BASIC FEATURES OF THE ETHIOPIAN LAW ON COMMISSION AGENCY

ZEKARIAS KENEAA[1]

Introduction

Agency is an area of law that has gained importance in Ethiopia over the last forty years. With the advent of the Registry of Acts and Documents in Ethiopia, conferring of agency on others and receiving of Powers of Attorney from others have, in particular, become very popular in the last fifteen years. Generally, it may be said that the value of agency as a useful institution is being given its due recognition in Ethiopia. It is not only the regular and direct agency, or the complete representation, to put it otherwise, that is becoming popular in Ethiopia. Cases of indirect agency and imperfect kinds of representations are also slowly and gradually becoming known, and in fact, becoming quite popular in the daily business transactions in the country. The hitherto not very well known area of commission agency, for instance, is now very well in use and of late, it has become yet another area to venture into. With globalization and Ethiopia's aspiration to join the WTO, the institution of commission agency will, undoubtedly, be more and more useful.

There is dearth of source materials relating to the topic of the article. Though there are some old materials and books available in the Law Library on agency in general, the writer could not find recent materials in sufficient quantity on commission agency. There are no reported cases on commission agency. The only and one case found by this writer that was reported on commission agency, though a very good case, is not found to be directly relevant to treat basic features of commission agency under Ethiopian law.

Despite the problem of not finding recent and relevant source materials, this modest work attempts to briefly discuss the basic features of the Ethiopian Law of Commission Agency, which is one of the aspects of agency recognized in Ethiopia. The paper does not, as such, deal with all aspects of Commission Agency as expounded in the Civil and Commercial Codes of Ethiopia. As the title of the work indicates, it only attempts to briefly deal with the basic features of the Ethiopian Law of Commission Agency.

I. Brief Historical Perspectives of Agency in the Civil Law System and the Ethiopian System

Agency as an institution in the civil law system is a fairly recent phenomenon compared to its existence in the common law system.[2] In fact, it was said that the institution was

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[1]Currently Assistant Professor, formerly Assistant Dean, Acting Dean and Associate Dean of the Faculty of Law, Addis Ababa University; he holds LL.B and LL.M. E-mail: zkeneaa@yohoo.com

totally not known in Roman law which is the root of the Civil Law legal system, because, in Roman law, obligations were considered to be personal.[3] In the father system of the existing Civil Law i.e., in Roman law, people, however, acted through messengers which, in a way, foreshadowed agency. Moreover, the so-called contract of *mandatum* pursuant to which the principal called *mandator* conferred mandate on an agent called *mandatrius*, served as a substitute for *agency* in Roman law.[4] It would, however, be important to note that the contract of *mandatum* did not bring about the effect modern *agency* brought about. Surprisingly, the contract of *mandatum* resulted in legal effects only as between the *mandatarius* and the third party and the principal did not have the right to exercise a direct action against the third party.[5]

Agency in the Civil Law system must have been highly influenced by developments in the Common Law system and mercantile reality and pressures. According to Schmitthoff, "...the common law developed already in the 15th century considerably earlier than the civil law, the principle that the principal was in direct contractual relationship with the third party. Thus, the foundation was laid for a theory of agency."[6]

Though Germany was influenced by the developments in the Common Law system, and around 13th century had imported into her legal system the principle of representation,[7] when it comes to the topic of this work, commission agency, it was observed:

> *In the 17th and 18th centuries the influence of mercantile law which was embodied into the common law, led the emergence of two classes of mercantile agents, the factors and the brokers. The expression agent came into use and the "confusion of the principal-agent relationship with that of master and servant" began to disappear.*[8]

In Ethiopia, agency in its modern sense was introduced with the advent of the Fetha Negast Nomocanon. The Fetha Nagast, in its Second Part and under Chapter XXX regulated "mandate."[9] However, like all other aspects of the Law of the Kings, there is no evidence, nor literature, showing the extent to which the mandate rules were put into application. Professor David wrote: Ethiopian tradition:

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[2] See generally Clive M. Schmitthoff, "Agency in International Trade: A Study in Comparative Law" 129 Hague Recueil Des Cours, Academy of International Law, Vol. I, 1970 pp. 115- 202

[3] Ibid; also see W .L. Church Cases and Materials on Agency and Business Organizations, Unpublished, AAU, Law Library Vol. I 1965, p. 3 ; Encyclopedia Britannica Vol. I, 1973-74, p. 291

[4] See Church, supra, note # 3 pp 4-5

[5] Ibid.

[6] Clive M. Schmitthoff, supra, Note # 2

[7] K.W. Ryan, An introduction to the Civil Law, 1962, p.72,

[8] Clive Schmitthoff, supra, Note # 2

[9] Translated from Ge'ez Abba Paulos Tsadua, edited by Peter L. Strauss, The Fetha Nagast, (The Law of Kings), Faculty of Law, Haile Sellassie I University, Addis Ababa, Ethiopia, 1968

"without any doubt, is weak enough if one considers it from practical point of view. Ethiopian juridical science has not existed up to our time, and the rules applied by the tribunals of Ethiopia are apparently inspired little by the principles set out in the Fetha Nagast."[10]

After the Law of Kings, modern law of agency was introduced into the Ethiopian legal system in 1960 with the promulgation of the Civil and Commercial Codes.

Expose de motifs of the Civil Code, the law that extensively dealt with agency, is not available. As a result, it has become difficult to adequately trace the roots wherefrom the provisions of the various books of the Code were borrowed. The same is true about agency in general and commission agency in particular. All that has been obtained showing that the Civil Code was essentially borrowed from the Civil Law/Continental legal system is what was proffered by the Master Drafter of the Code, Professor David. He wrote:

Once admitted that Ethiopia was interested in adopting a civil code, the second question presented was whether the model of this code should be taken from a Romanist system of laws or from the common law system. ...This question was foreseen and resolved only in an indirect way by the Ethiopian authorities. These authorities indirectly took the side favoring the continental system when they called French and Swiss jurists to work out the preparatory plans of codes. One could well expect of these jurists in fact, that they be aware of the concepts of the English reasoning; but it was clear that their composition and the care of perfecting a technical work would lead them inevitably to propose codes established on the continental model.[11]

Finally, though agency is treated both in the Civil Code and Commercial Code, the Commercial Code dealt with commercial intermediaries and commercial agents, it may be worthwhile to quote what the master drafter said after having dealt with having two codes, i.e., Civil and Commercial. He wrote:

The distribution of matters between the Civil Code and the Code of Commerce, not being dominated by commercial criteria, is in large measure arbitrary. All sales, all mandates and all pledges are thus regulated in the Civil Code, while all insurance, all conveyances and all partnerships are regulated in the Commercial Code.[12]

It would be important to note that contrary to the above, all mandates are not dealt with in the Ethiopian Civil Code. As stated earlier, commercial intermediaryship and

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[10] Rene David, "Civil Code for Ethiopia: Considerations of the Codification of the Civil Law in African Countries", 37 Tulane Law Review, p.192

[11] Ibid

[12] Ibid, p. 197

commercial agencies are dealt with in the Commercial Code. It is also doubtful if all conveyances are treated in the Commercial Code.

