Decision of the court

- 1) *The court shall not grant the application unless the person to be represented is not in apposition to appoint*

C. Authority Derived from the Law.

In most cases, the source of agency is authority of an agent derived from the agreement of the parties, that is, a bilateral agreement between a principal and an agent. Apart from this usual source, agency relationship could emanate from the operation of the law, that is, agency authority is derived from the law itself. Consequently, the consent of the principal has no role in creating the agency relationship and hence it is beyond the principal's consent that agent – principal relationship comes into existence. This usually happens where a person to be represented is not in a position to appoint his agent for one thing or another. Moreover, it is due to the necessity to safeguard the interest of the person to be represented. Further, agency is created

by operation of the law, as opposed to agency created as a result of agreement of the principal and agent; there is already a single contract, that is, a contract which is concluded by the representative, on behalf of the one represented, with the third party. Hence, the internal relationship between the representative and the represented, in this case, is legal and not contractual since it is created by the operation to the law.

In spite of the legal relation created between the representative and the represented, the rights and duties arising there from are governed by the provision pertaining to agency contract once the law has established the relation.

Questions for discussion

1. Can you mention the sources of authority under agency contract?
2. What requirements (elements) are demanded to form an agency relationship out of contractual relationship?
3. Can you give a case of authority (agency) derived from judicial act?
4. Explain and give an example of (authority) agency derived from the law?

2. Authority by Virtue of Contractual Agency.

We have discussed what authority is under the above topics. This topic focuses on authority, which is derived from the agreement of the contracting parties, agent and principal. Hence in reading this topic we shall see it from the perspectives of the common law approach, the civil law and the Ethiopian approach in order to understand it well.

2.1 The common Law Approach. (Law of Agency, Am. J: comp. law vol6 1957)

The foundation (theoretical) of the modern concept of agency in the common law is the doctrine of identity of principal and agent, in which this theory is generally expressed in the phrase ‘**qui facit per alium facit per se**’ [meaning, he who acts through another acts himself]. While adopting this theory, however, no distinction was made between the internal relation of principal and agent on the one hand, and the external relation between principal and agent towards third a

party on the other hand. The reason what the common law theory failed to make distinctions between these relations of the principal – agent and a third party was due to the maxim provided above, which involves the contract of only two persons.

In the perspective of commercial life, the central problem in the law of agency is the protection of the rights of the third party, who has transacted business with an agent who was not authorized to transact that business. “The theory of identity in regard to this problem adopts the maxim that the unauthorized acts of the agent does not bind the principal” But, owing to commercial needs force in certain conditions, some exceptions are accredited to the theory of identity in order to protect a third party who acts in good faith, with an agent. The theory of identity states as follows:

“ Where a mercantile agent, with the consent of the owner, is in possession of goods or documents of title, a third party to whom the agent sells pledges or otherwise disposes of the goods or documents in the ordinary course of his business is protected if that third party acts in good faith and has not at the time of the disposition notice that [the agent] has no authority to make the same. In that instance the disposition shall be as valid if the agent were expressly authorized by the owner of the goods to make the same. (F.H Lawson, 1969,p131)

According to these circumstances, the test adopted by the common law pursuant to the doctrine of identity in order to protect a third party accepting in good faith a disposition by the mercantile agent is that “ whether the goods or documents were entrusted to him by their owner”. “This test operates irrespective of whether the mercantile agent carried out the unauthorized disposition in his own name as will often be the case or in the name of his principal. (F.H Lawson, 1969, p131) An impediment arises, however when an agent is warned by his principal not to sell or dispose unless the latter tells the former to sell or dispose in his name without disclosing his principal’s name. In giving a solution to such a problem the common law theory” disregards whether the representative acted in the name of the principal or in his own name as irrelevant and it is the “entrusting” of the goods or documents which makes the person a mercantile agent.

The Theory of agency in the common law is classified into three types of agents. These are

- Agents acting for a named principal,

- Agents acting for an unnamed principal, and
- Agents acting for undisclosed principal

These three agents have a common function. That is, they act as an instrument in order to procure links between the principal and third parties in contractual relations. The major problem that may arise in an agency contractual relationship from the point of view of a contracting third party is to ascertain with whom he has contracted. Nevertheless, it is obvious that in the theory of agency contract, rights and duties arise primarily with the contracting third party and the party with whom he has made the main contract, since the third party may be ignorant of the existence of a principal. However, in order to solve such a problem, as discussed above, the liability test, which the common law agency doctrine has developed for undisclosed agency, provides the necessary principles.

The theory of undisclosed principal corresponds to the indirect agency of the civil law. The theory of liability test of the common law, more over, pays more attention as it was discussed before to the test whether the goods or documents of title come into the possession of the agent by the consent of their owner, and such test does not give any regard to the name test which emphasizes in whose name the goods or documents of title came to the agent which is the concept of the civil law.

Hence, as the common law doctrine of identity avoids the fragmentation typical of the civil law situation, the fundamental distinction that is created by the civil law concerning direct and indirect agency is completely unknown to the common law, since its concept of agency is sufficiently general to embrace both forms of representation. (I.e. A commission agent and commercial agent.)

- ❖ Discuss the theory of identity and identify the distinctions with the theory of separation?

2.2 The Civil Law Approach

The contract of mandate, which emerged with the growth of commercial transaction served to a considerable degree the practical substitution of agency. The mandatary [agent] in his course of contractual power was entitled to act in the interest of the mandate giver with a third party, but in his acts that he does with third parties, he may not bind his mandate- giver liable to the third party. The mandatary [agent] himself is responsible for the acts or contracts he entered into with the third party.

The theory of mandate demands that each party has certain duties and responsibilities that he should respect while the parties are in the course of the contract of mandate. Based on the above principle, the mandatarius (agent) and the mandator (principal) were bound to the following duties, (William L. Burdick, 1938, pp 193):

He/she had to execute the mandate reasonably in good time. , He/she was also bound not to exceed the mandate, to exercise diligently, to render accounts and to make over to the mandator (principal) all benefits accruing from the mandate including rights of actions against third parties. However among the duties of the mandator (principal) were to indemnify the mandatarius (agent) against expenses, loss and liability incurred in the execution of the mandate. Besides, he is bound not to revoke the mandate to his prejudice.

The mandate that exists between the mandatary and mandator's could also be terminated by mutual consent of the parties, by a unilateral revocation or renunciation of either party or by the death of either party.

The doctrine of agency in civil law legal system was founded in the theory of separation. What is the theory of separation?

“ The most characteristic feature of the theory of agency in the civil law is the strict conceptual separation of the mandate, i.e. the contract between the principal and agent. From the authority, that is the power of the agent to contract for the principal with the third party.”

We can understand that the emergence of the doctrine of separation in the civil law system has contributed to a considerable degree in discriminating the difference between mandate and authority. The theory of separation, which was, expounded by a German Jurist Laaband, could clearly point out the different aspects of mandate and authority as follows.

‘Mandate points to the internal relations between two persons – the mandator and the mandatory, while representation (authority) on the other hand, points to the external aspects of the transaction; the relation of principal and agent towards third parties.’

Based on the above point the very relevant issue to be considered is that the agent’s power to conclude a contract of mandate. That means the internal contract that is made between the principal and agent in regard to the extent of authority that the principal is giving to his agent is in principle ineffective with regard to a third party. This view implies that the third party does not bother about the contract of mandate that exists between the principal and agent.

Owing to the development of the theory of separation in the civil law legal system, the feature of the various types of intermediary ship is defined to underlying internal relationship between the principal and the agent. . To mention an example, the German civil code provides thirteen types of intermediary ships. In comparison to the German civil code, the French civil code adopted only four main types of intermediary ship. To mention them: ^(F.H. Lawson, 1969, pp125)

- Independent agent
- Employed agent
- Commission agent and
- Broker

With regard to the agency relationship from the view point of a third party, the key problem pinpoints ‘with whom has the third party contracted ‘. The civil law theory to answer this issue, adopts the test that ‘to ascertain whether the agent has contracted in a representative or personal capacity.’

According to the test adopted by the civil law, regarding the ascertainment of whether the agent acted in a representative or personal capacity, is the name test, which is in line with the direct and indirect agency that is a leading doctrine of the civil law.

The above concept implies that

‘ ‘ If an agent acted in his representative capacity, normally on behalf of his principal, the agency is to be direct, and if he acted in his own name, but for the account of his principal, the agency is indirect. (,F.H. Lawson, 1969, pp136)

Pursuant to the civil law theory of agency, ‘ ‘the direct agent is referred to as a commercial agent and the indirect agent as a commission agent, while in the common law terminology both types of representatives are described as agents.’ ’ (F.H. Lawson, The Roman law reader, 1969, pp125) with no distinction in between them.

To put it in a nutshell, under the theory of agency in the civil law legal system, in order to make an agent to be bound by his acts to an unnamed principal, he/she must at least disclose his intention of contracting as an agent or the situations must indicate this. Otherwise, the contract he concludes with a third party is considered as if he/she acted in his personal capacity, and it will not be important that he had the undeclared intention of acting for a principal and was duly authorized to do so or that he acts on the account of his principal.

This method leads to the distinction drawn between direct and indirect agency. Starting from this point of view, the civil and common law legal system adhere to different patterns.

Under the common law legal system, ‘ ‘if an agent was duly authorized, but acted in his own name, without disclosing the existence of his principal to the third party, the principal can nevertheless intervene and sue the third party directly.

Under the above category of agency (under the common law) the named and an unnamed principal corresponds to the direct agency of the civil law, while the undisclosed principal

corresponds to the indirect agency, even though their application in commercial transactions is practically different.

Pursuant to the varied patterns, which the indirect and undisclosed agency follows, in the activities of commercial life, the practical effect resulting in the final analysis is completely different.

Hence the civil law follows the following practical application. ‘‘In the case of direct agency, (commission) the commercial link between the third party and the principal (commettant) is based on two consecutive contracts. The contract between the third party and the commissioner and between the commissioner and the principal (commetant), and these two contracts is immutable’’ (F.H. Lawson, The Roman law reader, 1969, pp140)

According to the above two-contracts construction in the civil law legal system of direct agency, in principle there is no direct relation between the principal and the third party.

When we see the principle of undisclosed agency, the two –contracts construction is avoided. Accordingly, when we see the practical application of the undisclosed agency in business transactions, the concept lies as follows

‘‘If the agent was duly authorized but acted in his/her own name, without disclosing the existence of the principal, the latter can nevertheless intervene and sue the third party directly. And in the case of an agent acting for an undisclosed principal, the third party has a right of election when the existence and the identity of the agent becomes known to him/her later. The third party may either to retain the agent as his/her contracting party, or to treat the principal as such.’’

Pursuant to the above concept, once the third party is aware of the existence of the a principal, a direct contractual relationship shall be established or created between the principal and a third party in which direct rights and duties accrue under that contract between the third party and the principal. Due to the one contract situation, in the Common law agency theory ‘‘no assignment

or transfer of property from the agent to the principal is necessary, and as the case of normal direct agency was duly authorized, no liability falls on the agent.”

To give a summary of the above discussion, in both the civil and common law legal systems, there exists a different approach and practical situation of the agency theory. However, there are certain principles in common. Under this common principle, if a direct agent acts for his principal within the scope of his authority, privity of contracts does exist only between the principal and a third party. Hence in this case, the agent will not be liable to the third party. In addition to this, he will not acquire rights the against the third party. Therefore, under both the civil and common law legal systems, it is admitted if a direct agent acts for the reason that he has no authority or exceeds his authority, in such a case, unless the principal ratifies the unauthorized acts of such an agent, the agent himself shall be held liable for the third party unless the principal knew or ought to have known the defect in the authority. Under such cases, the French code provides the third party with a claim for indemnity. The German law, in such cases again permits the following right.

A third party has a right of election as against the agent, and therefore, he/she can claim specific performance or damage, but if the agent was aware of his/her lack of authority he/she is only liable for the damages that the third party actually suffered in the consequences of the main contract.

2.3. The Ethiopian Approach

Genesis, Development and Principles

The Roman law has been exerting a significant impact on the formation and development of modern private laws in many countries of the world, starting from the era of Justinia who was the Emperor of the Roman Empire around the 6th century A.D “Ethiopians at this time were in permanent communication with the Roman Empire of the East from which they derived their law (the Law existing legal system) based on the Roman law of Justinia.

From the above point we can observe that, even prior to the adoption of the *Fetha Negest* around the 16th century; the Roman law of Justinian influenced the Ethiopian legal system in its earliest stage. The *Fetha Negest* was not directly adopted from the Romans. It was a translation of the Egyptian Arabic prospects /version/ into ‘Geez’

Based on the point the “Ethiopian Christians declared the authority of the religious canon translated from Arab into Geez the Liturgical language of the Coptic church, and this model is related to the Byzantine tradition of law, and the *Fetha Negest* which is translation into Geez of Arabic precepts of the law which found their first inspiration in the book of Syro-Roman law and consequently in the Roman”

The historical genesis of the *Fetha Negest*, as discussed above, has connections with the early laws of the Roman Empire. The *Fetha Negest* under chapter 30 deals with the concept of mandate. This provision, which is provided for under chapter 30 dealing with the contract of mandate, provides rules governing the relationship of mandatory (Principal) and mandatory (agent). It doesn’t draw any distinction between the contract of mandate and authority. In this case, it means the contract of mandate embodied in the *Fetha Negest* is concerned only with the internal relations of the principal and agent; it doesn’t deal with the external relations of principal and agent towards third parties.

Hence, based on the concept encapsulated under the *Fetha Negest*, regarding the contract of mandate:

“The mandatory (agent) used to accept the mandate with or without remuneration; and a mandate was not held valid unless the mandatory (principal) gives it verbally and the mandatory [agent] accepts the word of the mandatory either formally or by his action”

(Rene David “1962, P 192)

In addition to the above point, the mandatory (agent) was obliged to follow the instructions provided from the mandator (principal). For example, the agent (mandatory)

Is prohibited to sell any thing on credit, without the order (direction provided beyond the fixed price. In addition to this, the Fetha Negest had a concept, which states that the mandator was to refrain from intervening whenever there is a dispute between the mandatary and the third party. According to this concept, the mandatary should confront the third party and be liable to third parties if any. (Paulas Tzasuam 1968, pp.172)

The aforementioned concepts indicate that according to the Fetha Negest, the contract of mandate had only to say with regard to the internal relation of the mandate giver and the mandate receiver (mandatary or agent). Hence the external relations i.e the relation of the mandatary or mandatary with a third party was not given a cover.

The concept of mandate provided under the Fetha Negest is similar to that of the continental Europe codes that had been promulgated prior to the coming into view of the separation theory. As provided earlier, in the discussion of civil law theory of agency, the distinction between authority and mandate was actualized after the theory of separation was identified. The theory of separation laid a clear demarcation between mandate and authority. Hence countries that adhered to the continental legal system adopted this approach.

To mention examples “The above concepts are found encapsulated under art. 164 of the German civil code, art 32 of the law of obligation of Switzerland, civil code of France art 211, and art. 2179, 2199 of the civil code” of Ethiopia

In addition to this, as provided by Michal Kindered, “ the principal sources of the Ethiopian civil code with respect to the law of obligation was the Swiss Federal code of obligations, and the French civil code was an important source”

From the above discussion point of view, the Swiss federal code of obligation and the French civil code, which became the sources for the Ethiopian law of agency, incorporate the concept of separation under their legal system. Hence, we can deduce that the current representation law of Ethiopia adheres to the theory of separation. Therefore, the Ethiopian Law of agency deals with

the respective concepts of mandate and authority in different provisions of the code. Hence, the internal relations of the principal and agent are dealt with by arts 2179-98 of the civil code. However, the external relations of the principal and agent towards the third party are governed by articles 2179-98 cum Art 2199-2265 based on art 2233 of the civil code.

The Ethiopian civil code also adheres to the mode of the civil law theory in agency representation. This is through adopting the name test theory.

Art. 2197(1) states:

“An agent who acts in his/her own behalf shall personally enjoy the rights or incur the liabilities deriving from the contracts he makes with third parties, not with standing that such third parties know that he is an agent.”

The concept of the above provision is that it stresses the principle that, as far as an agent acts in his own name, but for the interest of his/her principal, the third party should not directly sue the principal where there is non-performance of contracts. What does this mean?

As far as the agent enters into a contractual agreement with a third party, without disclosing his intention to a third party that he is transacting on behalf of his principal, the agent shall be liable for damages incurred on third parties. And since, the agent acts in his/her own name, the awareness of the third party that he/she is an agent is not an issue and it does not make him free from liability. In the same manner an undisclosed principal who has an interest on a third party has no right to get his remedy by brining a direct action against a third party.

The concept of commission agency is also incorporated under the civil code.

Art 2234(1) states

“ *the commission to buy or to sell is a contract of agency whereby the agent, called the commission agent, undertakes to buy or to self in his own name but on behalf of another person, called the principal, goods, securities or other fungible things.* ”

Under the Ethiopian law of agency, so as to create a commercial link between the principal and the commission agent, two consecutive contracts should be made by the commission agent. These are the contract that is made between the third party and the commissioner [representative] and the relation existing between commissioner and the principal.

According to the above point, there is no direct relation /connection/ between the principal and the third party. The main function of a commission agent, according to the civil Code, is to sell, buy or forward goods in the name of the commission agent but on behalf of the principal. The concept of commission agency is governed by special provisions (Art 2234-2252) of the civil code.

❖ **Question for discussion**

Which Theory of agency representation does Ethiopia follow, the theory of separation or Identity? Why? Discuss it with friends?

Chapter Two

Agency Contract under the Ethiopian Law

Introduction

Under the previous chapters we have already seen the justifications why we need agency law. The principles adhered to by Ethiopia are already provided under the previous topics. Under this chapter we shall deal with the concepts of agency in non commercial activities, generally the internal contract and the requirements to form such a contract, the scope of power of the agent, the powers and authorities of a general agent; and a special agent. This chapter commences with the internal contract, for it is the internal contract which is a basis for the external contract. In addition to this concepts on the external contract are part of the discussion of this chapter.

Chapter Objectives:

At the end of reading this chapter the students will be able to:

- ❖ Discuss the formation requirements
- ❖ Identify forms of offer and acceptance to establish contracts of agency;
- ❖ Appreciate the scope of a power conferred on the agent;
- ❖ Explain the scope of power of an agent conferred on the agent;
- ❖ Discuss the powers and authorities of a general agent;
- ❖ Realize the powers and authorities of a special agent.

2.1 The Internal Contract or Contract of Mandate

2.1.1. Formation and Requirements

Pursuant to Art. 2179 of the Ethiopian civil code, we find two sources of representation: the agreement of the parties or by law. In most cases, the authority to represent a person on a transaction with a third person emanates from the agreement of the parties and seldom, when the social and economic realities so demand, such authority is conferred on a person by operation of

the law. When the authority to act on behalf of another emanates from the agreement of the parties, the outcome will be that there will be two separate contracts. These are the internal contract between the principal and the agent and main contract concluded by the agent in the name of the principal with a third party. Accordingly, the internal relationship between the representative and the represented is legal as opposed to contractual. Since such kind of relationship emanates from the law [by the operation of the law], it does not require a special consideration. Hence, our discussion under this topic will focus on agency contract or mandate. In order to form a contract, consideration is one among the essential elements in the common law legal system. However, this is not an essential element of contract under the Ethiopian law of agency. Agency is one of the special forms of a contract. Therefore, in order to form an agency contract, consideration may not be essential under the Ethiopian law of agency. In addition to this, the elements of a valid contract provided for under art. 1678 of the civil code are also applicable for the formation of contract of a agency. These elements are:

1. Sufficiently defined, possible and lawful object
2. Consent and capacity
3. Form should be fulfilled.

Now let us see each of the requirements for the formation of an agency contract.

1. Object

A contract is of no effect unless its object is sufficiently defined, possible and lawful as provided under art. 1715 and 1716 of the civil code. When we consider the agency contract, the most difficult area is related to sufficiently defined object. This particularly happens especially with the extent of the power given to an agent. Because it could be very difficult to fix such a power, for the agent usually deals with third parties in the absence of the principal, it is difficult for him to rely on the principal in determining whether the interests of the principal would best be served by performing a certain juridical act except the power of attorney given to him by the principal in advance. Hence it may not be possible to enumerate the power of attorney all the acts whose performance by the agent would further the interest of the principal. On the other hand, if the principal authorizes the agent to do everything he thinks promotes the interest of the former, there is a risk of abusing the power on the part of the agent.

The law in the above case tries to find a solution somewhere in between the two extremes. Accordingly, under the French law, power given in general terms is construed to include any acts of administration. According to this law, the performance of transactions other than acts of administration calls for an express power. Therefore, an agent cannot alienate or mortgage property where there is no express authority.

In a similar fashion, the Ethiopian civil code adopted the same solution as that of the French for the above-mentioned problem. As stated under art. 2203 of the civil code, authority given in general terms encapsulates only acts of management. In here one can raise the question of what acts of managements are. The concept of acts of management is provided for under art. 2204 of the civil code. Accordingly, acts of management are: “Acts done for the preservation or maintenance of property, collection of debts, discharge of debts., sell of perishable things and goods intended to be sold interalia”. In addition to this, art. 2205 of the civil code explicitly states that express authority is demanded in order to perform acts other than acts of management. When we look at sub art (2) of art 2205, it specially prohibits the agent to alienate or mortgage real state property without a special authority. Hence, an agent who is granted a general power of attorney cannot sell a property to the principal. In order to do so, he should be given a special authorization. However, if the agent sells among the properties of the principal where there is no authority to such effect, the principal will not be bound to the third party. Therefore, the agent in this case will be liable towards the third party, unless the principal ratifies the acts of the agent.

2. Capacity

“He who gives a mandate exercises the will to do the act which he charges his mandatary to do in his place. He must therefore have the capacity necessary to do such an act, so that there is no particular capacity to a give a mandate; this capacity depends on the nature of the acts to be done”

A principal can only delegate transactions, which he is capable to perform himself. He cannot extend his legal capacity by acting via an agent. Therefore a minor can appoint an agent only for the specific acts, which he is capable under the law to perform personally.

Rights and duties are created directly on the principal by the contract, which the agent concludes in the name of the principal with the third party. Hence, regarding this contract, the capacity of the principal is an essential element of the contract because we have seen that this element is required to form a valid contract. And since agency is a special form of a contract, this element will be applicable there too.

The capacity of an agent is a matter of indifference with respect to the main contract. Hence, a principal can appoint an incapable person as his agent. If the former is confident enough in the honest and intellectual capacity of the incapable person. And this is owing to the fact that his agent is not responsible for the acts he performs in the name of the principal. The views with regard to the capacity of an agent and principal have been discussed under chapter one and no further discussion is required in here.

When we consider the Ethiopian civil code, a contract whose object is affected by incapacity can, upon the request of the incapable person, be invalidated [art1808 sub (1)]. However, if the incapable person does not apply for invalidation, the validity of the contract persists and the other party will be bound thereby. Therefore such a trend is equally applicable to the agency contract as it is a special contract.

3. Consent

The vice of consent of contract are covered by arts 1696-1710 of the civil code. As in any other contracts, if the consent of either party [principal or agent] is vitiated by any of these vices the contract of agency becomes voidable that the party whose consent has been vitiated can invalidate the voidable contract pursuant to art. 1808 [1] of the civil code.

Concerning the main contract entered into by the agent with the third party in the name of the principal, Art. 2189[2] of the civil code gives the principal the right to avail himself to the defect in the consent of the agent. Similarly, sub art. [3] of art 2189 of the civil code entitles the third party to set up the fraud of the agent against the principal. Therefore the principal can demand the invalidation of the contract between the third party and himself pursuant to art. 1808 (1) of the civil code, on the basis of the vitiated consent of the agent during the making of the contract. Similarly, the third party, which has been defrauded by the agent can request the invalidation of the contract according to art. 1808[1] of the civil code.

Pursuant to art. 2189 of the civil code, more favor is given to the principal in protecting him than to the third party according to art 2189[2]; the principal can avail himself of any defect in the consent of the agent.

Sub art [2] of art 2189 of the civil code doesn't put a restriction as to the type of defect which the principal can employ as a basis of invalidating the contract. On the other hand, sub art [3] of art 2189 states that the only defect that the third party can raise against the principal is "the fraud of the agent". The defect that the third party can invoke for the purpose of invalidating the contract is limited to only one kind of defect. That is, mistake, duress, false statement etc. cannot be invoked by the third party as defenses against the principal. Hence, one can conclude that art.2189 of the civil code renders more protection to the principal than to the third party.

4. Form

As a rule no special form is required to conclude a contract. This is left to the choice of the parties to opt the form in which their contract is to be made. Sometimes however, this may not be true. Where a special form is required by law or when parties by themselves stipulate to observe a special form, the contract will not be affected unless it is made in conformity with this formal requirement. Hence it non-observance of the form that parties agreed or the law prescribes makes the contract a mere draft. Hence doesn't bind parties, for it will not have any legal effect.

Let us consider the following provisions of the civil code.

Article 1720 Effects of provisions so to form

- (1) Where a special form is prescribed by law and not observed, there shall be no contract but a mere draft of a contract.*
- (2) A contract shall be valid notwithstanding that fiscal provisions, such as provisos relating to stamp duty or registration fee, have not been complied with*
- (3) Unless otherwise provided, a contract shall be valid notwithstanding that prescribed measures of publication have been complied with.*

As provided above, the contracting parties are free to make their contract in the form they assume is proper except the mandatory provisions prescribing a special form. The degree of this freedom of making a contract in the form that the contracting parties opt is not free of any limitation.

It is only upon the fulfillment of the following two conditions that the freedom mentioned above, works. These conditions are:

- a. There should not exist other forms that the law prescribed to be adhered to by the contacting parties.
- b. The parties should not stipulate any special form when they make their contract.

Agency contract is a special form of a contract; hence the above provisions, which are applicable to the general contracts, can apply to the agency relationships.

Offer and Acceptance for the Formation of Contracts of Agency

Consent is a vital element for contracts. A contract is formed via consent expressed by the contracting parties. Consent is expressed through offer and acceptance. There is no special form where offer and/or acceptance in the case of agency is to be expressed. It can be made “orally, or in writing or by signs normally in use or conduct such that in the circumstance of the case there

is no doubt as to the party's agreement", unless the party who has presented an offer demands a special form of acceptance. [Look at Art. 1681 of the civil code].