II. A Brief Description of Agency

Though it is not the concern of this work to deal with agency in general, it is, however, believed that orienting the reader with what agency is before dealing with Commission agency, which may be termed to be an aspect of agency, would be beneficial. In attempt to convey across the meaning of agency the late, and one of the most senior scholars on agency, Mechem, stated the etymology of the word agency as follows: "The word agent or agency, from *ago, agere, agens, agentis,* denotes an actor, a doer, a force, or power that accomplishes things"[13]

The word 'agent' or 'agency' is used in various contexts. It is, therefore, impossible to give the word a comprehensive meaning that denotes it in every situation it is employed. Professor Mechem, in his work cited above, offered the following:

> *Observation will show that the word has a wide range of use. Thus the chemist speaks of chemical agents, and the physician of therapeutic agents, the moralist declares that this or that institution or organization is an agency for good or evil; we say that man is a free moral agent. In a recent editorial the writer referred to party allegiance as the "great agency" for securing majority rule, and to a political party as a "responsible agent" of government. This agent or agency may at times be a physical or material, it may be a person, an animal or a tool.*[14]

It would be outside the scope and concern of this work to tackle the term 'agency' in the wide sense in which it is used in day to day parlance and relationships. Even though the etymology of the word, as noted above, is, certainly, of import to this work, the word 'agency' is employed in this work to denote "a branch of law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties by acts which the agent is said to have the principal's authority to perform on his behalf and which when done are in some respects treated as the principal's acts."[15] In other words, the word 'agency' as used in this work is employed in the sense that it is to "...represent another as being employed by him, for the purpose of bringing him into legal relations with a third party. Employment for this purpose is called agency." [16] In describing an agent, Mechem, in his above-cited work wrote: "In the sense in which it is used in the present subject, it denotes usually one human being who is used by another as a means of accomplishing some purpose of the

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[13] Floyd R. Mechem, Outlines of the Law of Agency, 4th ed. Callaghan & Co., 1952, p. 1.
[14] Ibid
[15] F.M.B. Reynolds, Bowstead and Reynolds on Agency, Sixteenth Ed., Sweeet & Maxwell, London, 1996, pp.2-3
[16] A.G. Guest, Anson's Law of Contract, 24th ed., The English Language Book Society and Oxford University Press, 1975, p. 571

latter."[17] According to the American Restatement of the Law of Agency, the institution under discussion is described as: "the fiduciary 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 to act."[18] In a similar tune, Seavey offered the following: "Agency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."[19] Based on French law at the time, Marcel Planiol in his Treatise on the Civil Law stated: "According to Art. 1984, the mandate is the contract by which one person, called the principal, gives to another, called the mandatary, the power to accomplish in his name one or several juridical acts."[20] Article 2199 of the Ethiopian Civil Code defines agency as: "a contract whereby 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."[21]

III. Various Nomenclatures and Aspects of Agency[22]

Agency may be categorized into various aspects. It could, for instance, be categorized into "direct" and "indirect." Agency may, as well, be tackled from the point of view of it being "civil" or "commercial." There are also aspects of agency known as "ostensible agency", "agency of necessity", "special agency" and "general agency." There may even be cases of "unauthorized agency." References are occasionally made to "disclosed agency" and "undisclosed agency" which may, interchangeably, be used with "disclosed-principal" and "undisclosed principal." Representations arising from consent may be described as "consensual agency" or "contractual agency" whereas; those ones emanating from the provisions of the law may be referred to as: "agency by operation of law."

One aspect of agency is the so-called "Commission agency," which is the concern of this work. The term "mercantile agent" is often used in its broad sense and, as such, may include the following categories of intermediaries: "broker", "commission agent",

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[17] Mechem, Supra, Note # 2, p.1

[18] Restatement of the Law of Agency, (2nd ed. 1958, Para. 1

[19] Warren Seavey, " The Rationale of Agency" (1919-1920), 29 Yale Law Journal, 868

[20] Marcel Planiol, Treatise on the Civil Law, Vol. 2, No. 2 Translated by Louisiana State law Institute, 1939, p.286

[21] Civil Code of Ethiopia, Article 2199

[22] See, generally: Floyd R. Mechem, Outlines of the Law of Agency, 4th ed. Callaghan & Co., 1952; F.M.B. Reynolds, Bowstead and Reynolds on Agency, Sixteenth Ed., Sweeet & Maxwell, London, 1996; Restatement of the Law of Agency, (2nd ed. 1958); Warren Seavey, " The Rationale of Agency" (1919-1920), 29 Yale Law Journal, 868; B.S. Markesinis, & R.J.C Munday, An Outline of the Law of Agency, 2nd ed., Butterworths, London, 1986, Ronald, A. Anderson, Ivan Fox and David Twomey, Business law: Principles, Cases, Environment, Southwestern Publishing Co., Cincinnati, Ohio,1983, Fritz Staubach, The German Law of Agency and Distribution Agreements, Oyez Publishing, London, 1977

"factor" "auctioneer", and "del-credere agent." [23] Clive Schmitthoff, refers to a commission agent as an agent with special responsibility. He wrote:

> *He is an agent who, acting in a representative capacity, undertakes personal liability to the third party. Prima Facie, that the agent should be personally liable to the third party is nothing extraordinary. This is the typical feature of the commissionaire or other indirect agent who, vis-à- vis the third party, acts as principal but is an agent in his relationship with the principal.*[24]

On the other hand, tracing the historical development of commission agency, Planiol stated that the definition quoted earlier, based on French law, that goes: "the mandate is the contract by which one person, called the principal, gives to another, called the mandatary, the power to accomplish in his name one or several juridical acts" is narrow. He offered the following:

> *The Code makes the essence of mandate consist in the juridical representation of the principal by the mandatary. This representation is nothing more than an improvement made by the Roman law in the method whereby the mandatary was discharged from his mission. The mandate existed before that and was performed without the representation of one person by another, and this primitive form of the contract has not disappeared: it still exists in commercial law under the name of "commission." And, in civil law, under the "contract of prête-nom." It is evident that the commission agent or the person, who lends his name, although they do not make known their principal, are only kinds of agents.*[25]

On the other hand, arguing that it is difficult to see any doctrinal objection in the common law legal system of indirect representation, it was noted:

> *Indeed something like this seems to have been the mode of operation of the nineteenth century factor, who received goods on consignment and sold them without making clear whether he sold his own goods or those of another. A commercial intermediary operating on this basis is sometimes even referred to as a "commission agent" or "commission merchant"* [26]

IV. Varying Definitions of Commission Agency

According to Black's law Dictionary, commission agency is described from the agent's view point. In fact, the dictionary offered definition for 'mercantile agent' and it goes:

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[23] K.R. Bulchandani, Business Law for Management,2nd ed., Himalaya Publishing House, Mumbai, India, 2002, pp.154-155

[24] Clive, M.Schmitthoff, "Agency in International Trade: A Study in Comparative Law" 129 Hague Recuel Des Cours, Academy of International Law, Vol. I 1970, pp.115-202