Acceptance of an offer of agency can be made either expressly or impliedly. The term expressly indicates the fact that acceptance can be made by any form less of silence. Impliedly as provided by Art 2201 of the Civil Code the fact that agency contract is presumed formed, when the offeree remains silent for an offer requiring formation of agency. Yet, the formation of agency requires an express acceptance where the offeree is the one who "carries out in an official capacity or professionally, or where he holds himself out publicly" of such functions which he/she is required in the offer to be an agent. This is envisaged under Art 2201 of the Civil Code. Those offerees who require an express acceptance for the formation of contract of agency are points of dialogue among us. Which groups of persons are they? These include: attorneys, forwarding agents *del credere* agents, and commercial agents, etc who carry out such functions for their livelihood, professionally.

2.1.2 Scope of Authority

Once a contract of agency is formed, the parties to the contract of agency assume the obligations that arise out of "the terms of the contract and by such incidental effects as are attached to the obligations concerned by custom, equity and good faith, having regard to the nature of the contract of agency " (emphasis added). This is provided by Art 1713(1) of the civil code as rearranged in conformity with the agency provisions.

The scope of the power assumed by the agent is determined by the contract-giving rise to agency. Yet, the scope of the agency assumed by the agent might not be expressly determined by the contract. In the latter case it is determined by the nature of the transaction to which the agency relates [Art. 2202].

The scope of agency conferred on the agent may either be special or general as provided by Art 2202(2) of the Civil Code. A power conferred to an agent is either special "for a particular affair or certain affairs only, or general for all the affairs of the principal." However, an agent may be

conferred both special and general power of authority in a single transaction for different affairs; these two powers exist exclusively. This means when the scope of the power conferred is meant general agency, it can by no means be a special power.

2.1.2.1 General Agency

Depending on the scope of the power conferred on the agent the authority one has received may be general agency. Such type of agency is conferred in general terms. In such cases, however it is not an easy task to classify a power conferred either as a general or special agency is an agency conferred to the agent in such a way that the former is empowered to manage the affairs of the principal. Usually, it is expressed in terms like: all my affairs, anything related to my property, any affairs which I am called to perform etc.

The scope of such authorities conferred in general terms is limited only to the management of the said affairs. It is confirmed under Art. 2203 that “agency expressed in general terms shall only confer upon the agent authority to perform acts of management.”

General agency relates to preservation/maintenance of those affairs/ rights of the principal. A general agent is given the power to do a number of transactions involving a continuity of service. A person, conferred with agency in general terms is only empowered to sustain the rights of the principal and is not empowered to perform acts of disposing the rights of the principals. Hence, such agents have a limited power less of disposing the rights of the person represented.

These acts of the agent are said to be acts of management. What are acts of management? The law has unequivocally listed down those acts which are named acts of management under Art. 2204. These are:

- ❖ Acts done for the preservation of maintenance of property;
- ❖ Leases for terms not exceeding three years
- ❖ The collection of debts
- ❖ The investment of income;
- ❖ Discharge of debts

These acts are acts of management of a similar nature in terms of preserving the rights of the represented.

Similarly:

- ❖ the sale of crops;
- ❖ the sale of goods intended to be sold; and
- ❖ The sale of perishable commodities and other similar acts are categorized as acts of management.

However, these acts are acts of disposition, a close look at these activities reveals that the purpose of conferring power to conduct these activities for an agent protects the loss of the rights of the person represented. And hence, these acts are acts of management.

Here, students are required to appreciate each of the activities listed under Art. 2204. All of them are relief cases where the law is interested to preserve the interest of the person represented. Look at a power of agency given from Seifu to Mollalign. Seifu is the owner of a house in Bahir Dar City, Kebele 14. He has decided to leave Bahir Dar for Addis Ababa for two years. He has also an interest to upgrade his house to a modern standard. This requires him to contact third parties like the Municipality of the town, the Kebele Administration and similar organs of the town. At the same time he has to attend his education in Addis Ababa for two years. At this stage can you explain what kind of agency he could confer to his agent Mollalign? Is that preferable for him to confer a general or special power? Obviously he is advised to confer a general power of authority. This is because he is only interested on the agent to do acts of management and not acts of management.

2.1.2.2 Special Agency

Special agency is an authority different from general agency in that it empowers the agent to dispose the rights of the person represented. Sometimes, this authority is named as act of disposition. A special agent is a person who is given power by the principal to act in a particular

transaction. Usually, it does not involve continuity of services unlike general agency. For example, an agent empowered to deliver a truck to a third party is a special agent. In the case of special agency the act to be performed by the agent is specifically provided, like: sale of a house, lease of a land etc. The power given to a special agent is broader than a general agent. However, it is apparent that the power of the general agent looks so broader in scope.

What is meant by a particular affair or certain affairs only under Art 2202(2) of the civil code? The terms signify the fact that the acts to be performed by the special agent have to be specified in such a way that the agent and the principal have priorly agreed on what acts are to be performed. Special agency confers upon the agent authority only to conduct the affairs specified by the agreement and their natural consequences according to the nature of the affair and usage. [Look at Art. 2206(1)].

It is provided in the form of an illustrative list under Art 2205 that these acts require a special power. Where an agent is called upon to perform acts other than acts of management, a special authority is required [Art 2205(1)]. This allegation of the law makes the list of acts under sub art.2 of the same provision an illustrative one. And hence, not only those acts listed but similar acts of disposition other than those of acts of management require a special authority of the agent.

Now let's look at each of the affairs that require special authority as listed down under Art 2205(2). This helps us to add similar cases that require special authority and in turn to identify those acts which do not require special authority.

- i) alienate or mortgage real estate; to alienate a real estate (big interest for the principal) requires the principal to decide on it with the knowledge of its consequences. It cannot be effected by a mere general statement made by the principal. It requires him to make an express statement that he has conferred a special agency on the representative to alienate his estate. Similarly, it requires a special authorization for an agent to mortgage a real estate (an immovable, for example). Because mortgage may ultimately result in disposition of the property (real estate).

- ii) To invest capital: unlike investing income, which is only an act of management, investing capital belonging to the principal requires a special authority. Do you see the difference between capital and income? Why does investing a capital require a special agency while income does not? Take time to appreciate the reasons. The answer lies in differentiating between capital and income.

The law has differentiated between these two acts in such away that the general agent needs to be able to invest the income of a certain business which he is appointed to as a general agent. This is because he/she is denied the interest of the principal.

Take this case. An individual who has been running a restaurant business has intended to leave for abroad and hence has appointed a friend of him in general terms. According to Art 2204(1), the agent is empowered to invest the income he collects from the business. That means he may buy sheep to slaughter for the restaurant, he may buy some other raw materials for the business. That is investing income. But he is not authorized to begin a new business for example with the money he has earned from the restaurant business. That is investing capital.

- iii) To sign bills of exchange: This is purely empowering a third party to draw money belonging to principal. This obviously requires a special authorization.
- iv) Effect settlement, consent to arbitration. These acts require a special authorization from the principal. This is because effecting settlement or that of arbitration requires disposition of rights of the principal.
- v) Make donations: A person only authorized in general terms, cannot make a donation which requires a special authorization.
- vi) Bring or defend an action: Once again an individual cannot bring an action or defend a case until he secures a special authority from the principal.

Look at the case below appreciated by one of the courts of Ethiopia. This is relevant in appreciating the scope of the agent. It was between Almaz Tefer and the Municipality of Hosa'ena.

This was a case where the plaintiff claims that her piece of land in the town of Hosa'ena was expropriated by the defendant without paying her in accordance to the law of the country. She prays for the order of the law of the country. She prays for the order of the court for the restoration of the property and to grant her compensation for damages and costs of litigation.

The defendant in its statement of defense pleaded that the amount of compensation was paid to Ato Delelegn Kassa, the plaintiff's authorized agent and attorney. It further alleged that if the agent denies this payment, it is able to prove it. But it is admitted by the agent, the defendant is not liable and hence lets the suit be dismissed. To prove this allegation the defendant has produced two documentary evidences:

- a) an agreement in which the plaintiff and her relatives appointed Ato Delelegn as their agent and attorney to represent them in suits of land or other property, in which they may sue or be sued.
- b) That money was paid to Ato Delelegn by the defendant and payment voucher was produced as evidence.

However, the plaintiff reaffirmed that Ato Delelegn was authorized to bring or defend action but not to receive payment.

The court held as follows. The case involves the question of agent's scope of the power. It is not disputed that Ato Delelegn is the plaintiff's attorney and agent. However, the plaintiff argues that Ato Delelegn's power is limited to representing her in legal proceedings and that he has no power to receive payment on her behalf. On the other hand, the defendant argues Ato Delelegn has a power of attorney as well as authority to receive payments. As mentioned above, we say that Ato Delelegn is the plaintiff's agent and attorney. Then the court goes on to restate the definition of agency contract and special agency as provided by the law. The court decides that when an authorized agent fails to hand over to the principal money that he has received on behalf of the latter, the principal must demand (sue) the agent and the third party who has carried out its obligations. Hence, the court has dismissed the case in favor of the defendant.

How would you have solved it, had you been the judge of this case? Would it be different from what is provided above? Use the spaces provided below and jot down the main points you would include in your judgment, if you feel yours is different from the judgment given by the court either in the arguments or final disposition.

The court has rightly identified the fact that the agent was authorized to bring and defend suits. No express authorization was given to Ato Deleegn to receive payment on behalf of the plaintiff. But the agent is given a general authority because he is named agent of the principal. The question here becomes whether a general agent can receive payment on behalf of the principal. Art. 2204-2205 identifies groups of special and general agency acts. In these provisions “Collection of debt” is an act of management which can be committed by an agent empowered in “agency expressed in general terms.” Therefore collection of debt is part of an act of management. But to bring or defend an action requires a special authorization by the principal. Hence the judgment of the court was sound.

2.1.3 Authorities of an Agent

The authority of the agent is the power within which the agent can act with the effect of making the principal liable with third parties. It is provided under Art. 2206(2) that anything that the agent does in excess of that authority will not affect the principal either to benefit or make him liable unless he has acted *post facto* acknowledging the act done, in accordance with the doctrine of ratification which we are going to assess at a later time. Moreover, if the agent acts outside his authority he may be liable to his principal for breach of the contract of agency or otherwise; or to the third party for breach of warranty of authority.

The authority to act on behalf of another is the result of actual authority. And the act of one on behalf of another brings the effect of linking the represented with the representative only when there is an authority actually given. Yet, there are also authorities which do not actually exist but looking like to exist, apparent. These two varieties of authorities to act through another are actual or as it is sometimes called real authority and apparent authority. The relevance of this group of authorities for our legal system shall be discussed below.

2.1.3.1 Actual Authority

Actual authority is the authority which in fact the agent has been given by the principal under the agreement or contract which has been made between them or by virtue of subsequent ratification or by law. Actual authority exists in two forms: express and implied. By virtue of the above mentioned provision, Art. 2206, the authority of the agent to act for another arises from what are specified by the contract, express authority and their natural consequences according to the nature of the affair and usage implied.

In one case, it was asserted by the court that an actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. The extent of the authority is to be ascertained by applying ordinary principles of construction of contracts including any implications from the express words used in the contract.

Express authority is specifically created and limited by the terms of the agreement or contract which give rise to the agency relationship. It is express when it is given by express words such as when the principal authorizes the agent to deliver a truck of a specified type to a third party in a given time and place.

Implied authority on the other hand is one implied from the nature of the business which the agent is authorized to transact in express terms. For example, where an agent is empowered to conclude a written and registered sales contract with a third party, it can be implied that this agent is empowered to buy a pen, a piece of paper, or sometimes to employ an expert to prepare a written contract when required by the law. Implied authority is important for the carrying out of the authority expressly granted. Moreover, where such implication can be made they are made on the basis that the principal has in fact consented to the agent's having authority to act in such a manner or as regards such transaction. Hence, if there is evidence that the principal has consented otherwise or not so consented, then this implication cannot be made. The important feature to note here is that the consent of the principal is a necessary part of implied authority. Hence this authority is one aspect of the agent's actual or real authority.

2.1.3.2 Apparent Authority

Apparent authority is not an authority arising from the consent of the principal whether express or implied according to the rules discussed in the preceding section. The agent's authority here is the product of the principal's conduct, his conduct that the agent is authorized to act on his behalf. It is an authority which apparently exists, having regard to the conduct of the parties. In fact/reality, it does not exist; but as a matter of law arising out of the factual position of the parties in the eyes of third parties. In these circumstances third parties assume that the agent has authority to act on behalf of the principal.

Apparent authority must be carefully distinguished from implied authority, which we have discussed in the above section. Implied authority is the authority which in fact the agent possesses as a result of the construction of the contract of agency in light of the business efficacy or of the normal practices and method of trade, business, market, place or profession in which the agent is working. Apparent authority on the other hand is the authority which, as a result of the operation of the legal doctrine, the agent is considered possessing, in view of the way a third party would understand the conduct and statement of the principal and the agent.

Unlike the common law notion of apparent agency/authority, under the Ethiopian law it does not, in principal result in the effects of agency. Yet, it does not mean that apparent authority does not result in the liability of the principal towards the third party and the agent is free from liability. When the agent has acted with an apparent authority, both the principal and the agent are liable towards the third party with which the agent has acted.

What is the nature of apparent authority under the Ethiopian legal system?

It is provided under Art. 2195 that the principal is liable with the agent in three cases:

- i) Where the principal has informed a third party of the existence of the power of attorney but failed to inform him of the partial or total revocation of such power;

- ii) Where the principal failed to demand the return of a document evidencing power of attorney, if any;
- iii) Where the statement, behavior has made third parties believe the existence of authority.

Now let's discuss each of the cases that give rise to apparent authority.

- i) Third party being informed of the existence of authority by the principal.

What is meant by *power of attorney*? There is confusion in the usage of the phrase *power of attorney* within the agency provisions of the Civil Code. It used to mean a written authority which is named a deed under the common law. As well it is used to mean power of authority. Look at the Amharic version of article 2182(1)... ከ ስልጣን ደብዳቤ የተገኘዉ ስልጣን ደብዳቤ : : Even the English Version of the Civil Code uses the two terms interchangeably and results in confusion.

The Civil Code was originally drafted in the French Language and then translated into Amharic and English. Unfortunately, a number of discrepancies exist between these versions in Chapter 1 of the Agency Title, Title XIV. One of them is related to the usage of the above two terms. The English versions of Arts 2181, 2182, 2195(a) speaks of a “power of attorney”. A power of attorney is sometimes thought to be a formal written document, deed as named in the common law. The French merely uses the word “power” (*pouvoir*) or the words “power of representation” (*pouvoir de representation*), neither of which embodies a requirement or implication of formality or of a written document. The same is true of the Amharic (ስልጣን ጠይቅ የሰጥዎት ስልጣን). Therefore the English words “power of attorney” within the Civil Code should be read merely as “power” without any implication of special formalities or of a written document. For further translation notes please look at “A commentary on the Law of Agency- Representation in Ethiopia”, by W.L Church, Journal Of Ethiopian Law Vol. III No. 1 pp. 314-316.

Hence, the term attorney under Art 2195(a) is the authority the agent has acquired. Once an authority is established to the agent from the principal, the latter may inform this authority to third parties as additional evidence (to the third parties) for the existence of power of authority

for the agent to act on behalf of the principal. In this case even when the authority comes to an end either partially or totally by a unilateral declaration of the principal (ratification) or by way of agreement, the third party to whom the establishment of the authority was informed need to be informed too as to the new fact. Hence, even if for the establishment of agency between the agent and the principal there is no need for the principal to inform to third parties, if he has done so, revocation of the power does not bring the obligation to an end concerning these third parties. That information given to third parties need to be revoked by the same speech made to the third party. The none fulfillment of this is making the principal liable with the agent. This is equivalent to the Amharic saying which goes, “ በ ስ ራ ስ ፋ በ ስ ፋ ደ ጠፋ ”

- ii) Failure of the principal to demand for the return of document evidencing agency: when the power to act for another is evidenced by a written instrument the revocation of authority is not alone sufficient to terminate the relationship between the principal, the agent and third parties. This is because the agent even when his authorities are terminated conceptually may act in the name of the principal supported by the written evidence unless this document is returned to the principal. To protect the interest of the principal on the one hand and the third party on the other hand the principal is entitled to demand the return of the document to him upon revocation (Art. 2184). When the agent alleges that the document is lost/destroyed the principal needs to seek a judicial remedy, i.e. declaration that the power evidenced by the written instrument is revoked. This is supported by Art. 2185 of the civil code.

A close look at Art 2195(b) has provided the return of the document and seeking a judicial remedy cumulatively. This would apparently mean that even when the agent has returned the document evidencing power of authority, the principal must in addition secure a judicial order. Do you feel that these two obligations/concepts go together? Should it be a cumulative requirement or an alternative one? That is, if the principal has secured the document upon the will or otherwise from the agent, does he need to go to court to declare the power of authority is revoked? Or is it when he is unable to secure it that document that he should seek a judicial declaration of the above content?

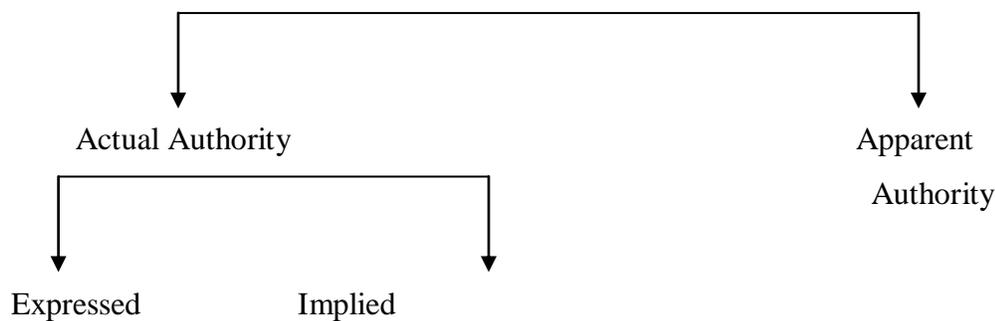
However, it is provided cumulatively under art 2195(b) in the sense that the principal must do both of them (secure the return of the document and seek declaration of end of authority), it is provided under Art. 2184 cum 2185 that the principal has a right and duty to demand return of document when the authority comes to an end. But the agent may not return the document because it may be lost/destroyed. In the latter case the principal may demand the court to declare that the document is revoked at the expense of the agent. Hence to seek a judicial declaration to the effect that a power is revoked works in place of a return of a document. Finally the cumulative requirement for return of the document and judicial declaration is meant when the agent fails to return the document and not as an additional duty on the principal on top of the return of document.

- iii) Where the principal causes in a certain manner for a third party to believe the existence of authority:

This one is the third cause making the principal liable with the agent towards third parties. In this last case, what is explained is: there was no contract of agency between the agent and principal earlier unlike the above two cases. It is the case where the “principal” and/or the “agent” alone has made certain statements or acts that give rise to third parties to believe that these two persons have agency principal relationship among themselves. Here it is not proper to use the terms agency and principal, because these persons have not agreed to develop agency-principal relationship. But a mere statement or act made by the individual in front of third parties enabling the latter to believe that there is agency principal-relationship legally makes the principal liable with the agent. For example, in a certain place where people get together, X has declared in the presence of Y that he is an agent to the latter in doing some juridical acts. When Y remains silent, third parties may perceive that there is agency principal relationship among these persons. This is true even when the principal has not intended to employ any agent. Similarly, when a housewife has acknowledged acts of a maid/servant while she has committed a credit sale for certain periods, third parties are in a position to believe reasonably that the wife has granted authority to the servant to buy goods of at least the same kind. And hence, the lady is liable with the maid.

This relationship under the common law gives rise to agency-principal relationship. But it does not give rise to agency-principal relationship in the Ethiopian context. Yet, it does not mean that it shall have no legal effect. When one of the causes we have mentioned above is evident by virtue of Art. 2195, the agent is liable towards third parties for she/he has acted in the absence of an authority. And the principal is also liable together with the agent for his statement, remaining silent, failure to act and generally because of his conduct. Generally, we can conclude that there is nothing called apparent agency in Ethiopia. But the principal is liable towards the third party with the agent to the occurrence or otherwise of one of the acts under Art 2195 of the civil code.

Authority of the Agent



2.1.4 Modes of Representation

There are various ways by which the agent may represent (act for the principal) the principal. While he/she acts on behalf of the principal the way he approaches third parties may be different. The Ethiopian law has acknowledged three modes by which the agent may represent the principal. However, these three modes of representation do not have the same effect under the Ethiopian law.

These modes of representation are:

- I) Disclosed agency
- II) Partially disclosed agency; and
- III) Undisclosed agency

Let's briefly discuss each of the modes of representation.

I. Disclosed Agency

As the name shows disclosed agency is the mode of representation in which the agent reveals the name of the principal to the third parties with which he/she is interacting (on behalf of the principal). Disclosed agency is recognized under Art 2189(1) of the civil code in such a way that the representation of the principal by the agent shall have the effect of affecting the principal when the agent discloses the name of the principal.

“Contracts made by an agent in the name of another within the scope of his power shall be deemed to have been made directly by the principal” Art 2189(1).

The effect of agency springs from this provision of law of agency, that is, the name of the principal disclosed to the third party and the agent acting within the scope of his power. The latter element, acting within the scope..., is to be discussed in the next chapter, “effect of agency”. Therefore the name test, disclosing the name of the agent or the agent acting in the name of the principal is an essential element of agency under the Ethiopia law. Hence, the agent acting not in his own name or in the name of any other person but in the name of the principal makes the mode of representation disclosed agency. By the same token the third party enters into contract with the agent with the full knowledge that the person with whom he/she is interacting is the agent and whose name as a contracting party is stated is the principal.

II. Partially Disclosed Agency

Partially disclosed agency is the situation where the agent represented the principal on the latter's behalf but in the name of himself. In this case the third party may not know the fact that the person with whom he is interacting is an agent. Or the third party believes that the contract is made between the third party and the owner of the affair himself.

Partially disclosed agency is revealed under Art 2197(1) of the law of agency.

“An agent who acts on his own behalf shall personally enjoy the rights or incur the liabilities deriving from the contracts he makes with third parties, notwithstanding that, such third parties know that he is an agent”.

Before we look at the message under this provision we need to look at the title of this provision and the wording used. The title of this provision is “Agent acting on his own behalf.” But there is a problem in the title of this provision in using the term “--- behalf”. Because if the agent acts on his “behalf” there is nothing called agency. Agency is after all acting on behalf of another (the principal). When he acts on his own behalf that is to be governed by a different law governing the specific transaction he has entered into. The Amharic version of this provision uses the term “name” in place of “behalf.” The Amharic version seems to use the right terminology that fits the rationale of the provision. Look at the observation made by Church, in the above cited Journal. He proceeds, the English version of Art 2197 speaks of an agent “acting on his own behalf,” the French and Amharic accounts speak of an agent acting “in his own name” or in “his (agent’s) name” (*en son nom propre*; በ ስም ስ ም) the distinction is important, since an agent can act on behalf of another but still in his own name (for example a commission agent; Civil Code Art 2234) The essence of representation as it is embodied under art. 2189 is that an agent acts in the name of another. Art 2197 is clearly intended to cover the opposite situation; that is, when the agent acts in his own name. If it did not, there would be no provisions covering the circumstances where an agent acts in his own name. The situation where an agent acting in the name of another but in his own behalf is covered essentially by Arts 2187 and 2188. For these reasons, the Amharic and French Versions are the only ones reasonable and the English should be read accordingly.

Accordingly, the term “behalf” in the title of the provision as well as the body of sub art (1) of this provision has to be replaced for “name”. And hence the content of the provision shall be read as:

Art. 2197 agent acting on his own name

(1) An agent who acts on his own name shall personally enjoy the rights or incur the liabilities deriving from the contracts he makes with third parties, notwithstanding that such third parties know that he is an agent.

This type of representation is said to be partially disclosed because the agent does not disclose the name of the principal but discloses that he is making the contract on behalf of a principal, and the third party is also aware that there is a person behind the scene whose name is not disclosed. This makes the agency partially disclosed agency. This is made clear by the provision (Art. 2197(1)) in stating “--- notwithstanding that such third parties know that he is an agent”. Even if this expression signifies the fact there is a possibility that the third party may not know that the agent is acting on behalf of another, it is also meant that the third party may know that the person in front is an agent acting on behalf of another. The former case is a case of partially disclosed agency.

The effect of agency in this case is: it does not affect the principal but the agent himself shall enjoy the rights and incur the liabilities arising out of the transactions. There is no liability the agent would incur.

III. Undisclosed Agency

Undisclosed agency is the mode of representation in which there is no disclosure of the fact that the front person is acting on behalf of another person. That is neither the fact that he is acting on behalf of another person nor the name of another person is made known to the third party contracting. Therefore, the agent acts on his own name and he is acting on his own behalf. The latter is inferred from the situation where the third party is not aware of the fact that the agent is acting to the benefit and on behalf of another. This form of representation is inferred from the expression of Art 2197(1) last proviso. That is “, --- notwithstanding that such third parties know that he is an agent.”

This last mode of representation does not bring any effect of agency. Yet, the person who acts in his own name and on his own behalf shall enjoy the benefits or liabilities himself.

By way of conclusion, only disclosed agency which is termed as complete agency under Art 2189 of the Civil Code shall bring effects of agency. The other two forms of agency explained under Art. 2197 of the Civil Code are not capable of affecting the principal and hence bringing the effects of agency.

EXERCISES

- i. How is agency contract formed?
- ii. Prepare a statement fulfilling a sample offer of making your friend an agent.
- iii. What does scope of agency tell?
- iv. What is general agency?
- v. What is special agency?
- vi. Write 2 points of difference among general and special agency?
- vii. What does act of management mean?
- viii. What does act of disposition mean?
- ix. Are the lists under Arts 2204 and 2205 exhaustive, or illustrative? Support with reasons
- x. What is actual authority?
- xi. What is apparent authority?
- xii. What is implied authority?
- xiii. How many modes of representation do you know? List down.
- xiv. Which of the lists above are recognized under Ethiopian law?
- xv. Where are partially disclosed and undisclosed agency stated under Ethiopian law? What is the effect of undisclosed agency under Ethiopian law?