[25] Marcel Planiol, Supra, Note # 20 p. 286

[26] F.M.B. Reynolds, supra, note # 15, p. 11

"agents employed for the sale of goods or merchandise are called mercantile agents and are of two principal classes, - brokers and factors(q.v.); a factor is sometimes called a 'commission agent' or a 'commission merchant.'[27] The same dictionary, in an endeavor to define 'commission merchant' offers the following:

> *A term which is synonymous with "factor." It means one who receives goods, chattels, or merchandises for sale, exchange, or other disposition, and who is to receive a compensation for his services to be paid by the owner, or derived from the sale, etc., of the goods. One whose business is to receive and sell goods for a commission, being entrusted with the possession of the goods to be sold, and usually selling in his own name.*[28]

Under German law, a commission agent (Kommissionär) is defined as "A person who, with a view to profit, undertakes to buy or sell goods or investment securities in his own name on behalf of another person (the principal)"[29]

As noted above, the terms 'commission agent' 'commission merchant' and 'factor' may be used interchangeably despite the differences that may exist among them. According to Markesinis and Munday, "traditionally, a 'factor' was defined as an agent into whose possession goods were entrusted by a principal and who customarily had power to sell them in his own name."[30] Similarly making reference to the English Factors Act of 1889 the same authors observed: "However, the body of the Act contains no reference to 'factors,' but refers exclusively to 'mercantile agents', 'who are defined in the following manner"[31]: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods."[32]

Schmitthoff noted that according to the Uniform Law on Agency and Commission, 'By commission agent this law means anyone who professionally undertakes to effect in his name on behalf of another (the principal) the purchase or sale of goods.'[33]

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[27] Henry Campbell Black, Black's Law Dictionary, 5th ed. West publishing Co. St. Paul Minnesota, 1979, p. 59
[28] Ibid, p. 247
[29] Fritz Staubach, The German Law of Agency and Distribution Agreements, Oyez Publishing, London, 1977, p. 118

[30] B.S. Markesinis, & R.J.C Munday, An Outline of the Law of Agency, 2nd ed., Butterworths, London, 1986, p. 146
[31] Ibid
[32] Ibid
[33] Clive, M.Schmitthoff, supra note # 24

V. Definition of Commission Agency under Ethiopian Law

Before dealing with the definition of commission agency under Ethiopian law, it might be of help to note that commission agency is defined both in the Civil and Commercial Codes of Ethiopia. However, detailed provisions on commission agency are in the Civil Code and not in the Commercial Code. The Commercial Code, in fact, contains only three articles dealing with commission agency one of which is a provision declaring that the provisions of Articles 2234-2252 of the Civil Code shall apply to contracts of commission under the Commercial Code. It would be interesting to note that Article 60(2) of the Commercial Code clearly provides that a commission agent is a trader regardless of the parties and of the nature and object of the contract. On the other hand, in the English version of Article 5 of the Commercial Code, commission agency is nowhere mentioned as a trade activity. This writer believes that this must have been done by oversight. The activity mentioned under Article 5(19) of the Code is 'stock broker' which also figures in Article 62 of the Commercial Code in the provision stating that 'stock brokers' are commission agents and have to be treated as such, unless the law provides otherwise. However, though 'stock brokers' are commission agents on the basis of Article 62 of the Commercial Code, all commission agents are not stock brokers. It would, therefore, be wrong to argue that if stock brokers are mentioned in sub-article 19 of Article 5 of the Commercial Code, it shall be deemed as if commission agency is included therein. Yet, it is another point of interest to note that 'commission agency' is mentioned in the official Amharic version of Article 5(19) of the Commercial Code.

When it comes to definitions of 'commission agency' under Ethiopian law, as stated above, both the Civil and Commercial Codes have offered their respective definitions. The Civil Code provides:[34]

> *(1) The commission to buy or to sell is a contract of agency whereby the agent, called the commission agent, undertakes to buy or to sell in his own name but on behalf of another person, called the principal, goods, securities or other fungible things.*
> *(2) The rules governing agency shall apply to this contract subject to such special provisions and exceptions as are laid down in this section.*

Further to the buying and selling commission defined under Article 2234, the Civil Code offers a definition for another type of commission agency. It provides:[35]

> *(1) The forwarding agency is a contract 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.*

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[34] Civil Code, Article 2234
[35] Ibid Article 2251

(2) The rules governing the contract of commission to buy or to sell shall apply to this contract.

The Commercial Code, on its part, has come up with the definition of 'commission agency.' It provides: [36]

(1) A commission agent is a person or business organization who, independently, professionally and for gain, undertakes to buy or to 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.
(2) A commission agent is a trader, regardless of the parties and of the nature and object of the contract.

VI. Contrast with Direct Representation

Agency may be direct where the agent acts in the name and on behalf of the principal. However, there are other versions of agency which may not qualify to be called direct representation or direct agency. Sometimes agency may be indirect. Bowstead & Reynolds offer the following:

> *There is another situation which can be said to amount to "incomplete agency": that of what may be called indirect representation. In commercial spheres a method of representation can be adopted whereby a principal appoints a person, who may be called an agent, to deal (especially to buy) on his behalf, on the understanding that when dealing with any third party, the agent will deal in his own name as principal. As between principal and agent, however, the relationship is one of agency (emphasis added).*[37]

Ethiopian law recognizes both direct/complete and indirect/incomplete agency. Direct representation under Ethiopian Law, it could be said, is governed by the provision of Article 2189 of the Civil Code wherein it is provided:

(1) 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.
(2) The principal may avail himself of any defect in the consent of the a gent at the time of the making of the contract.
(3) 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.

According to Article 2189, therefore, if an agent acts in the name of the principal and within the bounds and limits of the powers conferred upon him by the principal, it is considered as though the principal himself acted personally and directly without an

[36] Commercial Code Article 60
[37] F.M.B. Reynolds, supra, note # 15 p. 10

intermediary. As a result, he (the principal) shall be responsible for the obligations arising from the agent's acts and shall be entitled to enjoy the fruits flowing from the contract. In other words, though the contract is concluded through an intermediary, persons becoming parties to the contract are the principal on the one hand and the third party on the other and the agent is not considered to be a party to the contract. Privity of contract would be between the principal and the third party despite the fact that the negotiation and the actual conclusion of the contract were carried out by the agent. In a similar tune, Markesinis and Munday wrote the following:

> *Where an agent, acting within the scope of his authority, contracts with a third party on behalf a disclosed principal, direct contractual relations are established between the principal and the third party. The principal can therefore sue and be sued by the third party on the contract which the agent has made on his behalf. This principle is fundamental to the law of agency and, indeed, the basic purpose of agency always was to bring the principal and the third party into direct contractual relations with one another.*[38]

In Planiol's words:

> *if the principal is bound to perform all that has been done or promised, in his name, it is because of the effect of a juridical representation: he is really bound towards third parties because he is reputed to have contracted personally and not because of any obligation resulting from his relationship with his mandatary.*[39]

Planiol also wrote: "The execution of the mandate obligates him (the principal) directly towards third persons, just as if he had contracted himself without employing an intermediary. It is the effect of representation in juridical acts."[40]

However, it would be important to note where the emphasis is in the quotation taken from Markesinis and Munday and where it is in Article 2189 of the Ethiopian Civil Code. In what is offered by those authors, the emphasis is on whether or not the agent acted within the scope of his power, whereas in Article 2189 of the Ethiopian Civil Code both acting in the name of another, (the principal) and acting within the scope of the power of the agent are mentioned as requisites leading to the contract concluded by the agent being deemed to have directly been made by the principal.

Coming back to the cornerstone provisions of Article 2189 (1) of the Ethiopian Civil Code, the elements thereunder are that:

(1) the contract is concluded by an agent;
(2) in the name of another, (that other being the principal);

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[38] B.S. Markesinis, & R.J.C Munday, supra, note # 30 p. 116
[39] Marcel Planiol, supra, note # 20, p. 296
[40] Ibid, p. 297

(3) within the scope of his power (the agent's power);
(4) shall be deemed to have been made directly by the principal.

From the four elements, however, the second element is by far the most important in that it firstly signifies that there is agency and secondly because the presumption in element (4) would not have resulted unless the agent acted in the name of another, i.e., in the name of the principal.

It is, of course, important that the agent acts within the scope of his power for the resultant element that "the contract be deemed to have been made directly by the principal" to come about. Hence, let it not be taken as if the requirement of the agent's transacting within his powers is played down. One cannot, however, equate elements (2) and (3) above-mentioned in terms of importance because if the name requirement, i.e., the second element is fulfilled, and yet the agent acted outside the scope of his power, the resultant element under (4) above may still be brought about by the optional but remedial act of ratification by the principal.[41] Or, even if the principal might not be willing to ratify, the law may impose upon him the duty to ratify and the agent's acting outside the scope of his powers may thus be remedied by obligatory subsequent adoption.[42]

Optional, or as the case may be, compulsory ratification may also serve to remedy situations where an agent acted in an authority that has lapsed or even without agency of any kind between himself and the person on whose behalf he acted. One thing should be made clear once again. Whether a principal optionally ratifies the *ultra vires* act of his agent in situations where there is an agent-principal relationship between them; or where a purported principal ratifies the act of the person who, without authorization of any sort, manages his, i.e., the principal's affairs; or the law imposes a duty to ratify both in circumstances where there is agency relationship between the acting person and the purported principal, or in the circumstances of unauthorized agency; the agent must have, necessarily acted *in the name of* the person whose ratification he would be seeking. (emphasis added) There cannot, putting it otherwise, be a ratification having an external effect, without the agent having acted in his agent capacity, which is expressed through his acting *not in his own name but in the name of the principal.*(emphasis added)

Since under Ethiopian law, from the two tests included in Article 2189(1) of the Civil Code, i.e., the 'name' test and 'within the scope of his power' test, the more important one is the 'name' test, ratification, therefore, cannot make the principal of an agent who transacts with third parties *in his own name* a party to the contract and the principal cannot be deemed to have personally concluded such a contract through ratification.(emphasis added) As a result, third parties may not have the right to take direct action against the principal. Privity of contract shall be deemed to exist as

[41] Civil Code, Article 2190
[42] Ibid, Articles 2207 & 2264

between the agent and third parties with whom the agent contracted. Such is the case with respect to the situations where the agent acts in his own name but for the benefit of his principal dealt with under Articles 2197, 2198 and 2234-2252 of the Civil Code.

Planiol has the following to offer:

> *It is possible that the mandatary authorized to enter into a contract with a third person, instead of representing himself as empowered, by another, deals in his personal name as if the contract were his own. In this case he is personally bound towards the third person who has placed his confidence on him, and who desired to have him as his debtor.*[43]

In the circumstances covered by Articles 2197 and 2198 of the Civil Code, it is, in fact, provided, *albeit* not very clearly, and in contradistinction to the cornerstone provision of Article 2189, that 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. It is further stated that in cases where an agent acts "on his own behalf", third parties shall not have direct action, i.e., an action that would have resulted from cases where an agent acts in the name of the principal and within the scope of his power against the principal; and may only bring against him an indirect action on behalf of the agent with respect to the rights pertaining to the agent.

Note should be taken of the fact that under Article 2197(1), the language used seems to be different from the intended language that ought to have been employed to contrast the effect of an agent's acting in the name of another. It may, of course, be argued that the phrase "agent who acts on his own behalf" is proper because if no mention of the name of another i.e. the principal, is made by an agent, then he would not be acting on behalf of another except on his own behalf. Nevertheless, no sooner would the fallacy of the use of the phrase 'on his own behalf' in Article 2197 be exposed than when one reads the first two sub-articles of the next Article i.e., Article 2198 let alone other provisions which will soon be treated.

Sub-article (1) of Article 2198 provides that a principal who is behind an agent and on whose behalf the agent acts may recover any movable, which the agent acquired "on his own behalf while acting in his name". Though there is the possibility of arguing that both phrases "on his own behalf "and "in his name" appearing in sub-article (1) of Article 2198 refer to the agent and not to the principal; I am of a different opinion. I think the phrase "on his own behalf" in the sub-article under consideration refers to the principal and not to the agent and only the phrase "in his own name" refers to the agent. This argument owes its basis to the cornerstone, direct and complete representation provision of Article 2189(1) of the Civil Code in that to contrast consequences of the direct, disclosed agency, the indirect, undisclosed agency falling under Articles 2197-8

[43] Marcel Planiol , Supra, note # 20, p. 297

of the Civil Code, should be construed in such a way that the phrase "on behalf of" means "for the benefit of" or "for the account of" thereby indicating an indirect agency which is maintained by the agent's acting not in the name of another but in his own name but yet hinting that there is an indirect agency.

A close look at sub-article (2) of Article 2198 should also, in my opinion, give the sort of construction that the principal may substitute himself for the agent to enforce the rights acquired by the agent while he acted in his own name but for the benefit of the principal i.e., "on behalf" of the principal. In other words, unless the principal shows that the agent acted for his (the principal's) benefit but in his own name (in the name of the agent) thereby being able to prove to third parties who did not know that there was an indirect agency, he may not successfully enforce against them the rights that have accrued to him through the agent's acting in his own name. This is so, for the simple reason that there is privity of contracts between the agent and third parties and not between the principal and third parties as it is under the complete and direct agency governed by Article 2189 of the Civil Code. Procedurally, there are no clear provisions as to how the principal exercises his rights under Article 2198(2). It is not, in other words, provided under Art. 2198 as to whether the principal, by virtue of there being an agent-principal relationship, sues the agent first and then the agent pulls the contracting third party into the suit as a third party, but a real party defendant and then the agent pulls out or whether the agent should give a power of attorney to the principal so that he may exercise his rights on his behalf or whether the principal may be allowed to exercise the rights given to him simply on the strength of the legal provision, which seems unlikely.

As the agent's acting in the name of another is glaringly the most important requirement in Article 2189(1) for the resultant effect that the act done by the agent be deemed to have been made directly by the principal, I opine that the phrase "an agent who acts on his own behalf" appearing in Art. 2197 of the Civil Code should have been replaced by the phrase "in his own name" so that it clearly stands in contrast to the direct and complete agency and its effect under Article 2189(1). The title of Article 2197 ought, accordingly, to have been "Agent acting in his own name on behalf of another" or "agent acting on behalf of another in his own name".