Hypothetical and Real Cases

1. Ato Adugna has decided to alter his residence from Dessie to Gondar for change of work place. Ato Adugna has decided to sell some of his goods. But he was unable to sell them himself and appointed his cousin Yalew to sell some of his goods to anybody. Unfortunately, Yalew has sold for a price lower than expected to Kebede. This was because Yalew was mistaken for the identity of the good he has sold.

Question:

- Can Ato Adugna invalidate the contract Yalew has concluded with Kebede? State the relevant laws.

2. Would your response be different in the above hypothetical case if Ato Adugna has instructed Yalew to sell it on a fixed price?
3. Ato Zelalem, a middle class businessman was interested to buy a luxurious car. But he was unable to buy himself because of his work load. Therefore he has agreed with Abe to buy a car for not more than Birr 400,000.00. Abe is an active business boy but a minor. This agent has bought a beautiful car from Melaku for Birr 350,000.00 on behalf of the Principal.

Questions:

- ❖ Is there a valid contract between Melaku and Zelalem?
 - ❖ Let's assume that after the agent has concluded the contract with Melaku, he has succeeded in declaring the contract of agency (the internal relationship) invalid because he was incapable at the formation of the contract. What is the fate of the contract concluded by the agent and the third party? Can the third party succeed in invalidating the contract concluded between the agent and the third party on behalf of the principal?
 - ❖ What is the effect if the third party who himself was incapable at the time of formation of the contract?
 - ❖ Let's assume that the contract concluded between the agent and the third party was established from a threat of force by the agent. Can the third party succeed in invalidating the contract?
4. Ato Mamush has appointed Ato Yohannes to buy a car and conclude insurance agreement on the car. This agreement was concluded orally.
 - a) The insurance company has instituted a claim to invalidate the relationship it has made with the agent on behalf of the principal on the ground of formality requirements. Would it succeed?
 - b) Is it possible to say that the car is insured?
 5. Which of the following acts would be considered an act of management?

- 1) Ato Zelalem, the manager of Melkam's store purchases a broom with which to sweep the store.
- 2) Ato Zelalem purchases wood which will be used to repair the store.
- 3) Ato Deresse purchased wood which would be made into furniture for sale. Ato Deresse is manager of a furniture factory.
- 4) Ato Zelalem and Deresse borrow money from a bank to finance each of the above purchases.
- 5) Ato Seifu manages a furniture factory. He buys a new lathe for the factory. Before this purchase, the factory contained;
 - a) 3 Lathes
 - b) 100 Lathes.
- 6) Ato Deresse signs a contract for the building of an extension on the present factory building.
- 7) Ato Deresse signs a contract for the lease of a plot of land for this new extension.

6. The position held by a certain person may imply that he/she has certain powers as an agent. Consult Title II, Book I of the Commercial Code.

Do the following persons have the power to accomplish the act in question?

- 1) Ato Solomon is a salesman in P's store. He sales merchandises to Ato Tiruneh.
 - 2) Ato Solomon is a sales man in P's store. He signs a receipt for the delivery of goods which will be sold in the store, without express authority.
 - 3) Ato Solomon, a salesman in P's store, sells goods to Ato T on credit without express authority.
 - 4) Ato Mulat is the manager of P's store. Ato Temesgen has owed the store Birr 100,000.00 for a year. Ato Mulat accepts Birr 75,000.00 as a compromise on the claim because he knows this is all he can expect to get from Temesgen
1. Ato Paulos' guard (Zebegna) acting in Paulos' name but without authority, purchased a bicycle from Ato Tola for Paulos' son.
- Did the guard have 'apparent authority' to enter into such transaction?

If yes, what is the effect? If no, what is the effect?

2. At a party Ato Genetu told everyone including Ato Mengesha that he was the agent of Ato Paulos. Ato Paulos, who was also available at the party heard this statement of Genetu, but said nothing. The next day Ato Genetu approaches Ato Mengesha and sells him Paulos' automobile.
 - a) Has Ato Mengesha any claim against Ato Paulos?
 - b) If Mengesha has received possession of Paulos car, can Paulos recover the car?

Note: It should be clear that an apparent authority will not give an agent the power to create a contract between principal and third party although the agent will have the power to make the principal liable to a third party. This limitation may be explained by reference to Art 1678 of the civil code. One of the essential elements of a valid contract is that the parties must give their consent. In the case of apparent authority, the principal has not consented to bind himself contractually. Nonetheless, the principal has led the third party astray and so may be extra contractually liable.

3. When Aberu was hired as Melkam's cook, Melkam made it clear in the beginning that Aberu was not to do any of the shopping for the house hold. Nonetheless, Aberu began to shop at the New York supermarket, charging every item in Melkam's name. For three months, Melkam paid the bills but now refuses to pay for the fourth.
 - a) Is Melkam liable to the New York supermarket?
 - b) Why is it so?
4. Ato Melaku is a farmer residing in one of the Woredas of south Gondar Zone. He has been married for the last 5 years. Unfortunately, in the year 1999 he concluded divorce. In the year 1999 because of the uncommon whether condition of the region he does not collect a satisfying quantity and quality of cereals from his farm. However, he has collected some; which did not qualify as a seed for the 2000 farming year. His former wife's brother Ato Yitbarek was his best friend who would have been helping him on such situations as usual. But the divorce Ato Mekku has committed with his wife has broken the friendship between these people. Ato Yitbarek is a well know rich farmer

there. And he is able to supply the required seed of wheat for Ato Melaku had it not been for the disagreement. Hence, he is unable to demand Ato Yitbarek either to buy or loan the required amount of seed.

While he has been in this trouble, he has devised a mechanism to send another friend of him Ato Sewale to buy the required wheat in the latter's name disclosing the fact that he is buying the good as an agent but without disclosing the principal is Ato Melaku. Both have agreed on these points.

Questions:

- 1) Ato Yitbarek has delivered the required quintal of wheat before he has received payment. What are the rights of Ato Yitbarek?
- 2) Ato Yitbarek has concluded the contract of sale of two quintals of wheat with Ato Sewale. Later before he has delivered the goods Ato Yitbarek has discovered the fact the principal was Ato Melaku. Hence, he has refused the delivery of the wheat. Is the refusal supported by law?
- 3) Ato Mamusha and Sisay were good friends residing in Bahir Dar. They have agreed that Ato Mamush is to stay in Dire Dawa as agent of Sisay with a remuneration of birr 500.00 (five hundred birr). After 3 months Sisay has terminated the relationship upon no cause.

Questions

- ❖ Is there any possible remedy Mamush would invoke?
 - ❖ What is the act of Sisay named?
5. Ato Adamu who has no prior relationship with Ato Belew, purchased an automobile from Ato Tadesse in the name of Adamu. One week later Ato Belew hears of the transaction and informs Tadesse that he will be bound by the contract. Tadesse now refuses to deliver the car, claiming that Adamu was not an agent within the meaning of Art. 2190.

6. Ato Ager acting outside the scope of his authority, purchased an automobile in the name of Luel from Tadesse on 1st January 2006. Ato Ager ratified the contract on February 1st 2006. On what date did he purchase the automobile?

7. Ato Teme purchased an automobile from Alemu, paying him Birr 40,000.00. Alemu never delivered the automobile. Teme now discovers that the automobile belonged to Ato Zelalem and that Alemu was an agent of Zelalem. Alemu paid Zelalem Birr 20,000.00 retaining the other 20,000.00 as a loan. Alemu left for America. What rights, if any, has Zelalem against Teme?

2.2 The External Contract or Contract of Representation

A. Formation

The contract that is created between the principal and the third party through an intermediary of agents is commonly known as the external contract, and it is the most important aspect as far as the law of agency is concerned. It is concerned with the rights, duties and liabilities that could be created as between a principal and third party through the intermediary of an agent.

The fundamental principle of agency is that an agent who acts in the name and on behalf of a principal within the scope of the latter is power create direct contractual relationship between the principal and the third party without the agent personally being bound by the contract concluded. This indeed is the very essence of agency for a direct contractual relationship to be created between the principal and the third party. It has to be emphasized that the agent must have acted in the name and on behalf of the principal within the scope of his power. Once these elements are met as regards the effect of the contract, the agent steps out and only the principal and the third party remain to be parties to the contract concluded. Consequently, the rules of ordinary contract, which could operate between two contacting parties, will be applicable to the principal and third party relationship.

B. Complete or Actual Authority

What do we mean by complete or actual authority?

An agency relationship may arise from an express or implied agreement. Where this is so, determining the scope of the agent's express or implied authority becomes a major issue. This will be examined in the following discussion.

Agency however, may result without agreement of the principal and the agent. This can happen in the following instances”

- Where the doctrine of apparent authority can be invoked;
- Where a person has authority of necessity;
- Where, as a result of the doctrine of ratification, an agency relationship springs up ex post facto, and;
- Where the law authorizes one person to represent another;

i. Express Actual Authority

The extent of the agent's actual authority will depend upon the true construction of the words of his appointment, to which question we must now turn our attention. If the agency agreement is oral, the precise limits of the agent's authority will be a matter of evidence. If on the other hand, the agreement has been put into writing, then the relevant document will have to be examined. In such cases the scope of the agency is to be ascertained by applying ordinary principles of construction of contract.

ii. Implied Actual Authority

Article 2189(1) of the civil code provides two express and one implied requirements for a contract concluded by one party to be binding between the third party and the other contracting party. These are:

- There must be an agency relationship;
- The agent must have acted in the name of the principal and;

- The agent must have acted within his scope of power;

The second requirement is purely factual in the sense that one has to look only at the contract (if it is written) or the attending circumstances to determine whether the agent acted in his own name or in the name of the principal. On the other hand, the third requirement is a question of law that is what is and what is, not within the scope of the agents power is purely a question of law. That means the courts have to look at the facts and construe them in a legal manner. That means the court cannot look at the facts before them and mechanically determine whether the agent has acted within his scope of power or not. This is because agency is not a matter of agreement only but it is also a matter of social and public policy. This is best understood by having regard to the difference between power and authority. The essential characteristics of agency is the fact that the agent is vested with a legal power to alter his principal's legal relations with third persons and that the principal is under a correlative liability to have his relations altered. This power must be understood as a legal concept whereas authority is a factual concept. The two should not therefore be confused. Authority is the sum total of the acts which the principal and the agent have agreed that the latter can do and in so doing bind the principal. In other words, when the principal confers authority on the agent this means that principal and agent have agreed that certain acts should be done by A on P's behalf. Thus if P confers authority on A (factual situation) then A will have power to affect P's relations by exercising authority (Legal situation). This should not be taken to mean that the principal has conferred power on the agent. Power is strictly a legal concept.

The principal does not strictly confer the power of an agent but by the law; the principal and the agent do the acts, which bring the rule into operation as a result of which the agent acquires power. In other words, it is the authority the principal confers on the agent to do certain acts which brings the rule into play and vests the agent with the necessary power to affect the principal's legal relations with third parties. It may be the case that the agent can sometimes affect his principal relations even though he has no authority or has exceeded the authority that has been given to him. But, to what extent this can be done is a matter of law and as such it is a question not merely of logic but also of a social policy.

It should be clear from the above that the concept of power is different from that of authority in that power is a legal concept and not a factual situation. But it is also a wider concept since power may exist where authority is lacking. This can be explained as the fact that power and authority emanate from different sources. The existence and extent of power is that power is determined by a public policy; authority, on the other hand, is limited by the expressions of the principal's will as contained in the agreement with the agent. As a result, in certain cases, an agent who is neither expressly nor impliedly authorized to do certain things may nevertheless have power to bind his principal and confer rights on a third party.

When the source of the authority is the law, (such as the authority of the guardian and the tutor), determining whether the agent has acted within his scope of power is a relatively easy task. This is because more often than not, the law will determine the scope of power of the agent. For example, look at arts 265-312 of the civil code for power of the guardian of the tutor in representing a minor.

However, the task is problematic when the source of the authority is contract. In such cases, the scope of the power of the agent is determined in accordance with the contract (see article 2181(1)). Such a task is rendered difficult by two facts.

First, the existence of a contract of agency may be implied from the conduct of the parties. If a specific form is not expressly provided with respect to the main contract, the contract of agency may be express or implied. No formality is required for an appointment of an agent except when the agent is expected to make a contract, which has to be in writing or has to be evidenced in writing. Therefore an authority to represent the principal is implied when it is inferred from the conduct of the parties and the circumstance of the case. In such cases determining the exact scope of power is problematic.

Second, even when the authority of the agent is express, determination of the exact scope of power is problematic not because the agency contract is oral (in such cases the precise limits of the agent's authority is a matter of evidence) but because of the possibility of interpretation and

because of the possibility of applying implied terms-not mentioned in the oral or written contract but are part of the contract any way.

C. Unauthorized Agency and Ratification

I. Unauthorized Agency or Agency of Necessity

The emergency power of agency may emanate from a law. And it is cases where the principal has some manageable interest but fails to manage it. This time in the absence of a due authorization, some other person may undertake activities bearing legal effects pertaining to the principal to avoid the loss the latter may encounter .Such kind of agency is referred to as agency of necessity (unauthorized agency)

Article 2257- Scope of Application

Unauthorized agency occurs where a person who has no authority to do so undertakes with full knowledge of the facts to manage another person's affairs without having been appointed an agent.

Article 2265- Effect of Ratification

Where the principal is bound by law to ratify the transaction or he in fact ratifies it, the provisions governing agency shall apply (art.2233).

Agency of necessity happens when a person does not represent an agent on his behalf but conditions dictate the management of his affair. This kind of agency relationship arises when a person who has no authority to act for another person, undertakes with full knowledge of the facts to manage this person's affair without securing prior authorization.

This kind of agency exists only under certain conditions. These conditions must be of an emergency nature. When these conditions dictate, agency of necessity will come into view. In agency of necessity, the conditions must be reasonably necessary. While considering what constitutes reasonably necessary, apart or in combination to juridical acts, material circumstances

are to be taken into account. To give an instance, a person who put out a fire, which broke out in his neighbor's house while the latter was away, is considered as an agent of necessity. What this person did is deemed reasonably necessary having regard to the risk that happened on the property or interest of the person represented.

Hence, the following conditions have to be fulfilled in order for a valid unauthorized agency relationship to exist.

- i. What is done by the unauthorized agent is to be reasonably necessary.
- ii. The principal must not have consents to the management of his affair by the acting person.

The agency created would be a proper one if the principal gave his consent. Absence of consent on the part of the principal is attributed to the impossibility of tracing or communicating what is happening to his interest. For instance, if the person who acted on behalf of another knows the whereabouts of the principal and could easily contact him before the danger appears, he is not considered as agent of necessity. Let us again consider another case. A was in possession of goods that belong to B. He was instructed to keep- the goods in due care. Meanwhile, a condition that could render the goods purposeless (valueless) emerged. A tried to communicate with the owner who was far away, so many times but failed. Following this an individual Z came to buy the goods at a reasonable price before they perish. Accepting the offer, A sold them.

Under the above example, A had no authority to sell the goods; his power was limited to the rendering of proper care to the goods. However, during the management of the affair of cases that is mentioned above, anyone can embark upon the management of the affair of some other person. In the above case, A is considered as an agent of necessity and his act therefore binds the principal.

The person who has represented the principal will be compensated for the damage he sustains in consequence of the act he performs for the principal.

- iii. The acting person must have known that he has no authority to do so and yet undertake, with full knowledge of the facts, to act on behalf of the

principal. In other words, the acting person must have intended to manage the principal's affairs.

- iv. The agent must act to the benefit of the principal. Failure to do so may entail liability upon him. The provisions governing agency of necessity do not apply when the person acted on behalf of the principal doesn't undertake to the principal's benefit.
- v. An agent must act in the utmost good faith. His act should not be performed in a manner breaching good faith. Whether the agent has acted in good faith or not can be inferred from the circumstances such as from the act of the agent.

An agent who acted in the absence of any emergency to take action cannot in any way be considered one who is acting in good faith.

The agent (not duly authorized to do so) can undertake to do juridical acts pertaining to the principal, when all these requirements are met. The principal, provided that all the above conditions are met cumulatively, shall ratify his act. In a nutshell, the principal for whose benefit the act is performed shall ratify it. When the conditions for ratification are satisfied, a principal ratifies an agent's act, when, with full knowledge of the act, he accepts or retains the benefit of the act, or brings an action to enforce legal rights based upon the act, or when he defends an action by asserting the existence of a right based on the unauthorized transaction.

Upon the fulfillment of the above conditions, it is mandatory to make ratification. The principal to whose benefit the act is made in the absence of his consent shall accept the act as performed by himself. Ratification relieves the agent of any liability for the principal has undertaken to be in his shoe. If there is any right that the third party is available with as a result of the transaction the agent of necessity has made, it is the principal who ratified the act that the third party obliges.

It is obvious that the principal is bound by the acts performed by the unauthorized agent only where the management of his affairs is undertaken in his own interest.

❖ Question for discussion

Discuss the situations which force the principal to ratify the acts of the agent?

▪ Ratification

The agent binds his principal when he contracts, on his principal's behalf and within the scope of his authority. There are instances where an agent may act on behalf of his principal without any authority or exceeding his authority. Sometimes, the agent may also act under an authority, which has lapsed. In such cases no agency relationship is created. The person, on whose behalf the agent acts, has the option to accept or repudiate the fruits of the unauthorized dealing. If he opts to accept or adopt the agent's act as if he had actually been authorized, agency relationship will evolve consequently. The adoption of unauthorized act is called ratification. When the principal chooses to ratify, the agent is indeed to have acted within the scope of his power.

Article 2192 Effect of Ratification

Where the contract is ratified, the agent shall be deemed to have acted within the scope of his power.

In here we can note that ratification could either be implied or express. Ratification is express when it is made in clear words, and we call it implied when approval of the unauthorized act is made by conduct.

In relation to this, the principal on whose behalf the unauthorized act is done has the discretion either to ratify or repudiate the act. And this may rely on the fruits of the act. If the fruits of the act are promising, then the principal, most of the time wants to ratify the act.

There are instances where the principal may be forced by law to ratify unauthorized acts. Article 2207 of the civil code talks about this.

Article 2207-Obligation to Ratify

- 1. The principal shall, where good faith so requires, ratify the act done by the agent notwithstanding that he departed from his terms of reference.*

2. *The provisions of sub-article (1) shall apply where it is reasonable to admit that, in the circumstances, the principal would have extended the scope of the agent's authority, had he been aware of the situation.*
3. *The agent may not require the principal to ratify where, before acting, he had the possibility of securing authority from the principal or where, after having acted, he omitted forthwith to inform the principal.*

As provided under art. 2207(1) above, the principal may be compelled to ratify unauthorized acts were good faith so requires. This is a situation where the principal is expected to have extended the scope of the agent's authority had he had prior knowledge about the situation. And if the agent had communicated the situation to the principal, before he committed the unauthorized act after having acted, the principal would be obliged to ratify the act. And yet, when the principal's interest requires committing or doing the unauthorized act, the principal is compelled by law to ratify that act.

Rights and obligations on the unauthorized contract are created from the moment of the conclusion of the contract; that means, ratification has a retrospective effect.

The individual on whose behalf unauthorized dealing was made must be capable of entering into juridical acts at the time the unauthorized act was committed. This implies that persons who are incapable or else inexistent during the formation of a contract cannot ratify the act later on when they become capable of performing juridical acts.

Now let us see the relevant provisions of the civil code,

Article 2190-Abuse or lapse of power

- 1) *Contracts made by the agent in the name of another outside the scope of his power may be ratified or repudiated at his option by the person in whose name the agent acted.*
- 2) *The provisions of sub art. (1) shall apply where the agent acted under the authority which has lapsed.*

Article 2191 – Option of Principal

1) the third party having entered into the contract with the agent may demand that the person in whose name the agent acted immediately declare whether he intends to ratify or repudiate the contract.

Article 2192- Effect of Ratification

Where the contract is ratified, the agent shall be deemed to have acted within the scope of his power.

We have already stated that ratification has a retroactive effect and the act is deemed to have been performed by the agent having valid authority to represent his principal. Hence such retroactivity may be imposed against a third party.

Where the third party, who entered into a contract with an agent, finds that the latter acted without authority, he may demand that the person in whose name the agent acted immediately declare whether he intends to ratify or repudiate the contract (Article 2191(1) of the civil code.) The third party cannot, upon finding of the fact the agent lacks the authority, cancel the contract on his own and destroy the principal's power to ratify by withdrawing from the contract.

In order for ratification to be immediate or not depends upon the custom or the circumstances surrounding the case.

A valid ratification should fulfill the following conditions.

- The person ratifying must have had the present ability to do the act himself or is capable of performing juridical acts. In other words, the principal must be competent enough.
- The person for whom, the act was done must have been identified or the circumstances must have been such that he was capable of identification.
- The agent must profess to act as an agent on behalf of an identified principal. The person acting must have acted as agent for his principal.

- The principal or person represented to be the principal must have been in existence at the time the act was done and must have been competent to do or authorize the act done;
- The principal or person represented to be the principal must have had knowledge of the material acts at the time he ratified;
- The third party must not have cancelled the transaction.

In addition to the above, the following can be established from ratification.

If an act that was not authorized is ratified, agency relationship will be created between the principal and the agent. The principal will enjoy the fruits of the contract and also incur losses or liabilities that may emerge from the representation. And;

A contractual relation is maintained between the third party and the principal from the moment of ratification.

❖ **Questions for Discussion**

1. What are the effects of ratification?
2. What conditions should a valid ratification fulfill?

CHAPTER THREE

EFFECTS OF AGENCY

Introduction

Once a contract of agency is formed it has got effects. The principal obligation of a lawfully formed agency is the *relationship between the principal and the third party*. This happens without the principal forming the contract with the third party himself in person. This is the mystery of agency. This triple relationship brings obligations among the three parties: the principal and the third party; the principal and the agent; the agent and the third party. It is the obligation of these parties that is made the subject of this chapter.

Chapter Objectives

After completing this chapter students will be able to:

- ❖ Identify the effects of lawfully formed contract of agency;
- ❖ State the liabilities of the principal in an agency relationship;
- ❖ Discuss the limits of power of the agent, explain the effects of non-observance of name test, describe the effects of working beyond the scope of power;
- ❖ Explain the effects of ratification, repudiation;
- ❖ Describe the duties of the principal and the agent.

3.1 Establishing a Relationship between the Principal and the Third Party

The effect of agency is spelt out under Art 2189 of the Civil Code. The effect of agency is to develop a relationship between the principal and third party as though the contract/relationship was conducted between the principal and the third party. This effect of agency shall come out upon fulfillment of two conditions: the name test and scope.

The agent must act in the name of the principal. This is one mandatory requirement for the establishment of a relationship between the principal and the third party. In addition to the name

test, the agent must act within the scope of the power granted. These two elements are cumulative. The non-fulfillment of either or both is a barrier to establish the link between the principal and the third party. Now let's look at the effects of non-fulfillment of either or both of the requirements.

As provided under Art 2197, where the agent acts in his own name either on his own behalf or on behalf of the principal, it is only the agent that is liable to the third party. Hence, the central theme of agency linking the principal and the third party is missed. And therefore the name test makes a difference. The fulfillment of the name test, i.e. the agent disclose the name of the principal while interacting with third parties makes the principal liable to third parties as if it was made by the principal himself, by virtue of Art 2189(1). Where the non-fulfillment of the name test, i.e. the agent acting without disclosing the name of the principal falls under Art. 2197 and no liability of the principal toward the third party; and the agent bears the liability himself. And we can conclude that the name test is the main test of agency under the Ethiopian law of agency. In situations where the name test is not fulfilled, third parties shall have no direct action against the principal and may only exercise against him on behalf of the agent, the rights pertaining to the agent [Art 2197(2)]. Because of the failure of the agent to use the name of the principal while interacting with third parties, the link that would have been created between the principal and the third party is broken. The result of this is that the third party cannot demand the performance of the rights arising out of the act of the agent. The third party can only ask the performance from the agent. Or the third party may demand the principal in place of the agent only if the agent has a right against the principal by way of subrogation. But if there is no right, the agent can demand from the principal that the third party shall have no any right over the principal. That right of the third party is a kind of attachment of the rights of the agent against the principal. That attachment may only be effective if the agent has a right (for example remuneration) against the principal. Yet the principal is entitled to demand his rights over the agent or the third party to recover. When the agent fails to act in the name of the principal but on behalf of the latter, the principal is able to demand the recovery of the goods collected on his behalf. But there are two conditions attached to this right under Art. 2198. These are good faith of the third party and the fact that the principal has to discharge his duties toward the agent. When the principal has fulfilled these

conditions he can get the goods possessed by the agent or third party, while the agent acting on behalf of the principal.

The other element that needs to be tested for the establishment of the link between the principal and the third party is whether the agent has acted within the scope of his authority. In the preceding chapter we have exhaustively discussed the meaning and effect of the usage of scope. The scope of power of authority shows the extent/limits of the power of the agent. For the establishment of effect of agency linking the principal with the third party as if the relationship was concluded between these two (the principal and the third party) the agent must act within the scope provided. The scope of the power is determined by the contract-giving rise to the agency relationship [Art. 2181]. But 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. [Art 2202(1)]. The scope of agency may be determined from the contract giving rise to agency relationship which may be either express or implied. In whatever form it is given the agent is expected to act within the power either expressly conferred or implied. In this case the act of the agent shall have the power to establish the link between the principal and the agent. This allegation is supported by Art 2189(1).

What is the result of the agent acting beyond the scope of the power granted? To act beyond power may come from the agent acting with a lapsed power or power abused. The former implies a time limit for a power of authority. There was power to act on behalf of another but came to an end. The latter signifies the existence of power but the agent has acted beyond the limit of the power granted. In both cases the principal has no liability towards the third party. To acknowledge the acts of such an agent is at the discretion of the principal. Hence, the principal is at option either to ratify or repudiate the acts done outside the scope of power [Art 2190]. The principal may for different causes choose to acknowledge the acts of the agent done outside the scope of authority. That acknowledgement is named ratification. Once the principal has ratified it, the agent shall be deemed to have acted within the scope of his power. Hence, ratification has a retrospective effect [Art 2192].