The main concern of this work is 'commission agency' which is another example of an indirect agency. A glance at Article 2234(1) of the Civil Code reveals that a commission agent is somebody '*...who undertakes to buy or to sell in his own name but on behalf of another person called the principal, goods, securities or other fungible things*' (emphasis added).

The provision of sub-article (1) of Article 2234 also clarifies that in indirect agency cases, the agent acts in his own name but for the benefit of another, and that there is distinction between acting in one's own name and acting on behalf of another. The provisions of Article 2234(1) support my argument above-stated in that in "undisclosed agency" or "undisclosed principal" circumstances figuring under Articles 2197/98 of the

Civil Code, although the agent enters into contracts with third parties in his own name, yet he transacts to benefit another person-his principal. It could, therefore, be said that both as it appears in the title and the actual contents of the provisions of Article 2197, the phrase "on his behalf" could be misleading unless it is construed to be referring to "on the principal's behalf" and the phrase "in his name" definitely referring to the agent and not to the principal.

It would be worthwhile to mention, at this point, that the indirect agency situation that falls under Articles 2197/98 of the Civil Code on the one hand and commission agency on the other, are, in essence, the same. Bowstead & Reynolds wrote:

> *There is another situation which can be said to amount to 'incomplete agency': that of what may be called indirect representation.*(emphasis added) *In commercial spheres a method of representation can be adopted whereby a principal appoints a person, who may be called an agent, to deal (especially to buy) on his behalf, on the understanding that when dealing with any third party, the agent will deal in his own name as principal. As between principal and agent, however, the relationship is one of agency.*[44]

Making the German Commercial Code a point of reference, Staubach also observed: "The Commercial Code contains special rules governing indirect agency for commercial purposes. In particular, there are rules relating to commission agents, forwarding agents and agents who enter into insurance arrangements on behalf of others."[45] Staubach further argued:

> *A commission agent is bound by his contract with his principal to procure and enter into contract in his own name with a third person in order to carry out the commission. The relationship which arises between the commission agent and the third person under this executory contract is the external relationship in the commission transaction. The commercial Code does not have a special set of rules governing the external relationship, and the same rules apply to it as to indirect agency under the Civil Code. (emphasis added) Thus, the gent alone obtains rights and enters into commitments under the executory contract, and so if he sells goods under it he alone is entitled to payment of the price, and if he buys goods he alone acquires initial ownership of them.*[46]

When it comes to Ethiopian law, it may be said that 'commission agency' is, among others, governed by the principles laid down in Articles 2197/98. This, it is submitted, must be what the legislator had in mind when it came up with the provisions of Article 2234(2) of the Civil Code reading: "The rules governing agency shall apply to this

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[44]F.M.B. Reynolds, supra, note # 15 p. 10

[45] Fritz Staubach, supra, note # 29, p.118

[46] Ibid, p. 141, (emphasis supplied)

contract (the contract of commission agency as stated in sub-article (1)) subject to such special provisions and exceptions as are laid down in this section." However, the agency situations falling under Articles 2197/98 may be distinguishable from commission agency cases in that agency cases falling under Articles 2197/98 are not, as such, commercial agency cases whereas commission agency cases are, by virtue of Article 5(19), (especially the Amharic version,) *cum* Articles 60-62 of the Commercial Code. It is paradoxical to note that commission agency is not adequately treated in the Commercial Code and is extensively dealt with in the Civil Code. From the way Article 5 of the Commercial Code is formulated, those activities formulated in sub-articles (1) through (21) seem to have been designated as commercial activities and that somebody acquires the status of being a trader when he/she or it is engaged in any of the activities professionally and for gain.

VII. The Recognized Types of Commission Agency

There are many kinds of commission agencies e.g. the insurance broker[47] the stock-broker[48] the ship-broker[49] the advertising-agent[50] the French customs commission agency[51] or the German commission contracts in respect of subscription or exchange or conversion rights[52] "under which a bank is entrusted with the exercise of a right to subscribe for new shares or other securities to which its customer is entitled."[53] However, the Ethiopian Civil and Commercial Codes only recognize the following aspects of commission agency- 1) commission to buy or sell goods; 2) commission to buy or sell securities; 3) commission to buy or sell fungible things; 4) stock brokerage commission and 5) forwarding commission.[54] An attempt will be made here below to briefly consider each of the aspects recognized by the Ethiopian Law.

7. 1. Commission to Buy or Sell Goods

7.1.1 Commission to Buy Goods

A commission agent entrusted with the buying of goods would normally be an agent who enters into contracts for the purchase of goods in his own name but for the benefit

[47] J. Guyenot, The French Law of Agency and Distribution Agreements, London, 1977, p.156; see also Schmitthoff, supra, note # 24

[48] Ibid, see also Schmitthoff, supra, note # 24

[49] Ibid, see also Schmitthoff, supra, note # 24

[50] Ibid, see also Schmitthoff, supra, note # 24

[51] Ibid, see also Schmitthoff, supra, note # 24

[52] Fritz Staubach, supra, note # 29, p. 156; see also Schmitthoff, supra, note # 24

[53] Fritz Staubach, supra, note # 29, p. 156

[54] Civil Codes Articles 2234(1) *cum* Article 2251; Commercial Code Articles 60 & 62

of the principal. A goods-buying commission agent, would, in other words, be entering into sale agreements in his own name as a buyer for the period during which his contract of agency remains effective. It, therefore, follows that Articles 2266-2367, and, as the case may be, Articles 2368-2426 of the Civil Code and without prejudice to the prior application of these provisions, the provisions of Title XII of the Civil Code, i.e., Articles 1675-2026 of the same Code, would be applicable to a buying commission agent's external relationships i.e., his/her relations with seller third parties.

Among the mentionable duties of a purchasing commission agent are, 1) the duty to pay the price and take delivery of the goods he buys;[55] 2) duty to examine the goods he takes delivery of at the time when the risks are transferred to him or as soon as he gets the opportunity to examine them; 3) duty to notify the seller of the defects and/or non-conformity he discovered in the process of examination and his intention to avail himself of the defects and non-conformity; 4) duty to describe the nature, and extent of the defects and/or non-conformity detected on the goods he took delivery of; 5) duty to inform the seller that he rejects the goods delivered to him or alternatively that he requests the replacement of the goods so that he avoids transfer of risks over to him; and 6) duty to call the seller or his agent at the time he conducts examination on the goods. In general, a purchasing commission agent may avail himself of the warranty provisions of sales law in the Civil Code in order to demand specific performance or have the seller rectify the defects or non-conformity, unilaterally declare the contract cancelled either partially or totally as the case may be.[56]

Although nothing is provided to that effect in the Civil Code, if the principal has instructed the commission agent that the goods he buys be sent to him by the seller thereby avoiding the intermediary stage of the agent's taking delivery from the seller, and then redeliver the goods to the principal; there may not be the necessity of the commission agent's receiving the goods. In France, "more usually the goods are dispatched by the seller acting on the principal's instructions."[57] If the goods bought by a commission agent are directly dispatched by the seller to the principal, then the principal has to see to it that things that ought to have been taken care of by the agent have to be taken care of by him. Among others, the principal has to examine the goods at the time when the risks are transferred to him or at the earliest possible opportunity. If examination discloses defects or non-conformity for which the seller may be held on warranty, then the principal shall have to notify the agent so that he seeks the appropriate remedy in the circumstances by taking the appropriate measure. The agent becomes the most appropriate person to take measures legally appropriate simply because privity of contract is only there between the agent and the seller third party.[58] Although the arrangement that the principal's directly receiving the goods from the third party seller could in certain respects be advantageous to the principal, particularly from

[55] See generally, Articles 2203-2313 of the Civil Code
[56] Ibid, Articles 2290-2300
[57] Guyenot, supra, note # 47, p.167
[58] Fritz Staubach, supra, note # 29, p.141

the point of the consideration that he gets the goods fast, this consideration alone might not benefit the principal unless he also would be able to examine the goods as swiftly as possible and inform the agent so that he, (the agent) may be able to exercise his legal rights within the code prescribed time set for the purpose of holding the seller on warranty for defect and non-conformity.[59] The principal's getting the goods directly from the seller third party might as well adversely affect the interest of the agent in that he, (the agent) won't be able to exercise his lien rights on the goods he buys which serves him as a security for him to get his remuneration or even reimbursement of outlays and expenses.[60]

A commission agent meant to purchase goods in his own name but for his principal's account 'shall act at his own risk where, without the principal's consent, he pays the seller before delivery has taken place.'[61] The provisions of Article 2237 of the Civil Code presuppose that a commission agent, generally, is not permitted, and is not expected, to pay the prices of the goods he buys unless payment of price is simultaneous with delivery or even better, until after he, or as the case may be, his principal, has taken delivery of the goods purchased[62]. The provisions of Article 2237 are not, strictly speaking, prohibitions but the provisions sort of put the responsibility on the agent which otherwise would not have been his. In other words, the agent, who, unless he is a *del credere* agent, may not be held responsible for the performance of the contract he entered into with third parties would be held responsible towards the principal at least upto the amount he paid by way of price just because his performance preceded that of the third party and unfortunately the third party failed to discharge his obligation to deliver the good/s purchased. The application of Article 2237 should not, it seems, affect situations where the nature of the transaction made with the seller is such that payment of price is effected before the seller even makes, or, manufactures the goods to be delivered or even where delivery, as a matter of trade usage, follows payment of price. The Article focuses on the agent's securing the consent of the principal before paying the price anyway.

A purchasing commission agent should be careful enough in examining the goods he takes delivery of. Although he may avail himself of defects which could not be detected by the normal process of examination and which are subsequently discovered to which the law refers to as "latent" "hidden" "or rehidibitory" defects; provided however, that he notifies the seller as soon as the latent defect is discovered.[63] There may be also the possibility that the buying commission agent overlooks obvious defects as a result of his gross negligence in which case the seller would be exonerated from liability or warranty

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[59] Civil code Articles 2290-2300
[60] Ibid, Articles 2234(2), *cum* Articles 2247 and 2224
[61] Ibid, Article 2237.
[62] See also Article 2278 of the Civil Code providing for simultaneity of performance in the absence of agreement otherwise, and the provisions of Articles 2310 & 2311
[63] Ibid, Article 2293(2)

against defects.[64] The warranty shall, however, be due if the case falls under the provisions of Civil Code Art. 2296 (2).

A purchasing commission agent should also bear in mind that he owes his principal a duty to check as to whether the goods sent or delivered to him by seller third parties conform to the ones described in the contracts of sale. A buying commission agent would be required to do that with the view to hold selling third parties on warranty in the event that examinations and/or inspections disclose warrantable non-conformity.[65]

Civil Code Article 2235(1) seems only to provide for measures of preservation to be taken by a selling commission agent. Whether or not the provisions of the Article apply to a buying commission agent in the absence of an express provision to that effect may be worth considering. The very way Article 2235(1) is formulated, in fact, invites two different ways of construction. The first possible construction would be the one that limits the application of the provision to situations where the agent is a selling commission agent and that the sub-article refers to goods sent to the agent by the principal. This construction, therefore, limits the scope of application of the sub-article to the internal relationship between the principal and the agent, and hence it perfectly makes sense if a duty of preservation is imposed upon the agent. In other words, Article 2235(1) may be taken as a provision indicative of one of the fiduciary duties a commission agent owes his principal. The other alternative construction would be to take the provisions of Article 2235(1) as also referring to situations where a buying commission agent receives goods whilst contracting in his own name but on behalf of the principal. Particularly if the phrase: "[T] he goods sent to him on behalf of the principal" is taken in isolation it could be argued that the latter construction is the more appropriate one because such an expression may be taken as referring to cases where third parties would be sending goods to a commission agent whom they know as such. On the other hand, the word "sent," it may be argued, does not seem to refer to cases where a purchasing commission agent receives goods from third parties with whom he contracts. In such circumstances, it is submitted that the most appropriate legal and technical phrase would be "...goods delivered to him" thereby fitting into the consequential situations flowing from the nature of the indirect representation of commission agency.

If Article 2235(1) is limited to the narrow construction that it only applies to cases of selling commission agent who receives goods from the principal or directly from a manufacturer on behalf of the principal, and the other aspect, i.e.; the cases of buying commission are considered as not covered by the provision; it could be detrimental to the principal in that even agents who unreasonably fail to preserve goods delivered to them would be relieved from liability. After all, the requirements laid down under

[64] Ibid, Article 2296(1)
[65] Ibid, Articles, 2287, 2288, 2290-2300, 2308 & 2343

Articles 2208(1) and 2211(1) shall apply to commission agency and there is a fiduciary duty imposed upon commission agents as well.[66]

The strict provision of Article 2235(3) which imposes the duty of preservation upon any person who has not yet accepted the commission but who is by profession one may also be taken as an indication that duty to preserve applies to a buying commission agent as well.

It, therefore, follows that a commission agent is duty bound to preserve the goods he receives while transacting in his own name but on behalf of the principal. The duty to preserve includes all necessary steps that need to be taken by a purchasing commission agent so that the goods that come into his possession do not lose their quality, or deteriorate in value or even be stolen or perish.[67] Unless otherwise instructed by the principal, the preservation duty imposed upon a commission agent does not go to the extent of insuring the goods.[68] However, all appropriate measures, short of insurance, in the absence of instruction for insurance, would fall; it is submitted, within the broad duty of preservation.

7.1.2 Commission to Sell Goods

The other aspect of commission recognized by the Ethiopian law is the commission to sell goods in one's own name but for the benefit of the principal. Goods selling commission agency is an agency whereby one party called the agent agrees with another party called the principal, to sell in his own name but not for his own benefit, goods belonging to the latter. A selling commission, in other words, is a transaction whereby the agent sells goods that have been sent to him by the principal or even by the manufacturer for the benefit of the principal. As the name itself indicates, a selling commission agent would be engaged in selling transactions with third parties in his own name but for the benefit of the principal. Like the buying commission agent, a selling commission agent's sale transactions necessarily call for the application of Civil Code Articles 2266-2367[69] since the agent assumes the responsibility of a seller like in any ordinary sale transaction. Depending on the type of sale agreement the agent concludes, the provisions of Articles 2368-2426 of the Civil Code may also govern the transactions a selling commission agent enters into.