But where the principal has opted for rejecting the act of the agent, that act is called repudiation. And the effect is invalidation of the contract formed between the agent and the third party [Art. 2193]. Depending on the good faith or other wise of the third party the agent and principal shall be liable towards the former [Art 2193].

The agent shall be liable where the agent has acted in a lapsed power of authority while the third party was not aware of this fact. But where the agent is not aware of the fact that his power was either reduced or came to an end, then the principal rather than the agent shall be liable towards the third party [art. 2194]. Yet there is a way out for the principal from liability toward the third party. That is a proof that the third party was aware of the limits of the authority of the agent from the document evidencing power of authority of the agent [Art 2196(1)]. Once again the agent shall not be liable to pay compensation to the third party where he can replace the principal and carry out the obligations assumed. But this is attached to the condition that “the personal qualification of the ‘principal’ is not essential to him (the third party) and the agent agrees to be personally bound by the act he has done on behalf of another (the principal) [*emphasis added*] [Art. 2196 (2)]. For example, if the principal was an artist and the agent was authorized to conclude a contract with an organization so that the principal is to present his work (music) in a concert, then the agent cannot perform it himself in the above circumstances.

Now let us look again at the case where the two elements: name test and acting within the scope are being fulfilled. That case is the case of complete agency. As we have said earlier, one important effect of the fulfillment of these requirements is the link between the principal and the third party is established. And this is that the normal course of agency relationship. The establishment of the link between these two parties confers certain rights to each of them. Look at Art 2189(2) once again.

(2) The principal may avail himself of any defect in the consent of the agent at the time of he making of the contract.

Once the agent has acted in accordance to the requirements of Art 2189(1) the principal can enjoy all the rights as if he was the party who concludes the contract and for any defects in the

making of the contract he may replace the agent and demand the invalidation or otherwise of the contract formed between the agent and the third party.

Do you remember Art 1808(1)? It provides that in the case of defect in the capacity and/or consent of the contracting party it is the party that alleges to have suffered the defects that can demand invalidation. But Art, 2189(2) empowers another additional person to invalidate a contract affected by defective consent. That person is the principal. Art 2189(2) is an exception or a special provision to Art 1808(1), which empowers an additional person to invalidate even if the latter provision provides “only” the person who claims to have been affected by the defect in the consent.

A related question is: why is it only defect in the consent of the agent that is warranted by the law to the interest of the principal? Why not the case of non – fulfillment of object and/or form? The answer lies on the fact that Art 1808(2) provides that any interested person can seek the invalidation when the object and form of the contract is affected. That Art. 2189(2) is silent on this matter means that by virtue of Art. 1676 of the Civil Code the provision under Art. 1808(2) shall be applicable for agency contracts too. The effect of a cumulative reading of these provisions of the law is that the principal is not prohibited to raise the grounds of object and form to get the contract invalidated, when it suffers one or any of them. Hence, the reason why the law has provided only the case of defective consent is because it is an exception to the general principle under Art 1808(2), and it is not aimed at excluding the other grounds of invalidation which are open to any interested third party.

Similarly the right conferred on the principal to invalidate a contract based on the defect in consent of the agent is countered justifiably by the right conferred to the third party under Art 2189(2) of the Civil Code. It provides:

“Any fraud committed by the agent may be set up against the principal by the third party who entered into the contract with the agent”.

Surprising about this provision is that the type of defect is reduced from object and/or form to only one of the grounds of defective consent: i.e only fraud among mistake, duress and fraud. The scope of the rights of the third party to replace the agent is narrowed down. To make the allegation clearer; while the principal is entitled to invoke the defects in the consent [mistake, fraud, duress], non-observance of the requirements of object of the contract and formality requirements the third party is entitled to replace the agent to invalidate the contract with the principal “only in the case of fraud, only when the agent has committed fraud”. Is that fair? Or do you feel that there is another way of looking at the situation?

Let me take you back to your law of contracts course. What is fraud? Fraud is a deceit committed either by the contracting party himself or a third party [Art. 1704]. A fraud committed by the contracting party himself is not attached to any condition and it suffices to invalidate the contract. But where a fraud is committed by a third party, the fact that the contracting party knew or should have known of the fraud and took advantage of it has to be fulfilled for the contracting party to be able to invalidate the contract by virtue of a ground of fraud. The contracting parties may raise fraud committed by a third party only if they or one of them have known (subjective) or should have known (objective) of the fraud and took advantage thereof. Where these conditions are not fulfilled commutatively, under ordinary relationships the contract cannot be invalidated.

But when it comes to agency, there is no requirement that the third party must prove that the principal knows or should have known or taken advantage of it. Hence, for the mere fact that the agent has committed fraud against the third party, the latter is entitled to invalidate the contract. The principal is presumed by the law to know the fraud committed or should have known it and the second element that the contracting party, the principal has taken benefit of it is presumed by the law to be fulfilled because the agent works for the principal. Hence, Art 2189(3) is an exception or a special provision to Art 1704. When the fraud is committed by an agent, without any condition being attached to it, the third party can invalidate the contract. However, Art. 2189(3) does not preclude the rights of the third party to invalidate the contract defective in one or more of the elements of a valid contract. Thanks to the bridge under Art. 1676, all the provisions of title xii shall be applicable to agency relationships until a special provision within

the law of agency dictates otherwise. In the case at hand the provision under Art. 2189(3) is a supportive provision and not a contrary provision to the use of other grounds by the third party to invalidate. Therefore, both the principal and the agent are granted the right to invoke the invalidation of the contract when it was defective in one of the grounds at equal footing. There is no discrimination made by the law in granting the right to seek the invalidation of the contract.

3.2 The Obligations of Agency

General

As a relationship, agency imposes obligations among the parties involved in the relationship. The obligations are dependent on the agreements made, the law and by such incidental effects as are attached to the obligations concerned by custom, equity and good faith. (Art 1713). It is impossible to list all the duties/obligations within an agency relationship. Hence, below we are going to discuss only the main obligations of each of the parties to the contract of agency.

As duties and rights are correlative, duties of an agent are rights of the principal and duties of an agent are rights of the agent. Therefore we are not going to study the rights of the parties on the one hand and duties of the same on the other.

In this section of the chapter we will study obligations that parties to the contract of agency owe to each other. The agent has to discharge certain duties to the principal. On the other hand, the principal also owes certain obligations to the agent unless the agency is one of gratuitous. Let's look at some of the obligations assumed by the respective parties. These obligations and rights are similarly applicable to agency relationships arising out of law.

3.2.1 Duties of the Agent

Duties of the agent to a contract of agency arise either from agreement (express or implied) or from law (fiduciary nature of agency relationship).

Performance: basically where the agency is contractual the agent is bound to perform what he has undertaken to perform. This amounts to the duty to carry out the contract which the agent has made with the principal. Failure of the principal to carry out his obligations as agreed is non-performance and results in the liability of the agent toward the principal. In one foreign case, the agent was appointed under a contract to insure the principal's ship but the agent failed to do so. The ship sunk and was lost and the principal remained uninsured. It was held by the court entertaining the case that the agent had been liable for breach of contract.

How would you treat if this case falls under our jurisdiction? Would you decide the same? Different? Can you support it with relevant provision of the laws of agency?

A. Duty to Protect the Rights of the Principal from Conflicting Interests.

What is the interest of the principal? How is it to conflict with the interest of the agent?

The interest of the principal is the material interest valued in terms of his benefit. He should represent his/her principal solely for his benefit. The agent should not expect benefit of any kind from the transaction he/she executes without the knowledge of the principal. If the agent is going to benefit out of the transaction he/she makes on behalf of the principal without the knowledge of the principal that may result in a conflicting interest.

Conflict of interest may be expressed in three forms. These are:

- ❖ when the agent contracts with third parties;
- ❖ when the agent contracts with another principal; and
- ❖ when the agent contracts with himself.

Below these cases are discussed in brief with the effects on the contracts formed.

a) Contract with Third Parties

This happens when the agent concludes a contract with persons to whom he draws a benefit. To say that there was a conflicting interest the point is not with whom he has concluded a contract but the fact that the interest of the principal is affected by the act of the agent. The effect of a contract concluded by the agent in a situation of conflicting interest is provided by Art. 2187.

Art. 2187 conflicting Interest

(1) a contract made by an agent in a case where his interests conflict with those of the principal may be cancelled at the request of the principal where the third party who entered into the contract knew or should have known of the conflict.

The effect of a contract made by the agent in conflict with the interest of the principal is cancellation by the request of the principal. The principal, entitled to cancel the contract is bound to prove the fact that the third party was aware of the conflict (subjective standard) or that the third party should have known of the conflict (objective standard). The burden of proving the existence of conflicting interest and the awareness of the conflicting interest by the third party rests on the principal.

Having proved these two conditions the principal shall secure the right to cancel the contract that affects his interest. Yet, this right is required to be exercised by the principal only in a limited period.

Art. 2187(2),

The principal shall, within two years from his knowing of such circumstances, declare whether or not he intends to cancel the contract.

This provision protects the interest of the third party. The third party who has concluded a contract with the agent needs to know the fate of the contract he has concluded with the agent. Unless the principal makes his intention known to the third party whether he is going to cancel

the contract within two years, the principal shall lose the right to cancel and the contract shall be valid.

Even when the principal has made his intention known to the third party to declare the cancellation, the third party has the right to sustain the contract by making the difference good within two months from having been informed by the principal to cancel the contract (Art. 2187(3)) This is a subjective period of limitation dependent on the knowledge of the third party. If there is no proof that the third party knows the conflict earlier than the date he claims there is no limited period that bars the right absolutely.

b) Contracting with Oneself

Contracting with oneself of the agent may be explained in two ways: the agent acting on his behalf or acting on behalf of another principal. In these cases the principal can without proving either the conflict or the knowledge of the agent (which the law has presumed to know) declare the cancellation. Here, the law has taken for granted that when the agent acts either on his behalf or on behalf of another third party there is a conflict of interest. Yet the agent may sustain the relationship by making the difference good. But the burden to prove that there was not conflict of interest rests on the agent.

The presumption that a contract concluded by the agent on his own behalf or on behalf of another third party is rebuttable upon the agent being a commission and/or a forwarding agent [Art. 2188]. A commission agent may deal on his own account when the price of goods is quoted on the market or purchase of Stock Exchange in the absence of contrary instructions by the principal (Art. 2248). Here, when the price of goods to be purchased has a market price, it is logical to argue that there is no need to worry about conflict of interest in terms of benefit. Similarly a forwarding agent is also entitled to carry the goods himself (Art. 2252). This is because a forwarding agent is usually a carrier himself.

B) Good Faith required of the Agent

“The agent shall act with the strictest good faith towards his principal” (Art 2208(1)). What does the law mean by good faith? We hope “good faith” is not a new term for students. It is employed lots of times by the law. Good faith is a requirement attached to the fiduciary nature of agency relationship. Because the agent is working without procedural control from the principal, the principal being away from him/her, the concept “good faith” is a means to control the procedures to be employed towards the interest of the principal. Good faith is acting towards the best interest of the principal. “The [agent] shall disclose to his principal any circumstances which would justify the revocation of the agency or a variation of its terms. “(Art 2208(2)). There might be many cases where the principal needs to revoke the agency. These include: the case where the agent is less interested to the affair he/she is running on behalf of the principal; that the interest of the principal is at a risk of conflict; that the business/affair the agent is running on behalf of the principal is leading to bankruptcy etc. In all these cases and other similar situations the agent needs to seek the revocation or altering the terms of the agency relationship.

Fidelity is the best policy of good faith and hence agency. Where the agent is in a position in which his own interest may affect the performance of his duties to the principal, the agent is obliged to make a full disclosure of all material circumstances so that the principal with such full knowledge can choose whether to consent to the agents acting.

In one case where the agent conspired with a prospective buyer to pay the purchaser part of the agent’s remuneration the court has decided breach of good faith requirement. The duty to disclose under sub article 2 of Art 2208 involves disclosure of everything which to the agent’s knowledge the information is relevant to the principal’s judgment. The test has to be objective, i.e. whether a reasonable man would consider the information influence the principal’s interest. If the agent fails to work in accordance with the requirements of good faith, there is no provided effect either under art 2208. The effect of acting contrary to good faith is not well defined by the law. However, Art. 2209 is expected to respond to what the effect of acting contrary to good faith is, because it has a title of effect. But unfortunately it is an additional duty and explanation

of the good faith is required of the agent. In the absence of this we need to find a way to give effect to the failure of the agent to act in good faith.

The failure of the agent to fulfill the requirements of good faith or any other similar duties must be remedied by the rights of the principal to revoke under Art 2226 and Art 2227 of the Civil Code, where the principal is empowered to revoke the authority at his discretion where he has a just motive. That has to be the result of failing to act in good faith. An obligation without effect is meaningless to appear.

An additional explanation for good faith is provided by Art. 2209.

Art. 2209 effect

- (1) The agent shall act in the exclusive interest of the principal and may not without the latter's knowledge derive any benefit from any transaction into which he enters in pursuance of his authority.*
- (2) He may not use to the detriment of the principal of any information obtained by him in the performance of his duties as agent.*

An agent may not make a secret profit out of the performance of his duties as an agent. What is a secret profit? The expression under Art 2209(1) refers to any financial advantage which the agent receives over and above what he is entitled to receive from his principal by way of remuneration. This may include bribes given to obtain the agent's complicity in some activities not necessarily in the interests of his principal. A bribe in this particular case is meant the payment of a secret commission by a third party or the receipt by the agent of a secret advantage for himself from the other party (third party) to a transaction in which the agent was acting for his principal. The agent may also without the knowledge of a third person secretly gain financial advantages to himself from the exercise of his authority.

As we have concluded above, an agent who obtains a profit without the knowledge of the principal has breached the duty of acting in good faith towards the interest of the principal. The result of this breach is revocation of the contract of agency by the principal. We may again ask as

to the legal effect of the act of the agent that gives rise to the revocation of the authority. Would the agent be left with the profit he/she makes secretly /illegally/ in breach of Art. 2209? Again, either Art 2208 or Art 2209 which are devoted to dealing with good faith a duty of the agent do not give effect to this problem. But the prohibition of the law to make a secret profit and the fact that the agent must act toward the exclusive interest of the principal can be interpreted to imply that when the contract is revoked by the principal the benefits the agent gained shall no more be benefits to the agent. Therefore the principal may set aside the transaction and claim from the agent any profit the agent may have obtained from such transaction.

Last illustration of the requirement of good faith is provided under Art 2209(2). The agent need not employ the information he obtains in the exercise of his duty as an agent to the detriment of the principal. The nature of this obligation goes to be respected even after the termination of the agency relationship between the agent and the principal. Making use of information acquired in the course of carrying out of his duties by an agent for his own personal benefit is prohibited by this provision. This is usually true when an exclusive right of the principal is jeopardized by the agent. The agent is not allowed to make use of confidential (secret) information to engage in completion with the principal.

C. Diligence Required from an Agent

This obligation of the agent is related to the care and skill the agent is expected to show towards the affairs of the principal. Not only must the agent act in accordance with his authority, whether express or implied, he must also perform the undertaking with due care and skill. All agents own this duty of care to their principals, whether for consideration or gratuitous. A distinction is made however between the standard of care to be observed by a gratuitous agent and that to be observed by one who acts under contract for reward.

Art. 2211 diligence required of agent

- (1) The agent shall exercise the same diligence as a bonus pater families in carrying out the agency as long as he is an trusted therewith.*
- (2) He shall be liable for fraud and defaults in the performance of his duties*

(3) Whosoever undertakes without consideration to act as an agent shall not be liable unless he has not applied to the affairs of the principal the same degree of care as to his own.

Sub (1) and sub (3) of the above provision have made the degree of care expected of an agent towards the affairs of the principal depending on whether the agency is gratuitous or one with consideration (payment).

As one can easily grasp from the above provisions, in the case of agency with consideration (reward) the standard of diligence/care to be observed by the agent is put in terms of an objective standard “as a *bonus pater familias* in carrying out his agency as long as he is entrusted therewith”. (Art 2211(1)]. That is: the agent needs to show a reasonable care towards the affairs of the principal like a good father would show towards his family/children.

On the other hand, the traditional mode of expressing the gratuitous agent is that the agent is expected to exercise the care that he would exercise in respect of his own affairs. In other words, a person who does not possess to be skilled for example in any particular way need only show the same sort of care/diligence he would devote if he were performing the undertaking for himself.

One instance of the limit of diligence is provided under Art. 2212.

Art. 2212 Non liability of agent

- (1) Unless otherwise agreed, the agent, not with standing that he acted in his own name, shall not be label is the principal for the performance of the obligation of the person with whom he contracted.*
- (2) The provisions of sub(1) shall not apply where he contracted with a person whose insolvency he knew or ought to have known at the time of the making of the contract.*

This provision is applicable both for an agent for consideration as well as a gratuitous agent. An agent either for consideration or gratuitous has to be careful with whom he/she is making a contract in terms of the economic/business well being of the third party. The effect of this is the agent is liable to the principal for the performance of the obligation as a guarantor. Yet, this care and diligence is both subjective and objective in that if the agent has committed this contract with the knowledge that the third party was insolvent, there is no excuse on the part of the agent. But if the agent does not know this fact then it is to be weighed with a reasonable standard: that is whether “the agent ought to have known at the time of the making of the contract” shall be seen in the eyes of a reasonable man standard.

Before we conclude this duty let us look at the last issue to be raised here. In the last paragraph we have raised one point that the degree of care required of an agent is dependent on whether the agent is a paid one or a gratuitous. A paid agent is measured in terms of a reasonable standard and a gratuitous agent is measured in terms of the diligence he/she shows for his affair. But the question to be raised here is, the extent of degree of care expected of a gratuitous. How are we going to measure the degree of diligence he forwards to affairs? Again Art 2212 (abovementioned provision) provides an objective standard of the care /diligence both of the agents need to show towards the affairs of the principal. That is, even a gratuitous agent should be careful as to the solvency or insolvency of the third party. This means the agent (gratuitous) has to protect the interest of the principal beyond his own affair even when he is reluctant/negligent towards his affairs. Hence, there are arguments that a gratuitous agent must exercise the care that a reasonable man would exercise in respect of his own affairs.

Students, comment on the last ideas above? Should a gratuitous agent be judged in a reasonable man standard? Or should he/she be judged in respect to his own affairs only? If you prefer the first option is that not against the interest of the principal? If that is so (option1) why is it made objective under Art. 2212?

We know that the agent gets no benefit out of this transaction (gratuitous). When we look at the situation at this juncture, in fact it looks that no diligence beyond what he forwards to his affairs should be expected from him. Yet the interest of the principal may be at risk. In addition to this,

Art 2212 has made the diligence to be weighed in respect of a reasonable standard. The common law system has required a standard diligence even when the agent is gratuitous but our law seems to have employed a subjective standard (dependent on the behavior of the agent) toward his affairs. Yet, when it comes to the solvency of the third party, it is made otherwise, i.e. subjective standard is employed. The reason why the law has employed this kind of degree when it comes to solvency is because this is a high threat to the loss of the rights of the principal.

In one case a relationship was created between an attorney and a client in such a way that the former was to represent the latter in court of law for two independent cases. One of the cases was dismissed by court order. Following this the client (principal) has terminated (declared the termination of the agent principal relationship between them for fear that the agent (advocate) may not carry out his duties diligently. This fact was brought to court by the client claiming that the agent (attorney) was liable for the dismissal of the case and responsible for the termination of the second relationship.

Now let's look at a case together and judge.

The case arises out of an agreement between Ato Tadesse Dilnesaw (appellant) and W/ro Bekelech Kassa (respondent) whereby the appellant has undertaken in his professional capacity as an attorney (advocates) to represent the respondent in two cases in front of a court or courts against a debtor of the respondent (Bekelech). Ato Tedla Desta is claiming plot of land (in the first case) and asking for accounts in respect of a partnership between the said Ato Tedla Desta and her father. The agent and principal (the advocate client) have agreed that the respondent (principal) was to pay the appellant (the agent) Birr 200 (two hundred birr) in respect of the first case and Birr 3000 (three thousand) in respect of the second case. It was also agreed that in both cases the agent was to get ten per cent of the amount succeeded (adjudicated in favor of the client). At the time of the formation of the relationship the respondent (principal) paid Birr 500 (five hundred).

The case was initiated at an Awradja court. The principal (respondent) alleged in the Awradja court that the first case was struck out (look at Art. 69(2) of the civil procedure code) because the

agent (appellant) failed to appear on the hearing date: The file was (case was) struck out as proved by the court because the plaintiff and her advocate (attorney) failed to appear at the date of hearing of the case. The court fee paid to initiate this case was Birr 90 (ninety) and there was an award of Birr 50.00 (fifty birr) to the defendant against the plaintiff. As to the second case, the respondent, principal alleged that the appellant (agent) was not conducting her case satisfactorily and that she asked for the services of another advocate (attorney) who changed the original statement of claim and as a result judgment was given in her favor. Her allegation was that she withdrew the paper from the appellant (agent) after the bad experience in the first case where the appellant failed to appear on her behalf.

The court after providing the allegation in the lower court finds it important to state what the law under the civil code provides concerning such relationships and goes on to state as follows. The law as regards the hiring of intellectual work is laid down in Art 2632 and following the Civil Code. Under these articles, the person who gives his intellectual services, as an advocate does, is bound to carry out his obligation personally (Art. 2633) and where the contract or usual practice so allows and it is not incompatible with the object of the contract any assistants that the advocate employees must be under his control and at his responsibility. As a consequence of this personal and fiduciary character of the relations between the advocate and his client, the client may, at any time, terminate the contract (Art. 2637) and in such a case the client is liable to pay to the advocate only the expenses made by him in connection with the legal matter and a fair remuneration for the work that he has completed. Under Art 2636, the advocate must carry out the work in the best interests of his clients, conscientiously and in conformity with the practice and rules of the profession, he is liable to his client for an error committed; such error, however, must be one which is the consequence of evident carelessness or ignorance; the advocate would not be responsible for an error of judgment in the interpretation or application of the law. Under Art 2638, the advocate may at any time, recede from the contract provided that he does so in a manner that the client suffers the least possible prejudice.

After it has investigated the rules it found out to be relevant to solve the given case and it has reduced the rules into the case at hand. It goes on disposing the dispute as follows.

Now, in the present case it is quite clear that in the first case, the appellant did not appear before the court as it was his duty to do once he has assumed to act for the respondent; as a result of this the file was struck out (closed). That is not simply an error of judgment but just carelessness on the part of the appellant in fulfilling his obligations towards his client, and we say carelessness because no good reason has been put forward to justify the absence. The appellant cannot be heard to say that he had rendered professional services to the respondent in that he had drafted the statement of claim; any services he may have rendered were completely useless to the respondent in that the file was struck out (closed) with the loss of Ethiopian Birr 90.00 (ninety Birr) court fees and costs of Ethiopian Birr 50.00 (fifty Birr). The appellant is, therefore, liable to refund the sum of Ethiopian Birr 200.00 (Two hundred) and to pay the loss sustained by the respondent, that is birr 90.00 (ninety birr) and Birr 50, in all birr 340 in respect of the first case.

As regards the second case, there was an argument as to whether the respondent was justified in withdrawing the paper from the appellant after the incident in the first case? The appellant argued that the first case had not been closed (struck out) when the respondent terminated the contract and therefore she had no good reason to terminate. This fact is not material because under Art. 2637 the client may at any time terminate the contract with the advocate. In the second case however, the evidence shows quite clearly that the appellant had appeared on a few occasions before the court. The respondent submitted that this statement of claim was not properly drafted and that it was amended by the advocate she subsequently employed and that on such a mended statement of claim judgment was given in her favor. This is not a valid argument; the remuneration of an advocate does not depend on whether the case is won or lost; the advocate's remuneration depends on the services rendered. But apart from the fact that the respondent could at any time terminate the contract, she had in this case good reason to do. The file shows that at the date of hearing, October 6, 1960 the appellant was warned by the court that he should produce all the documents in support of his case and should have given copies to the defendant. It was after this that the respondent terminated the contract with the appellant and sought the services of another advocate. Although the appellant would be entitled to a fair remuneration for services rendered, in the present case any services rendered were completely fruitless as far as the respondent is concerned. For these reasons, the appellant is liable to refund the Ethiopian Birr 300.00 (Three Hundred) received for the second case.

Hence the court confirms the judgment of the lower court on different grounds given by the lower court on the application of the articles cited above.

Have you gone through the above case thoroughly? If you have some doubts in understanding the facts, the arguments and the rules and rulings of the court, read it again. I am sure you may have a question you want to ask and that question would probably be this one: What is the relation of this case with the law of agency? If you have asked so, you are “half way through solving the problem.

A relationship between an advocate/attorney and a client the former to represent the latter in court of law is a typical case of agency principal relationship because the advocate/attorney “agrees with another person, the principal (the client) to represent him and to perform on his behalf one or several legally binding acts.” It may be carried out by a professional or a non-professional individual. Not all professional duties undertaken are agency principal relationship. But an act carried out by a professional may be established in an agency relationship. For example, when a medical doctor takes a duty with a patient to medically treat the latter, this is a professional relationship that falls under “hiring of intellectual work” (Arts. 2632 to 2638). But this does not establish agent principal relationship between the doctor and the patient. However, when the advocate has undertaken to represent a client he/she is bound as a debtor who has agreed to carryout his professional duty (to render intellectual work and as an agent.

Hence, the above case falls under agent principal relationship. The attorney is not only bound by those provisions (the above provisions from Arts. 2632 – 2638) discussed by the court to dispose the above case as well as those agency provisions governing duties of the agent and termination of agency.

Which provisions of the law of agency are violated by the advocate while the case was struck out for the failure of him to appear at the date of hearing?

The primary obligation assumed by an agent is to perform in accordance to the agreement and the law. “The party who undertakes to do something may undertake to procure to the other party a specified advantage or to do his best to procure such advantage” (Art. 1712) (emphasis added) “ who so ever hires out his work shall undertake to carry it out in the best interest of his client, conscientiously and in conformity with the practice and rules of his profession.” That is the meaning of performance for a professional debtor like a doctor or a lawyer. But for an attorney who has agreed to represent his client in front of court of law there are specific obligations governed by the law of agency. The main obligation being working diligently and with due care. “The agent shall exercise the same diligence as a bonus paterfamilias in carrying out the agency as long as he is entrusted therewith.” This is the obligation failed to perform by the advocate when he failed to appear at the date of hearing resulting in stoking out of the case by the court. We will look at the implication of the analysis of the court in declaring the termination of the relationship in the section dealing with termination.

D. Duty to Account

The agent is bound to account for money and activities/ management of the affairs to the interest of the principal.

Art. 2210 Accounts

- (1) The agent shall account to the principal for sum received by him and all profits accruing to him in the course of his employment, not with standing that the sums he received were not owed to the principal.*
- (2) Where the agent converted to his own use monies he owed to the principal he shall be liable for the payment of interest as from the day of such use, without being necessary that notice be given to him.*

What has been said in the above discussions shows that the agent must pay over to his principal all money received to the use of his principal. This duty exists even if there is an adverse claim to the money by some one else including the agent. It exists even if the transaction in respect of which the money received by the agent on behalf of the principal was illegal. That is why the

above-mentioned provision says “--- notwithstanding that the sums he received were not owed to the principal”. This provision under quotation could also be the case where the agent has received an extra amount with a mistake of fact from third parties.

This duty requires for its proper performance that the agent should be in a position to know what he must pay to the principal, and that the principal should be able to see whether the agent has fulfilled his duty. Hence the agent is obliged to keep the principal’s property and money separate from his own and from other people’s property and money to keep proper accounts, and to be ready to produce them on demand to the principal or a person appointed.

Similarly the agent is bound to account to his management of affairs as requested by the principal.

Art. 2213 duty to account

- (1) The agent shall at any time account to the principal at his request for his management of affairs.*
- (2) He shall inform his principal without delay that he has accomplished his agency.*

This obligation is based on the above obligations. Whether the agent has performed in accordance with the contract and law, he/she is obliged to report to the principal the accomplishments of the affairs upon the request of the latter. The principal is presumed to praise the acts of the agent. However, there may be many cases where the principal may not bless the acts of the agent. This is usually when the agent does not work within the scope and in the name of the principal. In other words, when both or either of the cumulative elements of a complete agency are not fulfilled, the principal may or may not approve the acts. It is at his option to take any of these measures: repudiate or ratify (Art. 2191(1)).

The principal may take any of the following measures upon the report made by the agent in accordance to Art. 2213. These are: he/she may bless the act expressly, he/she may remain silent;

or he/she may expressly reject the acts done. All of these responses of the principal have their own legal effects under Art 2214. Look at the following explanation:

Art 2214 Approval of management

- (1) The principal shall be deemed to have approved the management of the agent where, after having received from him a statement there upon he remains silent for a longer period than warranted by the nature of the affair or usage.*
- (2) The provisions of sub Art (1) shall apply notwithstanding that the agent departed from the instructions he received or exceeded the scope of his authority.*

As we can infer from the above provision, Art. 2214; when the principal has expressly accepted the report made concerning the management of the affairs, for stronger reasons the agent shall be free from liability and the principal shall free the agent from the third parties with whom the agent might have acted with. On the other hand, when the principal has expressly rejected the acts done by the agent, then it is to be examined whether the agent has acted in accordance to complete agency or not and whether the principal is bound to ratify it. But if the principal remains silent upon receipt of the report then, “ the principal shall be deemed to have approved the management of the agent”. However, the principal is not expected to respond forthwith. But silence of the principal shall amount to acceptance “ if the principal remains silent for a long period than warranted by the nature of the affair or usage.” The last statement under quotation is not easy to determine. This needs to see case to case, that is the transaction the agent makes with third parties. Hence, if the agent has sold a perishable commodity belonging to the principal, this business does not warrant a longer period. Therefore, the principal is expected to make his decision known only within a short period of time. Because the nature of these goods makes the situation impossible and the principal must respond sooner or if the agent was authorized to buy a sheep to slaughter in a New Year occasion, the principal is expected to make his decision known before the sheep is slaughtered in the occasion. If he does not make his decision known till then, he is assumed to be late than what the nature of the affair or usage demands/dictates.

This is applicable for both an agent working within the scope or acting beyond the scope of authority [Art. 2214(2)]. This works for those agents who have done acts beyond the authority

granted. When the principal does not respond within a period dictated by the nature of the affair or usage then the principal is assumed to have approved and hence assumed to be ratified.

E. Duty of Non- delegation

The general rule is that the agent must perform his undertaking personally. The relationship of the principal and agent is a confidential one: the principal imposes trust in the agent of his choice. Hence, the obligation of the agent is to act personally in conformity with the maxim “*delegatus non potest delegare*,” which means the delegate (agent) cannot appoint a delegate (agent). However, there are exceptions to the above rule of non-delegation. These exceptions are spelled out under Art. 2215.

Art. 2215 Delegation of authority 1 possibility

- (1) The agent shall carry out the agency in person unless he was authorized by the principal to appoint a substitute.*
- (2) Such authorization shall be implied where from usage it appears a matter of indifference whether the agent acts personally or by deputy.*
- (3) The agent shall appoint a substitute. Where the interest of the principal so requires, when unforeseen Circumstances prevent him from carrying out the agency and he is unable to inform the principal of these circumstances.*

Hence, there are two exceptions to the principle, *delegatus non potest delegare*.

These are:

- a. When the principal authorizes the agent to appoint a sub agent: This could be made either at the time of the making of the contract of agency or at a later time.
- b. Authorized by law: the agent may be allowed to delegate another in his place of him when it is of no difference whether the act is done by the agent himself or by a third person and this is implied from usage of the place of performance; or where the agent is unable to perform the order himself because of unforeseeable circumstances and the latter is unable to inform this case to the principal.

The latter is basically aimed at preventing the interest of the principal. Generally, unless permitted by law or by the consent of the principal, the employment of a sub agent by the agent will be a breach of his obligation to the principal. This is because the relation of agent to his principal is normally at least one which is of a confidential character and the maxim *delegatus non potest delegare* to such relationships is founded on the confidential nature of the relationship.

Where the principal reposes no personal confidence in the agent the maxim has no application, hence the exceptions are applicable. But where the principal does place confidence in the agent, that in respect of which the principal does so must be done by the agent personally unless either expressly or inferentially he is authorized to employ a sub agent or to delegate the function to another.

So far we have only looked at the principle of non delegation on the one hand and exceptions on the other. What remains is to see the relationship among the principal, the agent and the sub-agent /delegate in cases where the delegate was supported by one or any of the exceptional cases discussed above.

The agent is liable for the acts of the sub agent he has appointed without authorization (Art. 2216 (1)) but where he/she has appointed upon one or more of the exceptional cases stated above the latter is liable “only for the care with which he selected his substitute and gave him instructions”. This is an advice and precaution for the agent to be in good faith, prudent in selecting and ordering a sub agent in the interest of the principal. Whether the sub agent worked out in accordance to the obligations of an agent does not make the former agent liable.

Concerning the relationship between the principal and the substituted agent Art 2217 provides that:

“The relationship between the principal and the substituted agent shall be as though the substituted agent had received authority to act as agent directly from the principal where the substituted agent had reasons to appoint a substitute”.

The relationship between the principal and the sub agent is either as if these persons have a prior agreement or as in the case of unauthorized agency. Their relationship is considered as if they had a prior agreement directly when the substituted agent had reasons to believe that the agent was entitled to appoint a sub agent: that is either by agreement or by law. This belief is dependent on the understanding of the individual. On the other hand, if the sub agent does not have any reasons to believe the fact that the agent was authorized to appoint a sub agent their relationship is governed by provisions of unauthorized agency (Arts 2257 – 2265) [Art. 2217(2)]

3.2.2 Duties of the Principal

The principal like the agent has some contravening duties towards the agent. These are:

- A. Remuneration;
- B. Duty to advance money;
- C. Duty to reimburse outlays and expense;
- D. Duty to release the agent from damages and liabilities;
- E. Set off conditional to the principal;
- F. Agent's lien right.

Now let's look at these obligations one by one.

A. Remuneration

As we have provided in the discussions, representation may be made upon consideration or gratuitous basis. Whether a representation is gratuitous or for consideration may be expressly provided at the formation of the contract or it may be implied at the time of the performance of the contract.

Contractual Remuneration

The most important duty of the principal is to remunerate the agent for services rendered. The obligation to pay such remuneration exists only where it has been created by an express or

implied contract between the principal and the agent. As we have provided in the above paragraph, it is possible for an agency relationship to arise from the agreement between the parties and yet be gratuitous. In fact, it may need construction /interpretation in each case whether it was the intention of the parties that the agent shall work gratuitously or whether an agreement to pay remuneration was made.

There are different forms by which agreement concerning remuneration may be stipulated. These include: first, the agreement might have stated the payment of remuneration and fixed the amount to be paid; second, the agreement might have stated that remuneration is to be due but without fixing the amount to be paid; the third instance could be, the agreement says nothing as to whether remuneration may be due or not. In the first instance the agent is entitled to the remuneration fixed in the contract. However, the court is empowered to reduce the amount fixed in the contract “where it appears excessive and out of proportion to the services rendered by the agent”. The court is not expressly empowered to increase the amount of remuneration to the benefit of the agent when it is found to be low as compared to the service rendered. It is only empowered to reduce the remuneration when it feels it is big.

There are opposing views in relation to this measure of Art 2219(2). Some say by way of analogy the court should also decide in favor of the agent when the remuneration is low. Others argue that in the absence of remuneration (stipulated), Art. 2220 assumes a gratuitous agency relationship. This presumption does not empower the court to increase a lesser remuneration to the benefit of the agent. This 2nd argument is substantiated by the fact that because the law presumes gratuitous agency in the absence of agreement for the payment of the remuneration, for stronger reasons a remuneration which is circumstantially low does not require an increase by the court. It appears that the law has deliberately inclined towards the benefit of the principal. This is in line with the choice of the law to presume gratuitous agency upon silence of the contract for the payment of remuneration.

Where the contract does not provide either by an express statement or by inference that remuneration is fixed, it is the third case of the relationship concerning remuneration. In this case there is no remuneration to be due. “In the absence of stipulation in the contract, the agent shall

not be entitled to remuneration...” (Art 2220(1) first limb]. But remuneration is presumed when the agent “carried out the agency within the scope of his professional duties or where remuneration is customary”. The principle that remuneration shall not be due unless agreed or implied from the contract is made otherwise in two circumstances governing agency. These are: where the agent carries out the agency within the scope of his professional duty, or where such remuneration is customary in the place of performance. A professional agent (for example, an attorney) cannot be presumed to work gratuitously unless the agreement has made it otherwise. Similarly, when the custom dictates that an activity that is performed by the claiming agent dues remuneration, it becomes the duty of the principal to pay the same. The amount shall be fixed by the court upon application of the agent. The second case falls in this last allegation, that is, when the parties or the law has assumed remuneration but failed to fix the amount. In these latter case Art. 2220(2) has provided “failing agreement between the parties, the court shall fix the remuneration in conformity with the recognized rates and usage”. The phrase “failing agreement between the parties” implies two cases: the case where the parties have agreed for the payment of remuneration without fixing the amount, and the case where the agent was a professional one carrying the activity in his professional capacity. The court in this case shall fix the amount to be due.

One instance of professional agent is the case of a commission agent. Commission agent, as we shall see in the chapter with special kinds of agents, is a professional agent. That is why Art. 2243 of the civil code grants remuneration automatically without any prior agreement for the payment of remuneration between the principal and the agent. Now compare Art. 2220 on the one hand (agreement in principle a condition for remuneration to due) and Art 2243 on the other hand (for remuneration due to no need to agree on remuneration). And try to appreciate the reason why these two provisions treat the subject (remuneration) differently.

B. Duty to Advance Money

The agent may need money to run the representation of the principal. These may include for example transportation and similar costs. “The principal shall advance to the agent the sums necessary for carrying out the agency “Art. 2221. However, this is the duty of the principal to

advance sums necessary to run the representation, no effect of the failure of the principal is provided with this duty. Perhaps when the agent has failed to carry out his obligation for causes of non-advancement of money by the principal, the principal, not the agent, shall be liable.

C. Duty to reimburse outlays and Experts

The money advanced by the principal may not be sufficient to run the affairs of the principal. Or the principal might not have advanced money for the agent. In such cases the agent may employ his own money or money from other persons. These outlays/expenses incurred by the agent need to be reimbursed.

Art. 2221

(2) He shall reimburse outlays made and expenses incurred by the agent in the proper carrying out of the agent.

(3) Interest on such outlays and expenses shall be due by the principal as from the day when they were incurred without it being necessary to place the principal in default.

In short the principal needs to reimburse the expenses the agent has incurred with the interests it bears calculated from the day where the agent has used the money.

D. Duty to release the Agent from Liabilities and Damages

The principal's duty to indemnify his agent's losses, liabilities and expenses incurred in the performance of the undertaking may be expressly stated in the contract of agency. But it is more usually implied.

Art. 2221 Liabilities and Damages

(1) The principal shall release the agent from any liabilities which he incurred in the interest of the principal

(2) He shall be liable to the agent for any damage he sustained in the course of the carrying out of the agency and which was not due to his own default.

The point to raise here is what is the liability to be incurred and the damage to be suffered by the agent? The liability of the agent arises in cases where he/she has interacted with third parties necessary to run the affairs of the principal. For example, the agent may be obliged to pay an additional customs duty or might have agreed to pay an additional tax or customs duty. In this case the principal needs to free the agent from liability. Similarly, the agent may suffer certain damages in carrying out the affairs of the principal. While he is carrying out his duties the agent may destroy goods, address damages against others, etc. What is required to fulfill is to prove that the damage sustained was not due to his own default.

E. Set – off Conditional to the Principal

The principal's obligation to pay remuneration when it is not committed is breach of the obligation on the part of the principal for which the agent may sue. In this case the principal cannot raise the defense of set-off under the pretext that the transaction was unsuccessful. But the principal may set – off the sums which he/she is bound to pay (including remuneration) when the business was unsuccessful due to the agents default in the performance of the affair. (Look at Art. 2223.)

F. Agent's Lien Right

If the principal has not discharged his obligation of paying remuneration, expense, damage or liability payments etc and the agent is in possession of goods belonging to the principal, then the agent is entitled to exercise a lien on such goods and retain possession of them until such time as the principal has satisfied the due claims of the agent.

Art. 2224 Agent's lien

Until the payment of the sums due to him by reason of the agency, the agent shall have a lien on the objects entrusted to him by the principal for the carrying out of the agency.

There is one competing interest we need to make clear here. The agent is entitled to hold the good/object entrusted to him until the principal pays the duties to the agent. But this right does not work for documents evidencing agency. This is made clear under Art. 2184.

Art 2184. Document to be Returned

- (1) The agent shall upon the authority coming to an end return to the principal the document, if any evidencing his authority*
- (2) He may not retain such document until final settlement of his accounts or claims with the principal.*

Hence, the agent cannot exercise a lien right over the document evidencing agency between the agent and principal. Therefore, only objects (document evidencing agency being excluded) are subjects of lien by the agent. But this right does not work for documents evidencing agency.

But can you imagine the reason why a document evidencing agency cannot be subject of lien?

The reason is obvious. If the agent is left to hold the document after the termination of agency (after the agent has performed his obligations) while these two individuals are in dispute, the agent may abuse these right and use the document to enter into contract with third parties, making the principal liable. Hence, it was logical that the agent was denied the right to hold the document evidencing authority after the power has come to an end. This not only protects the interest of the principal but also, third parties and business insecurity in general.

3.3 The Liability of the Principal, Agent and Third Party

It is the main effect of agency to bring liability among the three competing parties: the principal, the agent and third party. Below we shall treat the liabilities that would arise among and between these parties.

A. Effects as between the Principal and Third Party

The Basic Rule:

It is axiomatic that where the agent has made a contract with a third party on behalf of a disclosed principal who actually exists and has authorized the agent to make such contract, the principal can sue and be sued by the third party on the defects of the formation or performance of that contract. A direct contractual relationship is thereby created between principal and third party by the acts of the agent, who is not a party to that relationship. This, indeed, is the very purpose and rationale of agency.

The Importance of Authority and Name Test

The agent must have been acting with authority in making such contract. For a direct contractual relationship to result from the conduct of an agent, it must be shown that the principal has expressly authorized the agent to make the contract: or the agent, in making such contract, was acting within the scope of some implied authority or the principal had later held out the agent as having authority to make such contract; or the agent was not authorized to make such contract but his action was subsequently ratified by the principal; or the making of such contract was within the scope of the authority of an agent of necessity (case of unauthorized agency).

The liability of the principal towards third parties upon either an express or implied power is discussed in the above subsections. Remaining is liability of the principal for his acts of ratification for the act the agent has committed without any authority and case of unauthorized agency.

Look at this case adjudicated by one of the Ethiopian courts, designed to show you the effect of agency upon the relationship between the principal and the third party and the role of the agent in agency relationship.

It is a case between Ato Hailu Eshete and Ato Demissie Legesse and others. Read it carefully.

This case was brought and adjudicated in Addis Ababa high court in 1960. The defendants were director and administrators of Itegemenen Handicraft School. The plaintiff was a resident of Addis Ababa who has bought a second hand car (Volkswagen) from the school at a public auction. He alleges in his statement of claim against the defendants that the car bought was in need of repair and he had incurred expenses. Also he claimed since ownership of the car was not transferred to him he cannot enjoy what ownership entitles him (driving in the city etc).

The defendants on the other hand had presented a statement of defense pleading that:

They were agents of the school and produced evidence showing agency principal relationship between the school and themselves to sell the car. Similarly, they produced a receipt showing the fact that it was the school which has received the money and not the defendants except that they have signed on behalf of the school. Hence, demanding the court to dismiss their name as defendants and replacing the school as a defendant if at all the court believes that there has to be a defendant in this claim of the plaintiff.

It was held that the defendants sold the car to the plaintiff not as owners (individual or joint) but on behalf of the school. The court has substantiated its reasons as follows. The letters written by the plaintiff to the school authorities requesting that ownership be transferred to him proves that the plaintiff was aware of the fact that the school has directly involved in the sale of the car. Hence defendants cannot be held liable for acts done on behalf of the school. For these reasons said the court, we held that the proper party to be sued is the school and not the defendants.

How do you relate this case with the effects of agency?

“Contract made by an agent in the name of another within the scope of his power shall be deemed to have been made directly by the principal.” (Art. 2189)

One may ask the following questions to solve the above case with the rules (the law) sated here. Did the agents sell the car in the name of the principal (the school) and within the scope of their power? Because these are the preconditions that need to be fulfilled for acts of the agent to result

in making the principal liable towards the third party (the buyer plaintiff). As it was revealed by the evidence produced by the plaintiff and the defendants, the defendants have acted in the name and on behalf of the principal, the school.

The other point is whether the defendants have acted within the power vested. Similarly, as the court has proved from the documents produced by the parties, the defendants were authorized to sell the said car and not to hire or lease. Hence, by virtue of Art 2189 (1) the buyers of the car, the plaintiffs in this case are creditors of the school for any claims they have in relation to this case and the principal is liable to the plaintiffs; and the agents once then have acted within the scope and in the name of the principal are out of the scenario.

3.3.1 Liability upon Ratification of an Act Unauthorized

Generally, it is believed that the agent shall establish a liability between the principal and third party when he/she has authority at the time of making of the contract with third parties on behalf of the principal. Yet, the agent may work with a lapsed authority or in an authority departed from its terms.

Art. 2207 Obligation to Ratify

- (1) The principal shall, where good faith so requires, ratify the act done by the agent not withstanding that he departed from his terms of reference.*
- (2) The provisions of sub-art (1) shall apply where it is reasonable to admit that in the circumstances, the principal would have extended the scope of the agents authority, had he been aware of the situation*
- (3) The agent may not require the principal to ratify where, before acting, he had the possibility of securing authority form the principal or where, after having acted, he emitted forthwith to inform the principal.*

Here the principal is obliged to ratify the acts of an agent who in good faith, the interest of the principal requiring has departed from what is stated expressly or implied from the authority. The question here is what do we mean by “good faith”? It is provided under sub Art (2) of the above

provision that the obligation is imposed on the principal where it is reasonable to admit that the principal would have extended the authority had he known the circumstance. On top of these, the agent is in a situation where he is not able to demand an extension of authority or after he has committed he was prevented from telling the principal the acts he has committed.

Illustration:

The principal has authorized an agent to buy him 100 quintals of teff. He is interested to buy more but he has a capital which can buy only 100 quintals. Fortunately the price of teff has fallen and the money received for this purpose by the agent was able to buy 5 additional quintals of teff. The agent with this knowledge has bought 105 quintals of teff. This act of the agent may undoubtedly be called acted upon good faith. In fact, for the principal to ratify conditions provided under sub (2) need to be fulfilled. That is, the agent was unable to inform to the principal the facts which demand the extension of authority, and failing to do so he has informed the principal of this reality.

Exclusion of Authority:

The converse of what is said above is that the principal is not bound by any contract made by the agent outside the scope of such authority expressly or impliedly given. The effect of this is that the agent and not the principal shall be liable to the third party. Look at the provision below:

Art. 2293 Effect of repudiation

- (1) The provisions of Art. 1808- 1818 of this code shall apply where the contract is repudiated*
- (2) The third party having entered into the contract with the agent may demand that the damage caused be him by reason of his having in good faith believed in the existence of a valid authority be made good in accordance with the provisions of the following articles.*

Repudiation is the non-acknowledgement of the acts of the agent by the principal. The effect of repudiation is that the principal shall not be liable to the third party and hence only the agent shall be liable (Art. 2195). Yet, where the agent acted “in good faith not knowing the reason by which his authority had come to an end” the principal shall be liable (Art. 2194). Please open your civil Code and look at the provisions of this article. Similarly both the principal and the agent shall together be liable in circumstances provided under Art 2195 of the civil code. We have dealt with the concept of apparent authority in the earlier chapters. In those chapters we have looked at three cases where the agent and the principal shall be liable for the failure or acts committed by him.

B. Effect as between the Agent and the Third Party

In certain circumstances an agent will be personally liable on a contract which he has negotiated for and on behalf of a principal. The possibilities of such liability differ according to the nature of the contract. The agent shall be liable to the third party generally in two cases: where the agent acted beyond the scope of his power and/or acted in the name of a third party or in his own name. Acting beyond power is acting in a lapsed or outside the scope of his authority (Art. 2190). In these cases the agent shall personally be liable to the third party unless the principal ratifies the act of the agent. Similarly, where the agent acts in his own name or in the name of another person either on behalf of the principal or on any other behalf the agent shall personally incur the liability or gain the benefits wherefrom (Art 2197). But the agent is excluded from liability where the third party was aware of the limits of the authority of the agent in a document evidencing authority. [Art. 2196]. Even when the agent has acted beyond power but the personal qualification of the principal is not required for the third party and the agent replaces the principal there will not be liability of the agent towards the third party to pay compensation [Art 2196(2)].

EXERCISES

1. What is the effect of agency lawfully formed between the agent and the principal?
2. What are the conditions that need to be fulfilled for the main effect of obligation to come?
3. What is the result of the non – fulfillment of the name test.
4. How do you explain acting beyond power?
5. What is the effect when the agent has acted within the scope and in the name of the principal?
6. List down the obligations of the agent.
7. How is conflicting interest explained?
8. What is the effect of conflicting interest?
9. How do you explain the degree of diligence required from the agent?
10. What is meant by duty to account as an obligation of the agent?
11. Can an agent delegate a sub agent for the affairs of the agent? Explain
12. List down the obligations of the principal towards the agent?
13. Why is document evidencing power of authority not subject to lien? Explain

Hypothetical and Real Cases

3. CRBC construction is one of the construction organizations in Ethiopia engaged in building construction, bridges and similar undertakings. It has different projects running in the country. Ato Zenebe was appointed coordinator of a project in the CRBC from Gondar to Bahir Dar road construction. Ato Zenebe has leased a bull dozer for the benefit of the CRBC from a company engaged in this activity. The owner of the bulldozer has requested the payment of the rent from the CRBC.

Question

Is Ato Zenebe legally entitled to Lease a bulldozer?

2. Which of the following activities are acts of management?
 - a) An individual bought woods to repair a store.
 - b) Ato Kassa, manger of a wood working workshop has bought timber.
 - c) Ato Kassa, manager of the above workshop has concluded a contract of loan with a bank to run the business of the workshop.
 - d) Ato Kassa has concluded a contract on the maintenance of the building of the workshop with an engineer.

3. Ato Abebe is a driver of a lorry employed by the owner, Ato Amare. Once upon a time, while he was driving down to Hawassa, the car lost an expensive spare part. Unable to communicate this fact to the owner, for the car is damaged in the middle of Rift Valley far away from towns or villages; he has to buy the required spare part from a passerby car driver. Aware of all these facts, the owner has refused to ratify the act of the driver.

Question

How would you handle the situation?

4. Ato Seid has appointed Ato Lema to buy him a car (automobile). Ato Lema, while wondering to buy a car, has found his nephew, ready to sell a car. Ato Lema buys the car in the name and on behalf of Ato Seid with a price a bit exaggerated.

Question

- ❖ Ato Seid has discovered the fact that the car was bought from a relative of the agent and there was a conflicting interest of him with the agent. What is the remedy available to him? Discuss

5. W/ro Selamawit was appointed agent to buy a good for birr 200.00 (two hundred). She has bought the good for an additional price of birr 20.00 (twenty Birr). The third party from whom the good was bought requires the payment of 220.00 (two hundred and

twenty Birr) from the principal because he has concluded the sale contract thinking that W/ro Selamawit has a power to buy for that amount.

Question

❖ How do you manage the situation?

6. Ato Abe was appointed agent of Shimelis to buy certain goods. On Meskerem 2, 2000 he bought good beyond his power of authority. Ato Shimelis was satisfied with the quality of the good bought; However, he did not authorize the agent to buy that good, he has ratified the act the agent has concluded with the seller on Tikimt 30, 2000.