Although he sells goods not belonging to him,[70] a selling commission agent assumes the duty to deliver the goods he sells to the purchasing third party and to transfer the ownership of the goods over to the purchaser. A selling commission agent bears the responsibility to transfer to the third party buyer unassailable rights over the goods he

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[66] See Civil Code Article 2234(2)
[67] See, for instance, Civil Code Article 2323
[68] Civil Code Article 2242
[69] Ibid, Article 2267
[70] Ibid, Article 2270(3)

sells.[71] A selling commission agent, unless the warranty is validly excluded or restricted, or the exception laid down by the law comes into application, also warrants the buying third party against any total or partial dispossession which he might suffer as a consequence of another 3rd party exercising a right he enjoyed at the time of the contract.[72]

The selling commission agent assumes the responsibility to transfer ownership and to warrant against any total or partial dispossession primarily because he transacts in his own name and because of the nature of goods sent to him by virtue of the agency agreement. The goods sent to a selling commission agent must necessarily be ordinary goods, i.e. ordinary corporeal chattels the transfer of possession of which entails transfer of ownership.[73] In other words, goods to be entrusted to selling commission agents cannot be special chattels whose ownership may not be transferred by virtue of mere delivery of the goods or transfer of possession and other formalities required by the special law applicable to the goods must be complied with in addition to transfer of possession.[74]

In selling commissions, because he contracts in his own name, it would be the selling agent that would be held liable on warranty for defects and non-conformity. If the things (goods) sold by him happen to be suffering of warrantable defects or warrantable non-conformity, it is the selling agent that should be held liable on a warranty towards purchasing third parties and not the principal that owns the goods. Third parties cannot claim to have a direct right of action against the principal and may only have an indirect right of action by putting themselves in the shoes of the agent pursuant to the rules of the Civil Code governing indirect agency.[75]

Without prejudice to the possibility of the sub-article being intended to govern acquisition in good faith, it seems Article 2270(3) of the Civil Code is meant to govern cases of commission agency. Hence, the provisions of Article 2270(3), make a sale contract concluded by a seller in respect of things that do not actually belong to him valid. It is believed that the legislator had the case of selling commission agents in mind by formulating sub-article (3) of Article 2270 of the Civil Code, the way it now reads. As said earlier, the case of acquisition in good faith may also have been in the mind of the legislator by formulating Article 2270(3) as it now reads.

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[71] Ibid, Articles 2273(2), 2281-2286, 2341& 2342

[72] Ibid, Articles 2282 & 2342

[73] Note the provisions of Article 1193(1) of the Civil Code, by virtue of which the law lays down the presumption that that whosoever possesses a corporeal chattel is presumed to be its owner. Also take note of Articles 1143 & 1186(1) of the Civil Code providing that delivery transfers possession and that for ordinary chattels, transfer of possession entails transfer of ownership.

[74] Article 1186(2) of the Civil Code; See also Article 2267(2) of the same Code.

[75] Article 2234(1) *cum* 2197(2) of the Civil Code

A selling commission agent, as discussed earlier, owes the duty to preserve the goods falling into his custody. Accordingly, in a selling commission context, the seller agent shall bear risks of the things in his custody until he succeeds to transfer the risks to the purchasing 3rd party by delivering the things over to the buyers. Although he bears the risks, however, it is important that his duty to preserve the goods in his custody does not go to the extent of insuring the goods, unless the principal instructs the agent to take out insurance for the goods in his possession.

7. 2. Commission to Buy or Sell Fungible Things

7.2.1 Commission to Buy Fungible Things

Commission to buy fungible things is, in fact, not very different from commission to buy goods except that the former commission agency only pertains to the purchase of fungible things as distinguished from the commission conferred on somebody to buy specific goods. Fungible things are things of generic species. The name given to such things is generic in that there would normally be internal classifications for things having generic designations. Primarily because of the characteristics of fungible things, the law has come up with some special provisions regulating such things. Article 1747 of the Civil Code, for instance, is such a provision in that it reads: (1) "Unless otherwise agreed, the debtor may choose the thing to be delivered where fungible things are due." (2)" The debtor may however not offer a thing below average quality." Where somebody is authorized to act as a commission agent to purchase things of generic species, therefore, the selling third party is the one authorized to choose what is to be delivered to the buying agent. The selling third party, however, may not offer generic or fungible things that are below average quality.

Article 1748 of the Civil Code, also regulates transactions relating to fungible things. A fungible things purchasing commission agent, who may be taken as "the creditor" for the purposes of the Article under consideration, therefore, may not refuse fungible things on the ground that the quantity or quality offered to him does not exactly conform to the contract, unless this is essential to him or has been expressly agreed. Where the thing does not exactly conform to the contract; the purchasing commission agent, (the creditor) may proportionately reduce his own performance. Alternatively, where he has already performed, the creditor may claim damages.[76]

The commission agent given authorization to purchase fungible things may also avail himself of the provisions of Article 1778 of the Civil Code in that he/she may apply to the court to be authorized to buy at the defaulting third party's expenses, the things which the debtor assumed to deliver.

In cases of commission to buy fungible things, the agent may as well avail himself of all other appropriate remedial provisions in Title XII of the Civil Code without prejudice to

[76] See also Articles 2299(2) & 2345(2) of the Civil Code

the prime application of the relevant provisions of Sales Law whether general, or special, as the case may be.

7.2.2 Commission to Sell Fungible Things

A person may be conferred with commission to sell generic things. Though the position of a person authorized to act as a commission agent to sell fungible things is not, as such, very different from the one given the authority to sell goods; similar to the one authorized to buy generic goods, his position may merit to be given the special consideration it deserves mainly because of the simple fact that s/he is authorized to sell generic things. Civil Code provisions of Articles 1747, 1748 and 1778 would therefore; *mutatis mutandis*, apply to cases of commission to sell fungible things. By the same token, appropriate remedial provisions in the Law of Sales would also govern cases and relationships of a commission agent given authorization to vend fungible things belonging to his principal as though they are his own.[77]

7.3 Commission to Buy or Sell Securities

7.3.1 Commission to Buy Securities

Although securities, unless otherwise provided by law, are, for the purposes of property designation, assimilated into movables, and are treated as goods,[78] they do have their own characteristics and idiosyncrasies, which distinguish them from other kinds of goods. According to Article 1127 of the Civil Code, corporeal chattels are defined as "things which have a material existence and can move themselves or be moved by man without losing their individual character." There is no definition, as such, given to securities in the Civil or Commercial Codes. However, the provisions of Article 1128 of the Civil Code could be taken as giving hint that securities seem to be incorporeal rights embodied in transferable instruments of some sort. This is further supplemented by Article 715(2) of the Commercial Code which makes it clear that transferable securities are one among those negotiable instruments recognized by our Commercial Code; and that "negotiable instrument is any document incorporating a right to an entitlement in such manner that it be not possible to enforce or transfer the right separately from the instrument."[79] Dictionary definition, albeit a common law one, is that securities are "evidences of debts or of property evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate trust ...and other property." Among the frequently mentioned securities, stocks, bonds, notes, convertible debentures, warrants or other documents that represent a share in a company are but few.