Question

What is the date of conclusion the contract of sale? Is it on Meskerem 2,2000 or Tikimt 30, 2000? Why?

7. What is meant by the term “immediately” under Art 2190?
8. Ato Mulugeta, Zeleke, Shimelis and some other 5 individuals were getting together for monthly affair in a regular place. Ato Zeleke has declared to every body there that he is an agent to Shimelis to sell and buy goods on behalf of him. The other day, Zeleke has sold the TV belonging to Shimelis to one of the individuals who believed that Zeleke was really an agent empowered to sell the good. in the gathering made on the previous days
 - A. What is the liability of the agent?
 - B. What is the liability of the principal?
 - C. Would the principal succeed in invalidating the relationship?
9. Zuro Megbiyaye PLC lends money for persons to build homes; the borrowers sign notes in which the principal and interests are repayable in quarterly installments over a period of fifteen years. As security for each loan; it takes a mortgage over an immovable belonging to the borrowers or third parties. For the past ten years the PLC has sold its

notes, along with mortgages, to the bank. The PLC has continued to collect the installment payments on the notes and to transfer such payments to the bank. There has been no express agreement to this effect between the PLC and the bank; the borrowers have known of the sale of the notes and mortgages, but were told by the PLC that it would continue to collect the payments as agent of the bank. Ato Shimels, a borrower, paid three monthly installments to the PLC which were not transferred to the bank. The bank now sues Ato Shimels in court, demanding the sale of the property secured by the mortgage and payment of all amounts due.

Would it succeed? Explain.

10. Ato Alemayehu was appointed special agent of Muluken to buy a precious material from whoever he finds. Ato Alemayehu has received an offer from Lake to buy that precious material. But the price of the good was so high that Alemayehu cannot conclude the sole agreement with the seller with the money at hand which the principal has delivered to him. And he knows that Ato Muluken cannot deliver him any additional money. Having these backgrounds Ato Alemayehu has determined to use threat of force against the seller.

In an evening he has gone to a corner where he was able to find Ato Lake and succeeded in concluding the contract and getting the good delivered on a lower price below what Ato Lake was naming in a sober mind. The contract was concluded in the name and on behalf of the principal.

Ato Lake has initiated a case in front of a court to invalidate the contract concluded invoking threat of force (say conditions to invoke it are fulfilled). But Ato Alemayehu has defended the case invoking Art 2189(3).

His argument was the alleged act committed is not that of fraud but threat of force. Art 2189 (3) entitles the third party to set up a fraud committed by the agent and not a threat of force or even mistake. So, the defendant argues that the contract is valid.

Assume you are a judge for this case, what would you decide? (Hint: look at Art. 1704)

12. Explain the fact that the name test is the main test in Ethiopian agency law in terms of:

- a. Liability of the principal
- b. Liability of the agent
- c. Ratification

13. Tigist is appointed agent of Kassa. She was appointed to buy goods on behalf of Kassa. While she has been performing her duties in the name of her principal, Tigist has bought two items in her own name. Ato Kassa being aware of the fact that she has bought these items in her own name, he has communicated to the contracting third parties that he may or may not ratify the act of the agent.

Question:

The third parties who have concluded the contract with Tigist (Tigist acting in her own name) have approached you to know whether the statement of Ato Kassa is valid in the eyes of the law. Write the implication of his statements based on the relevant laws.

14. Once upon his leisure days Ato Lingerh, who was driving to a recreational area to pass the weekend away from home, lost one spare part of his car in front of his friend's residence on the way to his destination. He had to go to his friend and find a solution. While he parked the car within the premise of his friend and the two were enjoying together, the son of Ato Mamo (a friend of Lingerih) heard of the facts, without the knowledge of Ato Lingerih bought part of the car lost from a garage on credit basis and fixed the problem. Later, the owner of the garage requested the payment of the money in accordance with the agreement from Ato Lingerh.

Questions

- ❖ What would you advise both the owner of the garage and the son of the friend of Ato Lingerh?
- ❖ Would the sale agreement be valid?
- ❖ If the contract would not be invalidated, who should pay the price of the goods bought?

16. Ato Tadese was a diligent and faithful agent to Yayesh so far. Only today he has concluded a contract of service with Ato Gemechis beyond his authority. He has agreed with the latter to prepare him a table for a payment of 800.00 (Eight hundred birr) beyond his power. Ato Gemichis has been paid only 100.00 (one hundred birr) as part of the price. After he has finalized the work requests the payment of the remaining price. But the principal has informed him that, “my agent has acted beyond power while entering this contract with you. Therefore I am not responsible for the payment and you may ask him to pay you.”

Questions

- a. The third party has invoked Art. 2214; would that be tenable? Discuss.
- b. Suppose you are the judge in this case, how would you resolve this dispute?

17. Discuss the following concepts

- a) Apparent authority
- b) Undisclosed Agency
- c) Commercial Agent
- d) The difference between implied authority and implied agency

18. Ato Solomon is a government employee in Bahir Dar. Sometimes he buys and sells houses for gain. To keep him running this business fast, he has appointed Amanuel his agent. In the contract (written) giving rise to this agency relationship, it is provided as follows.

“ I the principal, Solomon, has given power of authority to the agent Amanuel on the following: to buy house and transfer title of the same, to form agreement and sign on them, to pay taxes, when required and to perform any acts in place of me.”

In the mean time Solomon dies. Following the death, heirs of the deceased residents of Addis Ababa have appeared to their father’s house to take their succession. Unfortunately an individual whom they do not know is residing in side. They asked him to evacuate because they are heirs. They were in fact declared heirs by court. Amanuel has shown them the above mentioned authority and told them that he has sold the house to a third party named Aster with the authority he has and their father has collected some of the price before his death. He has produced a contract of sale of the same house signed by the buyer and the agent. And he claims that it is only some amount of money remaining uncollected which they can do.

Questions

- a) Was that a special authority or general?
- b) Is Amanuel empowered to sell the house?
- c) Can the heirs succeed if they are going to take this case to court? What is their legal ground?

19. In the realities of agency “the name test is the main test.” Does this adage go with Ethiopian agency? Support your answers with laws and arguments.

20. Tadele is an agent of Zeleke in Bahir Dar. Zeleke has won the 2007 USA DV lottery. Before he left for USA he had applied for court and found a declaration of revocation of the agency. Tadele, without the knowledge of the revocation, has concluded contracts with third parties after the revocation of his authority.

Questions

- Is Zeleke bound to ratify those acts committed after the revocation?

- ❖ If your answer to the above question is in the negative, who is responsible for those acts?
- Would that have differing effect if the agent had acted in his own name and in the name of the principal? Discuss.

21. Say, an act committed by an agent is revoked by the principal because the agent has made it beyond power. The agent wants to perform the obligations himself to relieve himself from paying losses.

Question

Can the third party resist and succeed? Discuss.

22. What activities is a person conferred with power in general terms required to carry as an agent? And what activities is he not allowed to perform? List.
23. Discuss the conditions that need to be observed for an agent to employ a sub agent.

CHAPTER FOUR
AGENCY IN TRADE (BUSINESS AND COMMERCE)

Introduction

It is important to classify things into their specific categories both for the purpose of understanding the concepts well and to see their specific application.

One of the most important features of agency relationship is the authority of the agent. This is concerned with the functions entrusted to the agent, as well as the mode of exercising those functions. To some degree the agent's authority is derived from or defined by the particular kind of agency he undertakes. As a result of legal and commercial developments, certain kinds of agents distinguished by name and function have been developed with varying functions. Those various kinds of agents will be described below.

Chapter Objectives

At the end of this chapter students are expected to comprehend:

- ❖ The different kinds of agents;
- ❖ Special features of each type of agents;
- ❖ The relevance of each kind of agents.

4.1 Commission Agent

Have you ever employed the term commission in relation to performing an activity for another? Have you ever looked at an individual employed in a shop with a payment of money as per the amount he/she sold per day/week/month? For we have different commission agents depending on the activities done by the agents as well as the duties to be assumed it is a waste of time to give a general definition to a commission agent generally. Therefore, we have decided to look at the definition and features of each of the commission agents as follows.

A. Commission to Buy or to Sell

a) **Definition:** As the name implies a commission to buy or to sell is one given to an agent empowered to sell or buy goods. It is defined by Art 2243(1) as:

“the commission to buy or to sell is a contract of agency where by the agent, called the commission agent (to buy or sell) undertakes to buy or sell in his own name but on behalf of another person, called the principal, goods, securities or offer fungible things”.

For the purpose of comparison let's look at the definition given under Art 60 of the commercial code.

Art. 60(1) “a commission agent is a person or business organization who, independently, professionally and for gain, undertakes to buy or sell in his name, but on behalf of the principal, goods, movables or any other thing of a similar nature or to enter in his name but on behalf of the principal into a contract of carriage of goods.”

In both of the definitions the following are the underlying features of a commission agent.

The parties:

The parties involved here are the principal, and the commission agent/to buy or to sell). The special name commission agent (to buy or sell) works for a commission agency. The commission agent is a professional (trader) under the commercial code. A commission agent fulfills the features of a trader. But the principal can be any person. The agent acts in his own name. The most important, if not the only, feature of a commission agent (to buy or sell) is the fact that the agent acts in his/her own name. It is not relevant in this variety of agency for the third parties to know with whom they are contracting. The business itself does not require to know on whose behalf the third party is interacting. Yet the agent acts on behalf of the principal. An individual (third party) may not be interested to know who the seller of a jacket he has bought in a market

place is. The seller may be the owner or a representative. You may not be much worried as to the capacity (agent/principal) in which the seller has dealt with you. This makes ordinary agent different from this variety of agents. As you remember under Art 2189(1) the name test is relevant for the effects of agency to come. But here is the exceptional case of that general rule of “name test”.

The goods to be sold/bought are: goods, securities and tangible things. Dear students, is there any qualification over the subjects of sale/buy? I.e. is it any good that can be sold or bought by a commission agent? Look at Art. 2234. It has listed out the things which can be bought or sold by a commission agent. These are goods, securities or other fungible things. What is meant by good? Good is defined under Art. 1126 as either movable or immovable. Thus, it can be said that both movable and immovable goods are subjects of sale by a commission agent. But there are some who argue that immovable things and special corporeal chattels are not subjects of a commission agent. This is because a commission agent of this type works in his own name. That means he sells or buys goods as if he is the owner without disclosing the name of the principal. One of the requirements in sales transaction is that the one who is named seller must be able to transfer ownership. Thus, the seller must be one who owns the goods or whom the law presumes the owner. The holder of ordinary chattels (movables) is presumed owner and he can transfer title upon delivery. But when the good sold is a special corporeal chattel and/or an immovable, the possessor/holder is not presumed owner. Therefore the agent cannot sell conveniently a good which requires a special formality for transfer in his own name. The agent may be able to sell in the name of the principal. But that is not a commission agent to buy or sell: because the feature of the concept is affected in the latter case. The purpose of representing is to facilitate the affairs of the principal. Therefore, these people argue that an immovable cannot be subject of a commission agency.

Therefore, the term “goods” here is meant under the Ethiopian law (Art. 2284) goods which the possessor is presumed to own. These are ordinary chattels. Do you agree with these arguments?

On the other hand, securities include: shares, commercial instruments etc which do not require the principal for transfer of title. And fungible things are those goods in contradistinction to

specific goods which are usually measured with weight, length etc. These are mainly agricultural products like teff, wheat etc. Specific goods are also subjects of sale/buy by a commission agent.

B) Scope of Commission Agency Provisions:

Commission agency generally is a special category of agency relationship. The general rules of agency are applicable to commission agency subject to those special provisions which are applicable only to commission agency from Art. 2234 – 2256. That is provided by Art. 2234(2) as “the rules governing agency shall apply to this contract subject to such special provisions and exceptions as are laid down in this section.”

C) Duties/Rights of the Commission Agent:

Subject to the provision under Art 2235 or the civil code where the general agency provisions are applicable here too, we are not going to discuss the obligation of the general agent. Because the general rules discussed above are applicable for special kinds of agency-principal relationship unless the special provisions dictate otherwise. Therefore here we are going to look at the obligations special to a commission agent.

Measures of Preservation:

Unlike a general agent, a commission agent is much in contact with goods of the principal either to be sold (mainly because it may take time to sell goods) or bought until they are delivered to the principal. The goods which may be away from the principal for either of the purposes (sell or buy) are in possession of the agent. Hence it is not surprising if a duty of preservation is a primary obligation on the part of the agent in respect to the interest of the principal. A sales commission agent is bound to “take all the necessary steps for the preservation of the goods sent to him on behalf of the principal. This is the duty to protect the goods from damage of any kind. The agent is expected to safeguard the goods in his possession as a *bonus pater familias*, (Art. 2235).

Not only are those properties/goods under his /her custody but also those goods under carriage expected to be taken care of. Therefore, he is expected to follow up whether goods sent are in a good state of their condition as well as the fact that these goods have arrived on time, and he shall inform the principal any delay of the delivery of the goods to him/her (Art. 2235(2)).

The above duties are imposed in a similar fashion against a commission agent who has not accepted an offer to be an agent, when the goods are sent together with the offer. We hope you remember the points we discussed as to how acceptance of an offer is made when it is made to a professional agent. Under Art. 2201(2) we have said that unless such an agent immediately refuses this offer, acceptance is presumed. Yet, even when the offeree to a commission agency refused/rejected it, there is a duty to take preservatory measures “where the commission falls within his professional activity.” The offer made is selective to result in this effect. For example, an attorney who is sent an offer to be a commission agent to sell a good/or goods is not required to take preservatory measures [Art. 2235(3)]. This is because it does not fall under his professional activity.

Sale of Goods Consigned:

Part of measures of preservation of goods is sale of goods in imminent danger.

Art. 2236 sale of goods

Where there is a risk that the goods consigned for sale will quickly deteriorate, the commission agent may and where it is in the interest of the principal, shall have them sold with the assistance of the competent authorities at the place of their location.

This obligation is applicable for a commission agent to sell. Goods waiting a good price consigned for a longer period may be in a risk of deteriorating. In this case it is in the interest of the principal to sell these goods at the current price. The price of the goods might not be at the price the principal is looking for. To avoid conflict of interest as well as confidence among the parties (the agent and the principal) the law has devised a mechanism that the sale of the goods to

deteriorate to be made in front of public officials at the place where the goods are consigned. The goods may be sold at a lower price than expected. Yet this is in the interest of the principal compared to losing the total value.

Anticipated Payment:

This is applicable to a commission agent to buy. A commission agent to buy goods is going to pay prices. The payment of prices has to be committed after he/the agent has taken delivery of goods. When the agent commits payment of price before he has taken delivery, it is up to him whether the third party fails to deliver the goods. It is on his risk when the seller fails to deliver the goods on the agreed date. The principal is entitled to get the goods bought (price paid).

Art. 2237 Anticipated payment

The commission agent shall act at his own risk where, without the principal's consent he pays the seller before delivery has taken place.

In fact the principal may grant this right to the agent: to pay price before delivery takes place either at the beginning where authority was granted or by a later order. In this case the agent shall be paying at the risk of the principal and not at the risk of the former.

Sale on Credit:

This obligation works for a commission agent to sell. This is a counter obligation to the obligation related to anticipated payment discussed above. In principle the agent must commit a simultaneous payment. That is, he has only to deliver the goods upon the payment of the price by the third party. However, where it is the custom of trade at the place of sale and the principal has not given an otherwise order (not to sell on credit even in the presence of custom,) the agent may commit a credit sale. To put it in simpler terms a credit sale for the agent is allowed only in limited circumstances. when the custom of the place of sale allows, and the principal has not given contrary instructions to the agent.

In all other cases, the agent is liable to the principal and the latter is entitled to demand the price before payment to the agent is committed as if a cash sale is committed.

But a benefit that may be accrued because of a credit sale does not go to the principal in this case. Is there any additional benefit other than the price in selling a good on credit? In practice when a good is sold in credit it means the price is paid at a later date than it would have been, had it not been a credit sale. The seller fixes an additional payment (usually the interest of the price calculated in those unpaid days) that the buyer is going to commit. That is the benefit on credit sale. When the agent has committed a credit sale contrary to custom and/or contrary to instructions of the principal and the principal has received price as if sale on cash is committed, the benefit (extra benefit to the price) goes to the agent.

A close look at Art 2238(2-3) and Art 2239 reveals a discrepancy among these provisions. Look at Art 2238(2). The commission agent who has committed a credit sale has to inform to the principal two things: the person of the buyer and the period of time granted for payment. Sub Art (3) adds when the agent fails to tell the principal any of the above information the transaction is deemed to have been committed on cash basis and Art. 2239 shall apply. When it comes to Art 2239, it is provided as follows:

Art. 2239 unauthorized credit

- (1) Where the commission agent grants time for payment contrary to the instructions of the principal or usage, the principal may demand immediate payment.*
- (2) In such a case the commission agent may retain the benefits he received in granting time for payment.*

The problem is under Art. 2239 relates to “*immediate payment to the principal and benefits to the agent*”. Are these applicable when the agent has committed a credit sale contrary to custom and/or against contrary instructions of the principal, *or* is it because he has failed to inform the principal as to the person of the buyer and the period granted for payment?

Therefore, if an agent has failed to fulfill the conditions under Art. 2238(1) but has fulfilled those under 2238(2), is he relieved of an immediate payment? It is impossible to answer this question in the positive because Art. 2239 (effect provision) says where the agent fails to act in accordance with Art. 2238(1) and does not include the condition under Art 2238(2).

At the same time it is impossible to answer the above question in the negative too because Art 2238(2) provides Art. 2239 shall be applicable when the conditions under 2238(2) are not fulfilled.

We see a problem in the drafting of this provision. The purpose of Sub Art (2) of Art 2238 is to notify the principal to decide on whether the buyer is solvent and the time given does not affect the payment of the debt (price). When the principal has approved the credit sale, even when the buyer fails to pay at the agreed time, there is no liability of the agent but that of the principal. And the provisions under Art. 2239 do not apply. Yet, when the principal does not approve the credit sale then Art 2239 shall be applicable. Therefore, the purpose of Art 2238(2) is to present the factual situations of the credit sale in terms of the person of the buyer and the time granted to the principal to decide. However, whether this option (to decide on the approval or otherwise of the sale) does not seem to be given in clear terms by Art. 2238(2) it is implied by the cumulative reading of the two provisions.

B. *Del Creder* Commission Agent

An agent is not a guarantor of the obligation assumed by a third party. But it is not prohibited for an agent to be a guarantor for the performance of the obligation assumed by the third party with whom the agent has acted on behalf of the principal. Art. 2240 of the Civil Code indicates to the effect that an agent can be a guarantor for the performance of the obligations of the third party. It provides as:

Art. 2240 Guarantee give by commission agent

- (1) The commission agent shall be liable to the principal for the payment or the performance of other obligations by the persons with whom he contracted where he acted as a del cerdere agent.*
- (2) Unless otherwise agree, a commission agent entrusted with the purchase or sale of securities shall be deemed to be a del credere agent.*
- (3) A commission agent entrusted with the purchase or sale of goods shall be deemed to be a del credere agent where such is the custom of trade in the place where he resides or where he guaranteed the solvency of the persons with whom he contracted.*

When an agent acts as a guarantee he/she is named as a *del credere* commission agent (Art 2241). The *del credere* commission agent is liable to the principal for he payment or performance of obligations assumed by the third parties towards the principal. It may arise from two sources: consent of the agent and the principal and by the law. By law it arises where:

- ❖ The agent was entrusted to buy or sell securities or
- ❖ It is the custom of trade of the place where the agent resides; or
- ❖ The agent guaranteed the solvency of the third parties with whom he/she has contracted.

An agent entrusted with the purchase/sell of securities is required in effect to be cautious whether or not the third parties are capable of performing their obligations. The agent, and not the principal, needs to assess the nature of the securities to be bought and the capacity of the third parties to pay the agreed price.

Similarly, where it is the custom of trade in the area where the agent resides an agent to guarantee the performance of the obligations by third parties, it is natural for him/her to assume obligations of guarantee. And when the agent has guaranteed that the third party is solvent, an implied guarantee is assumed.

The effect of assuming guarantee of the performance of obligations by the agent is; “the agent shall...be liable to the principal for the performance of the contract he entered into unless non-performance was due to the principal’s default.” As if he was the guarantor of the obligation

assumed by the third party, the agent shall pay when the third party fails to pay. We may ask whether the agent is a simple or joint guarantor. It is given under Art. 2241(1) that a *del credere* agent is a joint guarantor: “--- a guarantor jointly liable with the person...” Sometimes the principal may be one cause for the non-performance of the obligation assumed by the debtor (third party). The principal may assume certain obligations that are essential for the performance of the obligations by the agent. These include for example: taking delivery of the goods bought by the agent or making transportation available. The latter might be assumed by agreement. In these cases the agent shall not be liable for the non-performance by the third party.

Insurance: the principal may want the agent to insure goods in the latter’s possession. It may be to the interest of the principal to insure the goods. But this cannot be presumed unless the principal has given a special order to the agent to do so. “The commission agent shall not be bound to ensure the goods unless the principal instructed him to do so” (Art. 2242). It is true that it is not the duty of the agent (commission agent) to insure any good at his hand to be sold or bought unless he is instructed to do so. Yet, it is not the right of the agent to refuse to insure the goods when he is instructed by the agent.

Remuneration of a Commission Agent

Remuneration for a professional agent like, a commission agent is presumed even when parties fail to agree on whether it is payable or not. Consequently, either when there is no agreement on whether remuneration to be due or not or when parties have failed to agree on the amount to be paid, the court shall fix the amount depending on “the custom of the place where the contract was entered---“. In the absence of custom dictating the amount, that court shall fix it on the basis of equity having regard to the work performed by the commission agent, the expenses he incurred, and the risks he assumed.” (Art. 2243 (1-2).

A *del credere* agent needs to be remunerated higher than the ordinary commission agent. The relationship deserves an extra commission because the commission agent has assumed extra duties. This extra commission is to be agreed by the parties or to be determined by court in accordance with usage or equity (Art. 2243(3).

Remuneration for an ordinary commission agent or a *del credere* commission agent is due “where the transaction entrusted is completed or failure to complete it is due to a reason attributable to the principal” (Art 2244(1)). The commission agent shall not be paid remuneration in the following cases:

- ❖ When the transaction was not complete for causes other than those stated by Art. 2241(1) and it is contrary to the usage of the place of his professional activity (Art. 2244(2));
- ❖ The agent has breached one of his duties (honesty) (Art. 2241(1));
- ❖ In particular where the agent pretends that he/she purchased at a higher price or sold at a lower price than he actually sold (Art. 2245(2)].

Honesty is the best policy of agency relationship. In the earlier sections while we were dealing with the duties of the agent, we said that the agent is required to act in good faith towards running the interest of the principal. Any clandestine benefit, a benefit without the knowledge of the principal is breach of good faith and hence acting dishonestly. That results in forfeiture of the agent of payment of remuneration.

Outlays and Advance:

There is nothing special for a commission agent with respect to the right of the agent to be reimbursed the expenses he/she has incurred in running the affairs of the principal. It is provided under Art. 2246 that the principal is bound to reimburse outlays and advances (money that should have been paid to the agent to run the interest of the principals) with its interest. Even when the business was unsuccessful, this payment is not denied but only when there is an agreement otherwise.

Lien Right of the Commission Agent:

There is nothing special in this case as well. The commission agent has the right to hold property bought property to be sold as well as money received from the buyer, (Art. 2247). The last group (Money) whether it is subject of lien could be arguable because it aprons that if the commission

agent is going to hold money it could mean that the agent can set off the money for the rights he has over the principal.

Commission Agent Dealing on his/her Own Account:

The basic requirement in agency relationship we have dealt with in the previous sub sections is acting in the name of the principal. But when it comes to commission agent, he/she acts in his/her own name. In addition to this, to deal with oneself is presumed to bring a conflicting interest and the principal is entitled to invalidate such a contract entered with the agent himself. But when it is a commission agent to sell/buy goods having a market value or goods quoted on a stock exchange (lacking in our country) the purchase or sale committed by the agent with himself is valid. In this case the commission agent who has dealt with himself remains entitled to the remuneration (Art. 2248). But this does not mean that when the price for the goods either having a market price or quoted in a stock exchange are different to the detriment of the principal, it is valid. The principal has the right to invalidate in this case. (Art 2248(3)].

The agent is required to name the third party with whom he/she has dealt with for the sale or purchase of goods. When there is no party named as a buyer or seller, then it is the agent himself or herself who is presumed by the law j(Art. 2249) to have bought or sold the goods for the principal. Hence, the above consequences shall follow.

- **Forwarding Agent**

Forwarding agent is one category of commission agents. In simple terms the function implies its name. It is an agent, with payment of a commission engaged in transferring, pushing goods of a principal to a carrier. It is defined under Art. 2251(1) as follows:

Forwarding agency is a contact of agency whereby the agent called the commission agent. Shipper or forwarding agent, undertakes to enter in his own name but on behalf of another person, called the principal into a contract for the forwarding of goods.

It is a contract of agency. Hence, all the requirements of a valid contract of agency are applicable here. The person undertaking to play on the side of one of the contracting parties, the agent side is named as: a shipper forwarding agent but he/she/it is generally named as a commission agent. The other contracting party is not given a specialized name but simply named as a principal. The object of contract of agency as we can grasp from the above definition is for the forwarding of goods belonging to the principal.

Usually shipping lines for example, the Ethiopian Shipping Lines Company, are engaged in forwarding activities. In this case the agent is engaged both in forwarding and for the transportation of goods of the principal as a carrier, to the third party, buyer.

As forwarding agency is a special form of agency, both the general rules of agency as well as provisions of a commission agency are applicable. This is supported by Art. 2251(2) “The rules governing the contract of commission agency to buy or to sell shall apply to this contract.”

Perhaps special for this type of agency relationship is insurance of goods to be forwarded or carried. In most cases this type of agency is applicable in exporting goods abroad from Ethiopia. This activity is committed in inland, air and water transportation systems. It passes through risky ways. Even in this case the law does not presume an obligation on the part of the agent (forwarding agent) to insure the goods. Even the principal cannot order the forwarding agent to insure the goods like the case of a commission agent to buy or to sell (compare Art. 2242 and Art. 2252(1)). It is only when the parties (principal and forwarding agent) have agreed to insure the goods that the latter is bound to insure the goods. This is because the principal is supposed to take every care in this type of transportation.

Like we have dealt with in the above paragraphs, the forwarding agent may act as a carrier and a forwarding agent at the same time without a special permission/consent of the principal (especially to act as a carrier.)

Illustration: Dolphin forwarding agent may agree to forward the goods via a carrier (e.g. The Ethiopian Shipping Lines Company) to the buyer residing in Germany. The individuals engaged

in this activity are: the seller of the goods here in Ethiopia, the principal; the middle person, the forwarding agent, Dolphin forwarding agent; the carrier (ESLCo) and the third party, the buyer residing in Germany. The object assumed by the forwarding agent is to deal with a carrier in his own name but for the benefit of the principal to transport goods abroad for example. The forwarding agent may carry the goods himself. In this latter case the agent is acting both as a forwarding agent and a carrier. It is in these situations that Art. 2252(3) provides, that the agent shall be entitled for the duties of the principal towards a carrier.

- **Manager**

At the beginning of this material, we said that agency is badly required to run legal persons. Business organizations as legal persons require agent to act on their behalf, without which the sought purpose of the organization cannot be achieved.

What is a manager? A manager is defined by Art 33 of the Ethiopian Commercial Code as “a manager is a person who has been authorized expressly or tacitly, to carry out acts of management and to sign in the name of the trader.” The manager has full power to carry out all acts of management connected with the exercise of the trade, including the power to sign a negotiable instrument (cheques, promissory note, etc). But he/she/ may not sell or pledge immovable property, nor may the manager sell, hire or pledge a business unless the manger is expressly authorized to exercise these acts.

You will learn this concept (manager) under you course, “Law of Traders and Business Organizations”. But for the purpose of this course read the provisions of the commercial code of Ethiopia from Arts 33 to 36.

To summarize, a manager is a person who is appointed as agent of a trader to do acts of management and/or to sign on negotiable instruments. These powers of a manger may be given either expressly or tacitly. The main issue here is to identify what type of acts are acts of management and what are negotiable instruments.

Acts of management are defined in Art 2204 of the Civil Code. A manager can and is bound to execute any one or more of the activities listed down under Art. 2204. These include: acts done for the preservation or maintenance of property, leases for terms not exceeding three years, the collection of debts, the investment of income and discharge of debts, sale of crops, sale of goods intended to be sold, and sale of perishable commodities.

Similarly negotiable instruments are documents that carry an entitlement /right to the lawful bearer. It is defined under Art 715 of the Commercial Code.

Art. 715 Definition

- (1) A negotiable instrument is any document incorporating a right to an entitlement in such a manner that it be not possible to enforce or transfer the right separately from the instrument.*
- (2) The law recognizes in particular as negotiable instruments commercial instruments, transferable securities, documents of title to goods.*

On the other hand commercial instruments are: negotiable instruments, setting out an entitlement consisting in the payment of a sum of money (Art. 732(1) of the Commercial Code). Bills of exchange, promissory notes, cheques, travelers cheque and warehouse goods, deposit certificates are commercial instruments recognized under the commercial code (Art. 732(1)].

Transferable securities are shares and debentures. And documents of title to goods can be exemplified by bill of lading or airway bill.

A manager of a trader is therefore, in addition to acts of management, bound and entitled to sign on the above instruments.

- **Commercial Agent**

A commercial agent is an independent trader engaged principally in representing another trader in certain areas of business. Like a manager, a commercial agent is not defined by the civil code,

but the commercial code defines and speculates different features of it Arts. 44-55. Only the salient features of a commercial agent shall be discussed below. The details of it, are found in your course, Trade and Business Organizations.

Art. 44 Definitions

- (1) A commercial agent is a person or business organization not bound to a trader by a contract of employment and carrying out independent activities.*
- (2) Unless otherwise provided in the agency agreement, contracts entered into by a commercial agent shall become effective without confirmation by the trader.*
- (3) A commercial agent normally acts as agent and may act as broker. He is a trader.*

A commercial agent is one entrusted by a trader with representing him permanently in a specified area and dealing or making agreements in the name and on behalf of the trader.

A commercial agent represents the trader in a specified area of trade. Usually a commercial agent is engaged in activities on behalf of the principal including: soliciting clients, selling goods, or entering any kind of transaction on behalf of the person/trader/principal he/she/it represents. This makes a commercial agent different from a commission agent. The latter is involved only in selling and buying of goods whereas the former is engaged in many others involving the commercial life of the principal. The scope of power of a commercial agent therefore is broader than a commission agent. Similarly, a commercial agent is an exclusive agent in a specified area unless agreed otherwise as stipulated by Art 45 of the Commercial Code. He is in principle presumed to be the sole agent of the trader in that specified agreed area provided in the agreement.

▪ **Commercial Broker**

A broker could be defined as one who brings buyers and sellers into contract with one another. When the parties are brought together, the contract of sale and purchase is entered into directly by the parties. The broker doesn't keep the goods or the property of the principal in his possession.

Illustration. Ayney is a formal broker who is registered by the municipal city of Mekelle as a commercial broker with a license. She performs in the employment of house servants, especially she invites people who have special job skill with concerned employers. As a result, she brings the employee Almaz to serve with her computer skills in ‘Beta’ computer center. As a result she demands fifty Birr from Almaz a and hundred Birr from the employer, Beta computer center.

Can you now understand what the function of a commercial broker is from the above illustration?

The commercial code of Ethiopia defines commercial brokers as follows:

Art, 56 Definition

1. *A commercial broker is a person or business organization who independently, professionally and for gain brings parties together for the purpose of their entering into an agreement such as a contract of sale, lease, insurance or carriage.*
2. *A commercial broker is a trader, regardless of the parties he brings together and of the nature and object of the contract for the completion of which he acts as an intermediary.*

EXERCISE

- i. What is the basis to classify agents into different types as discussed in this chapter?
- ii. Who is a commission agent?
- iii. What differences do you observe between the definition given by the commercial code and the civil code?
- iv. What is *del credere* commission agent?
- v. What is the difference between a commercial agent and a manager?
- vi. Discuss commercial brokers?

CHAPTER FIVE

EXTINCTION OF AGENCY RELATIONSHIP

Introduction

An obligation does not usually remain indefinitely. It comes to an end for different reasons. Agency is not different from this general principle. It comes to an end for different reasons. One cause to extinguish agency relationship is termination. Performance of the obligations assumed by each of the parties within the given time is the other cause that brings obligations of agency to an end. Similarly, invalidation, cancellation, merger, novation, etc can bring obligations of agency relationships to an end.

Most of these reasons are dealt with under the law of contracts in general. But there is one cause special to agency relationship. In this chapter you are going to study the meaning, the procedures and rules involved in one of the causes of extinction of agency relationship, termination. There are two cause of termination. These are the law and the parties. These causes shall be dealt with in detail under this chapter. Accordingly this chapter encapsulates causes of extinguishing agency relationship, including the general causes of termination by the parties and by law, detailed concepts on Revocation of agency (*Art 2226*) and renunciation of an agent (*Art 2226*) are dealt with. The effects of extinction of agency relationship are also exhausted under this chapter.

Chapter objectives:

After you have studied this chapter you will be able to

- ❖ Explain the causes of extinguishing agency relationship;
- ❖ Define the methods of extinguishing agency relationship by the parties;
- ❖ Define the methods of extinguishing agency relationship by the law;
- ❖ Define revocation;
- ❖ Define renunciation;

- ❖ Discuss the effects of revocation, enunciation
- ❖ Discuss the effects of death, incapacity, bankruptcy of the parties.

Extinction of Agency Relationship

As we have provided in the introductory part of this chapter, termination is not the only cause that extinguishes agency relationship. The reason why termination is preferred to be discussed here is that there are certain principles applicable only to agency different and special from what is covered under the general contracts rules.

Termination of agency is possible to arise from two sources: by the act of the parties and the law. Act of the parties could mean either agreement by the two parties or by unilateral declaration from one of the parties.

i) Agreement:

Agreements/contracts are not only entered into to create obligation but also to extinguish obligations as well (Art. 1675). The principal and the agent may agree to terminate a relationship that exists among them. “A contract may terminate where the parties so agree” (Art. 1819 via the bridge Art. 1676.) upon agreement, nothing is impossible to assume except those prohibited by law (usually by public laws and mandatory private law provisions).

Illustration: Heran and Tsegaye had agreed in the year 1999 E.C an agency relationship between themselves. Heran has assumed a duty to sell in a boutique shop belonging to Tsegaye. Tsegaye has also assumed payment of 2% of what is sold per month as a remuneration/commission. In the year 2000 Heran wanted to run her own business. When she presented an offer to extinguish their agency-principal relationship, Tsegaye unequivocally accepted it. This is termination by agreement because it is committed upon the consent /will of two of the parties.

ii) Unilateral Declaration by the Parties:

After you have read the way agency is terminated upon agreement of the parties, you might have asked a question, what is the fate of agency-principal relationship if the agent doesn't want to terminate and present an offer of termination? Also, what if the principal refuses/ rejects when an offer of termination is presented to him? Or otherwise, when the principal presents an offer to the agent to terminate, what if the agent refuses to accept it? These and similar questions are proper to ask.

Agency principal relationship is not a slave-master relationship. It shall terminate, when both parties are willing, upon agreement. But if one is not willing to do so upon a unilateral declaration, it shall survive only upon the will of the two parties.

There are specialized terminologies employed to unilateral declarations to terminate agency relationship. The declaration to terminate by the principal is called *revocation*. And the declaration by the agent is termed as *renunciation*. Below, the rules and procedures as well as the conditions of each of these concepts shall be presented in detail.

a) Revocation of Agency (Authority of the Agent)

Revocation is a term linked to the principal. It is a unilateral declaration on the part of the principal to terminate the existing agency-principal relationship. It occurs when the principal gives notice of termination of the authority to the agent. There is not special formality requirement as to this notice. It may be given in any form: a document in writing is unnecessary (not mandatory even when the original authority was contained in a document). That is named revocation. Revocation of agency is unconditionally a discretionary right of the principal as Art. 2226 provides. Look at this provision.

Art 2226 Revocation of Agency

(1) The principal may revoke the agency at his discretion and where appropriate compel the agent to restore to him the written instrument evidencing his authority.

(2) Any provision to the contrary shall be no effect.

Revocation is a choice left to the principal. In the common law, it is not discretionary for the principal to revoke the authority only upon his need. However, in principle, the principal is empowered to terminate the relationship upon his will. There are certain limitations on the principal to revoke authority of the agent. Let's see some limitations below.

Irrevocable agencies: In the first place revocation is not allowed without the agent's consent where the agent has been granted authority to act on the principals behalf but in respect or for the protection of any interest of the agent. In the common law this becomes true when the authority was given either by deed or for a valuable consideration as a security in respect of a liability of the principal to the agent. In one case decided by a common law court, it goes that, an agent was sent to sell goods on behalf of the principal. He made advances to the principal on the security of these goods sent. It was held that the authority was irrevocable; because the agent has paid a security for the relationship. Hence, when there is a security advanced by the agent, it is not the right of the principal to revoke without the consent of the agent. This happens when the security remains unpaid. Does it work under our law?

Even in the common law, irrevocable agency does not apply where the sole purpose of the agency, as far as the agent is concerned, is to enable the agent to earn his commission by action on the principal's behalf. Similarly where the agent has incurred personal liability by acting in pursuance of his authority such that the principal would be liable to indemnify the agent in respect of such liability, then the principal cannot revoke his authority so as to avoid the obligation of indemnifying the agent while leaving the agent personally liable. In another case, the agent was employed to make bets on behalf of his principal: he was authorized to pay if he lost the bets. The agent placed the bets but lost. The court has held that the principal could not

revoke after this had happened but was still liable to indemnify the agent, since the agent, for the sake of his character and business, was bound to pay the amount that had been lost.

Under our law of agency, however, there are duties of the principal to indemnify the agent of any liabilities even before the agent is getting indemnified or freed from any liability the principal is empowered to revoke the authority of the agent without the consent of the latter. Yet, there is a right of the agent to keep any property /money as a lien for the payment of any justifiable claim against the principal. But this remedy works for an agent who has some property or money belonging to the principal in his hand/possession.

Revocation under our law of agency is purely the right of the principal granted by the law. As you remember we have discussed some obligations of the agent. These are: good faith, diligence, duty to account, duty to carry out obligations personally, etc. Revocation is not only ignited upon the agent failing to fulfill one or more of these obligations. It can be done/declared by the agent without the agent committing any of these obligations. That is, it is made “on the discretion” of the principal even when parties have agreed to the effect that the principal cannot revoke the relationship without the consent of the agent or without agent failing to fulfill one or any of his obligations or the principal before carrying out his obligations (e.g. making the agent free from liability (damages). This is void relationship. Hence, it does not prevent the principal from enjoying the right to revoke against the above events. That is expressed by Art. 2226 (2) which provides” any provision to the contrary shall be of no effect.

On top of the above facts about revocation, there is a missing obligation of the principal when revoking authority of the agent. As you know on your ‘Law of Contracts’ course, the party that is to terminate a relationship is bound to furnish notice to the other party at least in principle, unless this is excluded by agreement of the parties in the making. When it comes to revocation of agency by the principal, there is no obligation of giving on the part of the principal to revoke the relationship. We will see this concept in comparison with termination by agent (renunciation). Till then keep this idea that there is no duty imposed against the principal to give notice to the agent while declaring revocation.

However, there is a post facto (after the fact), consequential obligation on the part of the principal. That is, once the principal has declared the revocation of the agency relationship there are certain obligations to follow the principal. Basically, the principal is bound to compensate the damages the agent may suffer as a result of a revocation declared by the principal. Look at this provision.

Art. 2227 Effect of Revocation

(1) The principal shall indemnify the agent for any damage caused to him by the revocation where such revocation occurs prior to the agreed date or under conditions detrimental to the agent.

(2) The principal shall incur no liability where the date was agreed upon in his own interest exclusively or he has a just motive for revocation.

This provision is not a condition for revocation rather it is the effect of revocation. Revocation, let alone made suddenly, but even when it is made upon notice may result in damages against the agent. The above provision is the natural consequence of the logic that one who causes the damage has to compensate. The agent, with a view that the agency relationship might proceed for a reasonable period of time, might have arranged some private affairs for example. This is usually when the time for termination of the relationship is not agreed upon.

When parties have agreed upon the date of termination of the relationship, and when the principal fails to observe that date the principal has to indemnify the agent for the damage sustained by the latter because of the termination.

However, there is a defense to the principal upon termination of the relationship. These are: where the date was agreed upon the exclusive interest of the principal or where the principal has a just motive for revocation. Therefore, when the agency relationship is established only for the interest of the principal, there is no need for the latter to compensate the agent. For example, a gratuitous agency relationship is not made for the interest of the agent but for the exclusive interest of the principal. Hence it does not matter whether it is terminated today or tomorrow where the agency relationship does not fetch any material interest to the agent.

Similarly, where the agent has failed to observe one or more of his obligations, then the principal shall have a good motive to terminate. For example, when the agent has failed to act in good faith; failed to act diligently; failed to account (financial and/or activity); does not carry out his obligations personally etc, the principal is relieved of paying compensation when he terminates the relationship.

b) Renunciation (Repudiation)

A counter right granted to the agent is the right to renounce the authority he had acquired. This is termed as renunciation. Look at this provision.

Art 2226 of agent

- (1) The agent may renounce the agency by giving notice to the principal of his renunciation.*
- (2) Where such renunciation is detrimental to the principal, he shall be indemnified by the agent unless the latter cannot continue the performance of the agency without himself suffering considerable loss.*

Renunciation as you can grasp from the above provision is a declaration made by the agent to terminate agency relationship that existed with the principal. Similar to revocation, it is a unilateral declaration. There is no limitation provided by the above provision on the right of the agent to terminate agency relationship. But you can appreciate a difference if you closely look at the two provisions: Art. 2229 and Art. 2226. The provision granting the right of the principal to terminate by revocation prohibits an agreement to the contrary of the right to terminate upon his/her will (Art. 2226(2)), whereas the provision under Art. 2229 which grants agent to terminate the relationship upon his will does not have a counter provision to this effect.

So, does it mean that the parties (principal and agent) can agree to the effect that the agent cannot terminate the agency relationship except upon the consent of the principal?

Is that fair to limit the rights of the agent to terminate by a prior agreement while this is not the situation in the case of the revocation?

Contractual Relationship based on the Basic Principle of Freedom of Contracts

A contract entered for an indefinite time comes to an end upon the request of one of the parties. Let's go back to Art. 1821 of the Civil Code.

“Where a contract is made for an undefined period of time, both parties may terminate it on notice”.

This cannot be denied by a prior agreement.

Once the agent has terminated the relationship by a unilateral declaration, there are two consequential obligations upon him. These are giving notice and payment of indemnification.

Notice is peculiar to renunciation and not to revocation. The agent unlike the principal is bound to provide an agreed, customary or circumstantial period of notice to the principal within which he/she is going to terminate the relationship (Art. 1822). Can you imagine the reason why the law has discriminately bound the agent to give notice and not the principal while unilaterally terminating the relationship?

As you might have noticed under the heading revocation above, the principal is not bound to give notice while revoking the power of authority. On the contrary, it is the duty of the agent to give notice to the principal while renouncing the relationship.

The reason emanates from the very nature of agency relationship. The required good faith, diligence... cannot be expected from an agent who is given notice for termination within a future fixed date. Hence, it is contrary to the general principle of the required duty of the agent. On the other hand, there are interests of the principal at stake if the agent has to terminate the authority suddenly. Hence, this (notice) is time for the principal to take care of his interests.

Yet, this does not mean that the agency shall remain indefinitely unless notice is given. But it is meant that the agent is bound to indemnify the principal where, because of the failure of the agent to give notice, the principal suffers damage. upon termination by the agent, with or without notice the principal may not suffer any damage. In the latter case, there is no compensation to pay to the principal.

iii) Termination by Operation of the Law

Aside from any agreement between principal and agent, or any unilateral act by either of them, the relationship between principal and agent will terminate when the transaction which has been undertaken has been performed; upon death, in capacity, or bankruptcy of either or both of the parties (the agent, principal).

Now we will look at the termination of agency relationship by operation of the law, as listed above.

- a) **Performance:** The execution of his authority by the agent brings that authority to an end. Illustration: An agent who has sold goods, for the sale of which he was employed (agreed) has performed his obligations. No more obligations shall remain except to demand the payment of remuneration depending on the agreement. And when the two parties have performed their part no obligation is in force.

- b) **Subsequent physical events:** Let's assume that the property which the agency was required to sell is destroyed. Would the agency relationship terminate or continue to exist? You do not find a specific provision within the law of agency that would be a solution to this problem. You need to look at the general contracts provisions. As you might remember, the agency relationship requires object to be assumed. The object assumed by the agent in the above example is sale of an object (good). But when this good is destroyed the contract remains without an object. A contract without an object is void. Hence, the relationship vanishes, extinguishes upon the good being destroyed.

- c) **Death, incapacity or bankruptcy of the principal.** It is a general principle that death of one of the parties does not bring the obligation assumed by the parties to vanish. Rather the heirs or the successors shall enjoy the rights or insure the duties arising out of the relationship established by the deceased.

When it comes to agency; the death, incapacity or bankruptcy of either or both of the parties has its own specific effects. The main point behind the special effect upon death of the parties is that the agency relationship is confidential and personal: hence the individual identity and existence of either of the parties is very essential.

Art. 2232. Death or incapacity of principal

- (1) Unless otherwise agreed, a contract of agency shall terminate by the death of the principal or where he is declared absent, becomes incapable or is adjudicated a bankrupt.*
- (2) The agent shall in such event continue his management where he has commenced it and there is not danger in delay until the heirs or the legal representative of the principal are in a position to take it over themselves.*

Without the need to take any further step, the death, incapacity or declaration of bankruptcy of the principal automatically results in the termination of agency relationship between the agent and the principal. But this can be made otherwise by an agreement between the agent and the principal prior to the death incapacity or bankruptcy of the principal. This is explained by the *unless otherwise* proviso of Art 2232. That is the parties may agree their heirs continue their relationship even upon the death of the principal. This usually is done when the authority granted is to execute acts which do not require the person of the principal. When no agreement is made between the agent and the principal to the effect that the heirs shall replace the deceased, then the agency relationship shall terminate and there is an additional and consequential duty on the agent. That duty is that the agent must continue the management of the affairs for a reasonable time. That is, he should not stop the representation as soon as he heard the death /incapacity or

bankruptcy of the principal. This is especially true when the agent has already started representing the principal (performing his obligations).

We may wonder how long the agent should continue the management. It is only until the “heirs or legal representatives of the principal are in a position to take it over themselves.” The problem is what if the legal representatives or heirs representatives do not take the management sooner? It looks that the heirs or legal representatives must take it over in a reasonable time, with no delay. And hence, if there is a delay in taking over of the management in a reasonable time, the agent cannot be responsible for the loss or damage over the affairs of the principal.

Another issue to raise here is why does the law use the term “management” while the agent could have been a special agent as well. It appears that after the death of the principal even when the relationship was that of a special agency relationship, that is agency empowering the agent to dispose; it is changed on the death of the principal to be a general agency. This is because once the principal dies, succession opens and the owner of the affair is changed and the agent is required only to preserve the affairs/rights of the inheritance.

The owner is the heir or beneficiary any way. And hence this agent becomes an agent of necessity for the heirs or beneficiaries. A necessity agent is empowered by law to do acts of management to save/preserve the interests of the principal (the principal by default is the heir or beneficiary). A deceased is no more a principal. He has no rights and duties. The human person is subject of rights and “duties” from birth to death. The death of the principal terminates agency in principle. Therefore the agent can only manage the affairs he has commenced. If the agent does not begin the representation, he has no duty and right to represent the principal after he has heard of the death/incapacity/ bankruptcy/ and he/she cannot dispose like a special agent.

What do we mean by managing? You have devoted much time hopefully in identifying the difference between acts of management ((general agency) and acts of disposition (special agency). If this is still confusing, take this opportunity to read these concepts in the previous chapters.

The same explanation holds true for bankruptcy (when adjudicated bankrupt) absence (when declared absence by the competent organ) or incapacity of the principal.

This effect (death of the principal termination) works only for an ordinary agent. When the agency relationship is that of a special kind of representation like a commission agent, a different legal effect follows. We shall investigate this effect when we look at the effect of representation upon the death of the agent down here.

d) Death, Incapacity, Absence or Bankruptcy of the Agent

Similarly the death of the agent for stronger reason takes the agency to an end. When the agent dies, becomes incapable or adjudicated bankrupt, the relationship comes to an end. Look at this provision:

Art. 2230 Death or incapacity of agent:

- (1) Unless otherwise agreed, a contract of agency shall terminate by the death of the agent or where he is declared absent, becomes incapable or is adjudicated a bankrupt.*
- (2) The heirs or the legal representatives of the agent who are aware of the agent shall inform the principal of these circumstances without delay.*
- (3) They shall, until such time as necessary steps can be taken by the principal, do whatever is required in the circumstances to safeguard the principal's interests.*

There are three important points to appreciate in these provisions:

- ❖ Death/incapacity/ bankruptcy of the agent results in termination of agency (principle);
- ❖ By way of agreement prior to the death/incapacity or bankruptcy of the agent, it can be made otherwise to continue the relationship with the heirs of the agent (exception)
- ❖ The duties imposed on the heirs of the agent (duty to inform the circumstance to the principal and duty to the management until the principal takes it over)

When the agent dies, we do not expect a dead body to continue the agency relationship and it is natural to terminate the relationship. Thus it is obvious that the death of the agent extinguishes the agency relationship. Incapacity or bankruptcy also holds the same.

It is logical to ask a question as to why incapacity of the agent automatically results in the termination of agency. That is to say, incapacity is a ground to invalidate a relationship as we have exhaustively dealt with under Chapter Three of this material. It is up to the incapable person or his representation to seek the invalidation of the relationship. Even the other party cannot demand the invalidation of the relationship. But here, it is provided that incapacity of the agent results in an automatic extinction of the relationship. In fact, we can see the danger that would be addressed against the interest of the principal upon the sober agent becoming incapable in the middle of his carrying out the affairs.

Let's say that the principal was aware of the fact that the agent was incapable at the formation. He (the agent) was a minor of 16 years old. After some 5 months of a proper representation, the principal wants the termination of the relationship for a hidden cause. But the principal has invoked the fact that the agent is incapable and prayed the termination of the relationship by invoking Art. 2230. On the other hand, the agent argued that by virtue of Art 1808(1) via Art. 1676 of the civil code, it is only him or his tutor (legal representative) who can demand the invalidation and not the other party (the principal) since the cause for extinction (by invalidation) is the incapacity of the agent (one of the parties).

Do you find it tenable to argue for the agent on the above grounds?

This answers the dialogues we had in the first chapter as to whether an incapable (e.g. minor can be an agent).

Looking at the two ideas together, it is up to the parties (both the principal and the agent) to keep the relationship among themselves. The agent on the one hand can invalidate a contract of agency upon him seeking the invalidation of the agency. Similarly the principal can terminate the relationship of agency among themselves. But we need to appreciate the difference in effect of invalidation and termination. Invalidation takes parties back to their previous position (Art. 1815

Via 1676) and termination does not have a retrospective effect (Art. 1819(3)). Hence, the principal upon termination by invoking incapacity as a ground cannot annul the works/representations done so far until the date of termination while the agent can annul it. This is a caution to the principal to take every care in employing a minor as his agent.

The above allegations work for declaration of absence and bankruptcy accordingly. Once the agent dies, becomes incapable, is declared absent or adjudicated bankrupt (this one is for a business organization) the relationship automatically terminates.

While the agent is in one of the above situations, the principal might not know whether the agent is in fact in this state (death, incapacity, absence or bankruptcy). This may be against the interest of the principal. The gap may affect the principal. There might be nobody to take care of the principal's affairs. This situation requires attention by the law. The gap needs to be filled by the law. Hence, the law wants people around to take care of the interest. These people are the heirs or legal representative of the agent who are aware of the agency and obviously the situation of the agent. They are bound to inform to the principal the fact that the agent is dead, isincapable, declared absent or adjudicated bankrupt. This has to be made without delay.

Yet, until the principal takes his affairs over, the heirs or legal representatives (in case of incapacity) of the deceased (agent) must do whatever is required in the circumstances to safeguard the principal's interests. However, the extent of the duty is not easy to grasp from the above provision, because these individuals are agents of necessity; they are bound to act only acts of management to "safeguard the interest of the principal."

A similar, logical flow follows when the agents are many in number. In this situation it would be possible for all of the agents to die together or one or more of them to die and others to survive.

The point in this case is what would the status of the agency relationship between the surviving agents and the principals be? It depends upon whether the relationship is a cumulative one (joint) or it is a separate one. The relationship may be either the appointment is a whole sum, i.e. the

agents shall be agents together or the agents have a separate relationship with the principal. Look at the provision below that shows the Ethiopian approach towards treating such situations.

Art. 2231 Plurality of agents

- (1) Where several agents have been appointed for the same affair and are required to act jointly, any cause of termination of the agency occurring in respect of the person of one of the agents shall terminate the authority of all unless otherwise agreed.*
- (2) The other agents shall notify the principal upon becoming aware of the cause of termination of the agency and shall in the mean time do whatever is required in the circumstances to safeguard the principal's interest.*

As to the working of joint agency, when several persons are appointed agents, the agreement may dictate the agents to act jointly. In this case, the general principle is that the death, incapacity, declaration of absence or bankruptcy of one, the agency shall result in the termination of the relationship with the surviving agents too. But this principle may be made otherwise by a prior agreement. That is, they may agree before the death of one of the joint agents that the relationship shall survive among the existing (surviving) agents when one or several of the agents die, become incapable, declared absent or adjudicated bankrupt. In this case the relationship between the agent(s) on the one hand and the principal on the other hand shall continue; but shall terminate between the principal and the agent deceased, bankrupted, declared absent or incapacitated.

There are some obligations imposed on those joint agents who are not affected by one or any of the causes of termination discussed above.

These are:

- ❖ to inform the principal the fact that the agency is terminated because of the circumstance evident; and
- ❖ In the mean time they are bound to “do whatever is required in the circumstances to safeguard the principal's interests.”

These obligations are similar to those heirs or legal representatives have towards safeguarding the interest of the principal in these circumstances. The death, incapacity, absence or bankruptcy of the principal or agent or both has a different arrangement and effect when the type of agency is a special kind; like, commission agent, manger etc.

What is the effect of death, incapacity, absence or bankruptcy of a principal or agent in a commission agency? Is it different from an ordinary agency relationship? Look at this provision.

Art. 2250 Termination of commission

The commission shall not terminate where the principal or the commission agent dies becomes incapable or is declared absent where the heirs or representatives of the principal or commission agent continue his commercial activity.

While in the case of ordinary agency, the death, the incapacity, the absence or bankruptcy of the principal, the agent or either of them results in the termination of agency-principal relationship, this does not work in the case of commission agency. The death, incapacity, absence or bankruptcy of the agent/principal or both in principle does not automatically, as of right or duty result in the termination of the relationship. The termination comes only when the heirs of the principal or commission agent do not like to take over the duties/the rights in the relationship.

When the commission agent for example dies, it is the choice of the heirs to continue the affairs of the principal or to leave it. If the heirs continue the commercial activity of the principal, the latter cannot terminate the relationships for the sole reason that the commission agent dies. This is the result of the fact that a commission agent is a professional agent as defined by Art 60 of the Commercial Code. The commission agent does the work for gain and his/her livelihood may be dependent upon this affair. This implies that the agent's heirs (kids and dependent individuals) are also dependent on this business.

The other rational given is affairs committed by professional agents (like a commission agent) do not require the person of the agent. Usually, the agent himself carries them out with the

employment of other individuals. On the other hand there is no prohibition of an agreement among the principal and the commission agent to the effect that the heirs or legal representatives of either of the parties or both shall continue the relationship among themselves upon the death, incapacity or declaration of absence of one or both of the parties.

Generally, unlike an ordinary agency relationship, where for the continuation of the relationship requires an additional agreement, in the case of commission agency, the death/incapacity) declaration of absence of the parties (one or both) does not terminate the relationship when there is a need on one of the party's heirs or legal representatives.

However, if for example the agent dies and the heirs of the agent are interested to takeover the affair but the principal does not want to work with the heirs, the law entitles them to continue the affairs (Art. 2250).

But when the heirs are judgment debtors of a claim to continue the agency it is unlikely for the relationship to continue. The principal is empowered under Art 2226 to revoke an agency relationship unconditionally. This latter provision empowers a commission principal to avenge those heirs of an agent succeeded in a court of law to continue the relationship the deceased had with the principal. He may for example revoke the agency relationship coming from the law by order of (judgment) a court following the death of the agent. There is no prohibition to terminate on any other cause, other than the death of the agent.

This latter allegation may lead us to investigate whether the principal is entitled to terminate upon no cause. But it seems there is no doubt from the discussion made so far. Look at the arguments below.

A cumulative reading of these two provisions gives us the following effect: either the message under Art. 2226 is meant that the principal cannot revoke the relationship unless he had a just motive or the effect of these two provisions is contrary. The first effect does not seem to be implied because Art. 2227 (2) signifies the fact that the principal may also revoke without a just motive in stating "the principal shall no liability where the date was agreed upon in his own

interest exclusively or he has a just motive for revocation”. The last limb implies that the principal may also revoke for a motive not just. Hence this line of the alternative argument leads us to the conclusion that the principal may terminate (revoke) the relationship against the interest of the heirs who have succeeded the affair by judgment of a court through litigation.

But because we need to give effect to the two provisions, we can construe these two provisions to the effect that the principal of a commission agency cannot revoke the relationship unless he has a lawful/just motive. Yet, we may be in difficulty whether the relationship should remain indefinite until such time the principal has found a just motive to terminate. That stands against Art 1821 of the civil code. When a contract is made for an indefinite time it may be terminated by the request of one of the parties upon giving notice.

The last point to consider before we leave termination of commission agency is the fact that “bankruptcy” is missing under Art. 2250 unlike the two counter provisions under Art 2230 and 2232. Is it a slip of the pen or an intentional one? Before you read the illustration below try to state your own ideas.

In the earlier provisions the purpose of the law is to reveal the message that upon occurrence of one of the facts: death, declaration of absence, incapacity or adjudication of bankruptcy of the agent or/and the principal terminates the relationship unless otherwise agreed. The latter provision under Art 2250 is aimed at regulating the situation of transfer of rights and obligation from the deceased to the heirs or legal representatives. Hence, this provision governs persons who can succeed the deceased/ heirs or successors.

Does an organization (business organization) have an heir? It does not. Therefore, when an organization is declared bankrupt while it was an agent or a principal, it results in termination of the agency relationship it had, because there is nothing called heir to succeed organizations. Note that bankruptcy is a technical term applicable to business organizations. Therefore, the law has intentionally omitted the term bankruptcy under Art. 2250.

The following case decided by the Ethiopian Supreme Court is a typical case where you can define commission agency and where you will be able to appreciate the effect of death of an agent (a commission agent) shall bring in agency relationship. The case was initiated in Gondar high court between Huluagersh Tsehay et al and Shell Company Limited.

The case was initiated in a High Court in Gondar, reviewed by the Supreme Court and finally decided by the Cassation Division of the Ethiopian Supreme Court in Addis Ababa in 1991(1983 E.C).

Applicants of the Supreme Court were plaintiffs at the rendition high court and Shell Company Limited was a defendant in the beginning. In the high court (North Gondar Area High court) the applicants as plaintiffs have pleaded in their statement of claim that:

- a) Their successor (the husband of the first applicant and father of the second applicant Ato Alene Wallelign), Ato Wallelign Kassie before his death had concluded a contract of commission agency to sell fuels belonging to the principal, Shell Company Limited in Gondar town establishing a depot located in kebele 13 and higher 1 of the town.
- 2) Ato Wallelign Kassie died on October 6, 1982 E.C and following his death the successor and wife of the deceased have on November 11, 1982 requested the principal to send fuels for Birr 41,162.00, sending the latter amount via a bank.
- 3) The successors and the wife of the agent are interested to continue the business and have are running it. Hence upon the death of the agent by virtue of Art. 2250 they claim they are entitled to continue the activity.

It is based on the interest and capacity they have that they demand for the continuation of the relationship between the company on the one hand and the agent (successors on the other hand) they allege. However, the company responded saying that it is not interested to continue the relationship with them and requested them to settle the balance which existed between the principal and the deceased agent.

The plaintiffs prayed to the court to order for the compensation and payment of the following:

- a. Benefits from the time where it was terminated (death of the agent)

- b. By virtue of Art. 2250 to continue the agency relationship between the successors and the company.

To substantiate their claims they produced evidences to the court. The respondent company on its part has argued to the termination of the relationship as the agent had died. It specifically presented its defense as follows:

Preliminary Objection:

There is no legal and contractual relationship between the plaintiffs (applicants) and the defendant (respondent). The relationship which existed until the death of Ato Walleign Kassie, is terminated following the death of the latter. Hence these applicants do not have a vested interest over the claim and let the court dismiss the case.

On the Subject Matter of the Suit:

- a. There was no commission agency to sell or to buy established between the deceased and the Co. If there is any evidence produced by the applicants, it is terminated upon the death of the agent by virtue of Art. 2230.
- b) There was no commission agency. The relationship established between the deceased and the company is contract of lease of a shop in which the deceased used to sell different kinds of fuels.
- c) The deceased was given a default notice prior to his death because he was not able to serve the public properly. The notice given and his death is the cause to the termination of the relationship.
- d) The compensation demanded by the applicants has no ground for there is no established legal relationship between the applicants and the respondent.

The applicants have reaffirmed their claim:

- They have elaborated the applicability of Art. 2230 on the one hand and Art. 2234 and Art. 2250 as well as Art. 61 of the commercial code. They argued the latter group of

provisions entitles the heirs to proceed to run the business upon their will while the former provision is otherwise. And they claimed the applicable provision was the latter in this particular relationship.

- They noticed the evidences they presented in the lower court showing that the relationship between the deceased and the company was one of commission agency.
 - The payment (remuneration) for the agent was Birr 0.03 for each liter of fuel.
- Had the fuel been sent to them at the time where they demanded, they would have benefited a certain amount (they have stated the amount) and they deserved to be compensated.

The Gondar Area High Court decided in favor of the applicants with the following arguments.

- a) The relationship established among the Shell Co. Limited and the deceased was one of commission agency. As Article 2250 provides, “the commission shall not terminate where the principal or the commission agent dies, becomes incapable or is declared absent where the heirs or representatives of the principal or commission agent continue his commercial activity”.

This is again supported by Art 60 and 62 of the commercial code and Arts 2234 2249 of the civil code.

- b) The default notice given by the respondent would not have brought the termination of the agency relationship, because as it provides, if the agent fails to prove why it does not provide adequate service to the public in only a months time from the time where the notice was issued, the company is forced to terminate the relationship. However, the agent did not comply with the notice and no termination was declared and the Company had served fuel to the agent two times before the death of the agent. Hence, there was no termination of the relationship.

Even after the death of the agent the heirs have continued running the commercial activity (sold fuels and sent the sale money back to the Company). The above facts show that the heirs have

continued the commercial activity as Art. 2250 demands and have interests to continue working on behalf of the company. Accordingly, the court awarded compensations to the plaintiffs (applicants).

Dissatisfied with the judgment and decision of the High Court, the Shell Company Limited lodged an appeal to the Supreme Court of the country situated in Addis Ababa.

The court reversed the judgment of the High Court with a different (unique) meaning given to Art 2250 of the Civil Code. The base of its reversed decision emanates from the belief of the court that an agency principal relationship is terminated by law upon the death of one of the parties. Especially when the agent dies heirs of the agent have duties to protect (continue the management) the interest of the principal until the latter takes over the activities himself or appoint another Art 2230(2), (3)]. Upon this belief the court continued to argue that the meaning and purpose of Art. 2250 is a measurement of whether the heirs have carried out their obligation of taking necessary steps until the principal takes over his affairs. And it provides; because the heirs have successfully carried out taking necessary steps until the company takes it over, they are not liable but duty bound to deliver the business to the principal when he/she/it comes to control.

The Supreme Court concluded that the meaning given to Art. 2250 by the High Court was wrong. Upon the death of the agent contract of agency terminates. The purpose of the provision under Art 2250 is in the case of commission agency, when the heirs or legal representative continue his/its commercial activity it is said that they are carrying their duty to take necessary steps and they are free from liability.

Hence, the cause for the case to be brought to the Cassation Division of the Supreme Court, as claimed by the applicants is: there is a mistake of law in applying Art 2250 of the Civil Code. Both parties have presented their sides to the court (Cassation Division).

The court has framed two main issues to solve the dispute. These are:

- a) Is the agreement concluded between the respondent and the deceased on November 16, 1974 terminated before the death of the deceased?
- b) If it is not terminated, can the heirs continue the commercial activity following the death of the agent?

Concerning the first issue, the Court has affirmed that the respondent has given a default notice to the agent before his death in accordance with Art. 4 of the agreement concluded between them. The content of the default notice was ordering the deceased to give to the company the reasons why it did not provide quality service to the public and continue the service only within one month. The failure of doing so was stated to be termination of the relationship. The agent has continued the service upon receipt of the default notice. This was confirmed by the respondent too. As Art 4 of the agreement provides the relationship shall be declared terminated by the company only when the agent fails to provide the services after being given default notice.

On the other hand, the agent did not appear in front of the respondent complying with the default notice. Yet, the company did not declare the termination; instead it delivered fuels to the agent. This shows, the agent has satisfied the respondents in providing service, or at least the point of disagreement in providing service to the customers is now solved upon the respondent failing to terminate the relationship. The court has therefore rejected the claim of the respondent that the agreement/ relationship was terminated before the death of the agent.

The second point the Court focused on was the second issue framed: Whether the heirs of the deceased are entitled by law to continue the commercial activity. The Court framed the main points raised by the parties in the High Court. The applicants claim was, as the relationship established between the deceased and the respondent tells the relationship was one of commission agency and they need to enjoy the rights of heirs of a commission agent. However, the respondent argued that the contract concluded between the respondent and the deceased was a contract of lease of a shop (depot) that the deceased paying Birr 600 per year carries an independent commercial activity in and he was not an agent and no agency principal relationship was established between them.

Also the Court tried to identify the nature of the relationship from the written agreement concluded between the parties. When it is looked at of face value, the Court says, there is no indication as to whether it is a contract of agency, sales, lease, labor or any other. It simply says “Dealers” agreement. Hence, the Court said that it needed to look at the obligation assumed by each of the parties, so that it would be able to identify the nature of the contract. The following were observed by the Court from the written contract attached.

- 1) Art. 11 of the agreement, the operator’s payment of Birr 600.00 per month to the company:
This payment was proved by the oral litigation in front of the Court that it was not a lease money but money for the maintenance of the buildings of the business and if at all we take the relationship to be one of lease, Art. 2928 provides for a contract of lease, the death of the lessee does not extinguish the relationship.

The relationship between the deceased and the respondent is not one of sales agreement: that is, the respondent a seller of fuels and the deceased a buyer of the fuels for commercial activities. The Court continued. This is because the deceased was selling the fuels received from the respondent upon frequent and regular orders of the latter. On top of this, the deceased was bound by agreement: that he cannot buy any fuel a product of any other fuel company: he cannot promote product of any other fuel company; cannot engage in any other business relating to fuels of other company products; that he is bound to provide reports of accounts (both activity and financial); that the deceased was bound to keep the business open at times where the respondent dictates, etc. These and similar agreements entered between these parties fall under Art 60 of the commercial code. Art. 61 of the commercial code states that the provisions of the civil code from Arts. 2234-2252 shall be applicable in the case of commission agency. Hence, once we decide that the relationship is one of commission agency, Art. 2250 is the preferred and applicable provision to solve the case at hand and Art. 2230 or Art. 2232 are not applicable in this case, because latter provisions are applicable only for an agency relationship of ordinary nature and not for a specialized type of agency. The deceased was a commission agent.

Thus, as Art 2250 provides a contract of commission agency does not terminate upon the death of the commission agent. But the necessary condition for the continuation of the relationship upon the death of the commission agent is the carrying out of the activity by the heirs.

After the death of the commission agent, the heirs continued the commercial activity. Even the respondent did not deny this fact, when it proved that it sent fuels to the heirs. And the heirs were interested to continue the activity from where it was. That is why they lodged a pleading and continued the litigation. The activity of the business was only temporarily terminated because of the refusal of the respondent to send fuels with a view that the relationship terminated upon the death of the agent.

The Court concluded that the relationship that was existing between the deceased and the respondent was commission agency. The death of the commission agent does not bring the relationship to its end when heirs of the deceased continue the commercial activity. Because the heirs have continued the commercial activity, sell of fuels to consumers, the relationship does not terminate by law unless the heirs and the respondent agree otherwise.

Finally, it declared the decision and judgment of the Supreme Court was reversed and decided in line with the decision and judgment of the high court in favor of the applicants of the Cassation Division of the Supreme Court and plaintiffs of the high court.

This is not the end of the issue. Is there any protection accorded to the heirs in the above case if the principal (the Shell Company Limited) terminates the relationship (agency principal) giving notice?

Look at Art. 1821 providing how one of the parties are entitled to terminate a contract entered for an indefinite period”.

“Where a contract is made for an undefined period of time, both parties may terminate it on notice.”

Well, you may argue that this provision is remote because it does not specifically deal with agency relationship and further commission agency. We shall see these cases one by one. This provision, Art 1821 is applicable to agency relations by virtue of Art. 1676, the general contracts provisions are applicable irrespective of the nature of the relationship (agency, sales etc) unless there is a special provision stating otherwise.

Look at Art. 2226 “the principal may revoke the agency at his discretion and, where appropriate compel the agent to restore to him the written instrument evidencing his authority.” (Emphasis added). Even any provision (agreement) taking this right away from the principal is void (sub(2)). The effect of the revocation is that the principal is bound to indemnify the agent if the revocation was committed before an agreed date (if there is one) or if it is not before an agreed date, when the revocation is detrimental to the agent. Yet, the principal is prevented from paying any compensation if the latter has good grounds to terminate by revocation.

Let us go back to the case one more time. The heirs have succeeded to continue their commercial activity in place of the deceased. And now, the relationship (agency-principal) is established between Huluagesh Tsehay and Kassie Walleign as agents and the Shell Company Limited as a principal by law and judgment of court.

Let’s again assume that the company (principal) has declared revocation of the agency just in 10 days after the execution of the decision and the heirs have resumed the commercial activity. Is there any protection to them? Notice the discussions made in the last section to the fact that the principal is not obliged to give notice to the agent to revoke (Art. 2229 and 2226). There is no protection accorded to the heirs to prevent them from a sudden revocation of the agency the heirs have assumed even the day after they have assumed their activity by court order. The only remedy is compensation upon proving that it was detrimental to them. But if the principal is able to prove that it has a just motive to do so, usually proving the fact that the agents have failed to fulfill one or more of their obligations, there is no compensation to be paid to the agents (heirs). Therefore, the principal is able to terminate the relationship upon paying compensation if the agents succeeded in proving the revocation is detrimental to it.

EXERCISES

1. What causes extinction of obligations of agency-principal relationship?
2. How is agency-principal relationship terminated?
3. What does unilateral declaration of either of the parties mean?
4. What is the effect of death of the principal in an ordinary agency principal-relationship?
Could it be different, when it is a forwarding agent?
5. Is notice a mandatory requirement against the principal to terminate agency, principal relationship? Why? Why not?

Hypothetical and Real Cases

1. W/ro Fikir has appointed Betty as her agent to sell her house for birr 200,000.00 (two hundred thousand). Betty was looking for buyers. In the mean time Fikir has concluded a sale contract with a friend of her to sell the house. Just the next day, after Fikir has concluded the sale, Betty has concluded a sell contract with the amount dictated by the owner without knowing the new development.

Questions

- What is the remedy for this problem?
 - Which sale is a valid sale?
2. A contract of agency was concluded between Bayush and Mastewal. Mastewal was the agent to sell a good belonging to Bayush for a fixed price. The agency was agreed to last for a maximum of 30 days. Bayush has terminated the relationship only within 15 days from its formation.

Question:

If Mastewal insists for the continuation of the agency relationship, would she succeed?

3. Tamene, Tadele, Tademe and Tagele have appointed one agent to perform their common activities. The agent has been diligent in handling tasks assigned to the benefit of his principals. Unfortunately after 6 months of having a common agent, Tamene has died of accident.

The remaining three principals were confused whether their agent remains an agent upon the death of the co-principal.

Advise the effect.

4. Zewudu has appointed three experts to work together as agents in his factory. However, it is agreed that they are co – agents: they are administrative manager, technical manager, and finance manager. While these agents were working successfully, one of them, the finance manger was declared incapable (insane) by court order as a result of car accident damaging his skull. The other two were not sure whether their acts after the death of the finance manager would bind the principal.

Questions

Based on the relevant provisions of the civil code please advise the two agents what the effect of death of one of the co agents would be.

Liability to One Another and to a Third Party

The relationship of principal and agent, as discussed in the above topics is recreated as a result of an agreement between the parties and persists until it terminates by the act of the parties or by the operation of law.

The agency relationship, of the principal and the agent can terminate at any time where the mutual consent of the parties no longer exists. The termination of an agency contract entails that, when both parties and one of them have put an end to the contract and once the agency contract

has terminated by what-so-ever means, such termination shall have no retrospective effect. It is to say that the contract simply ceases to be enforceable or to produce effect. (Art1821-1822)

Hence the termination of agency agreement extinguishes the respective rights and duties of the principal and the agent. Once the authority of the agent has expired, revoked or renounced, the agent shall no longer have power to bind his principal and cannot make the principal liable for anything, which he, does after the notice of revocation has been received by the principal and made known to third parties. When revoking or renouncing an agency contract, the party who alleges for the termination of the contract should give notice to the other party either orally or in writing. In this respect the party that offers the termination of the agency contract should comply with the legal or customary period of notice (Article 1822(1) of the civil code). However if the period of notice is not fixed by the law or custom, such party should take into account the circumstances and just give a reasonable time of notice for the other party (art.1822(2))

In cases where the principal terminates the agency contract by revocation, he can force the agent to return all documents evidencing the agent's authority according to the wording of art.2226 (1) and 2184(1) of the civil code.

If the revocation was made before the agreed time and causes damage to the agent, he is required to pay compensation to the agent. In similar fashion, if the renunciation by the agent before the date fixed results in a detrimental effect upon the principal's interest, the latter can claim an indemnity from the former as encapsulated under art.2229 (2) of the civil code.

According to the above mentioned instances, where the revocation causes damage upon the agent's interest he may so far demand remuneration that the agent would have been derived had the agency contract not terminated.

Let us consider Friedman's opinion in this regard.

The agent can also sue the principal for remuneration earned before the revocation, and possible for remuneration which would have been earned had the agency not been terminated ((C.H.L.Fridman 1966, pp.285)

Considering the above conditions, in the absence of specific provisions in the contract of agency between the agent and the principal, the right of the agent for getting compensation pursuant to the termination of the contract of agency depends upon the reason for which it is terminated, whether there exists an agency contract and whether such termination amounts to a breach of contract. Furthermore, a principal's revocation of agency contract made to avoid payment to compensation, cannot deprive the agent of compensation for a result he has actually accomplished.

However, when a principal in a right way discharges his agent for good cause, the agent may not be entitled to compensations for the services he has not rendered. The situation that may amount to good cause for the discharge of an agent by his principal may be in cases when the agent commits fraud against his principal's interest. For example, when the agent betrays the trust by acting adversely to the principal's interest and other breaching of similar duties may result to the disloyalty of the agent.

With regard to the agency relationship with the third party, the position depends upon the service of an appropriate notice,

Let us see the following statement provided by Fridman,

Since by revocation, the agent ceases to have authority to act on behalf of the principal, the agent can no longer bind the principal by any transaction which he enters into with third parties after notice of revocation has been received. The agent will be personally liable in respect to any such transactions.
(C.H.L.Fridman 1966, pp.285)

The most important reason that the position of the third parties could depend upon notice is that, as a general rule, it is recognized that the acts of an agent within the scope of his authority can

bind the principal as against one who had formerly dealt with him through the agent and who had no notice of revocation, because such a person is justified in assuming the continuance of the agency relationship. But if a third party with full awareness and following the receiving of notice concluded with an agent whose power is revoked, the agent himself shall become liable to the nonperformance as well as breach of contract.

References

- ✧ American Law and economics review agency law and contract formation, vol.6 no.1 2004,
- ✧ American Law and Economics Review Vol. 6 No.1 2004: Agency Law and Contract Formation.
- ✧ Barry Nichlisa, An introduction To the Roman law, 1965,pp.201
- ✧ F.H Lawson, the Roman law Reader, 1969,p.101
- ✧ F.H.Lawson, The Roman Roman Law Reader, (1969) p.103
- ✧ G H L Fridman, the Law of Agency, London 1990
- ✧ G.H.L fridman, the law of agency, London, 1990
- ✧ Journal of Ethiopian Law, Vol. 3 No.1 1966
- ✧ Law of agency, Am. J: comp. Law vol.6 (1957) pp.165)
- ✧ Paul Marcharty, Materials for the study of the law of Agency and business organization,(1967)pp.2-3
- ✧ Willaim L.Church, ‘A commentary on the law of agency representation in Ethiopia’ Journal Of Ethiopian law, Vol.3, No.1, pp.308.
- ✧ William Holdsworth/sir/, A History of English Law vpl 8,1966,pp223
- ✧ William L.Burdick, The Principles of Roman Law And Their Relation To modern Law, 1938,pp426)
- ✧ Mulgeta Mengist, material on Agency law, Mekelle University, Law Faculty, May 2005, unpublished)

Laws

- ✧ The Ethiopian Civil Code, 1960
- ✧ The Ethiopian Commercial Code, 1960