The Ethiopian Commercial Code recognizes three categories of negotiable instruments viz. "commercial instruments", which are enumerated under Article 732(2) of the Code,

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[77] Read Article 2300(1) of the Civil Code, for instance
[78] Article 1128 of the Civil Code
[79] Commercial Code Article 715(1)

"transferable securities" and "documents of title to goods."[80] Unfortunately, the Code does not separately deal with transferable securities and documents of title to goods as it elaborately deals with commercial instruments. Nevertheless, as commercial instruments are said to be those negotiable instruments setting out an entitlement consisting in the payment of a sum of money,[81] by exclusion, therefore, it could be said that negotiable instruments which do not set out the payment of a sum of money and which are not documents of title to goods, are transferable securities. The Ethiopian law, it may be stated, at least recognizes share certificates (stocks), debentures, negotiable life assurance policies and bonds as transferable securities.[82]

A commission agency may be given to buy transferable securities and an agent entrusted with such agency is not an ordinary commission agent. He is the so-called *del credere*[83] agent unless there is an agreement otherwise which dispels the rebutable presumption under Article 2240(2) of the Civil Code that a commission agent entrusted with the task of buying securities shall be deemed to be a *del credere* agent. If a commission agent is a *del credere* agent, the law imposes on him the obligation to be liable to the principal for the payment or the performance of other obligations by the persons with whom he contracted.[84]

A securities purchasing commission agent may be required to be even more conscientious than a goods purchasing one. He has to be able to profess the technical know-how of dealing with the instruments he purchases in his own name but on behalf of the principal. *Inter alia*, he may be expected to deposit the securities he purchases with a bank in accordance with Article 912ff of the Commercial Code for their safety and their proper handling, which includes but not limited to, the collection of yields of the securities. It, in fact, seems that it is banks that undertake to become commission agents for purchasing of securities more than any other person, in which case it becomes a lot easier to handle the securities.[85]

It is gatherable from some provisions of the Commercial Code that transferable securities, by and large, may be in the form of either in the name of a specified person or to bearer.[86] Considering Articles 660 and 696 and the few ones following, it may also be said that at least negotiable life insurance policies may be issued in the form of "to order" instruments. In the event that the transferable securities purchased by a commission agent are in the names of specified persons i.e. that of the seller third parties; then the commission agent is expected to follow the procedure provided for by Articles 722 and 723 of the Commercial Code to have the instruments registered in his

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[80] Ibid, Article 715(2)
[81] Ibid, Article 732; see also Black's Law Dictionary, supra, note # 27, p. 245
[82] See Commercial Code Articles 325, 340, 429-444, 474, 660, 696-697, 912-918, and 947-958
[83] Article 2240(2) of the Civil Code; see also pages 24 & 25 infra, for the definition of *del credere* commission agent
[84] Ibid, Article 2241; see also the discussion on pages 24 & 25 infra
[85] Fritz Staubach, supra, note # 29 p. 150
[86] See Commercial Code Articles mentioned at note # 82 supra

own name in the issuing company's or person's register and then repeat the same procedure again to have the securities transferred over to the principal's name. Purchasing of securities in the names of seller third parties, though possible, may, nonetheless, be expensive and tedious in the face of the provisions of Articles 722-723 and 341 of the Commercial Code.

It would be a lot easier if a securities purchasing commission agent is to buy bearer securities as opposed to those ones in the names of specified persons. In the case of bearer securities their transfer does not involve any process other than simply handing over of the documents. An agent who buys bearer securities "in his own name but on behalf of the principal" needs only to take delivery of the instruments from selling third parties and merely deliver them over to his principal to effect transfer of title over the securities. Pursuant to Articles 340 and 721 of the Commercial Code, such securities are assigned, or transferred by delivery without any other requirement. Per Article 340(2) of the Commercial Code, "Unless the contrary is proved, such shares shall be deemed to be the property of the holder for the purposes of payment of dividend, redemption and right of participation in general meetings". Article 721(1), on its part, provides that "the holder of an instrument to bearer establishes his right to the entitlement as expressed in the instrument by the sole fact of the presentment of the said instrument."

A securities purchasing commission agent who has become an endorsee possessor of endorsable transferable securities, for example, a life insurance policy to order, should re-endorse the policy in the name of the principal and hand the instrument (policy) over to him (the principal).[87]

7.3.2 Commission to Sell Securities

Commission agency may be conferred upon someone for the purposes of selling of securities as well. As mention has already been made for the cases of commission to buy securities, it is usually banks that serve as depositories of securities.[88] It would be worthwhile to note that in cases of commissions for sale of transferable securities, a practical problem will arise in the face of the provisions of Article 722 &723 of the Commercial Code. The selling commission agent will not be able to sell the securities unless and until the principal transfers the ownership of the transferable securities registered in his name to the name of the agent. Primarily, therefore, the principal who is desirous of having a commission agent to sell his registered securities should first have the securities registered in the name of his commission agent. This becomes a prerequisite because the agent will be selling the securities in his own name. On the other hand, it would be easy and straightforward to have bearer securities sold through the intermediary of a commission agent.

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[87] Commercial Code Articles 696 and 724

[88] See note # 85 supra

7. 4 Forwarding Commission

As defined under Article 2251, forwarding commission agency is a contract 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 forwarding of goods. Basing himself on the then in operation German Commercial Code, Staubach wrote:

> *A forwarding agent is a person who carries on the business in his own name of consigning goods for carriage by carriers or by owners or charterers of sea-going vessels for the account of other persons. The forwarding contract between the consignor of goods and a forwarding agent is closely related to the commission contract. Like a commission agent, a forwarding agent carries on a business independently, and enters into contracts of carriage in his own name but on behalf of other persons as his principals.*[89]

Although the sub-topic of this section of the work appears to be limited to forwarding commission agency, Article 2251(1) has a broader coverage and it embraces three categories of forwarding agents called commission agent, shipper or forwarding agent. The latter two, seemingly different kinds of agency, might look misplaced in there. However, they all are bound together by the provision of Article 2251(1) which makes it clear that all the three could be called forwarding agents and hence the title of the Article. The other binding factor is that whether the person undertaking to execute the agency is called shipper, forwarding agent or commission agent, the objective of such an undertaking by the agent would be the same in that he would be entering into an obligation to become a party to contracts to forward goods in his own name but on behalf of the principal.

Since the rules governing the contract of commission to buy or to sell apply to forwarding commission agency,[90] a forwarding agent would be duty bound to preserve the goods he undertakes to forward short of taking out insurance for the goods unless, of course, there is an agreement otherwise. [91]

Where the commission agent or the shipper has been instructed to insure the goods, then he would be obliged to take out appropriate insurance policies for the goods. With respect to insurance, Articles 2242 and 2251(2) are in effect warning provisions to the principal/owner or to any other party who might have insurable interest in the goods that he/she should ensure that appropriate arrangement is made for insuring the goods on his part or alternatively he must see to it that taking out insurance cover for the goods is

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[89] Fritz Staubach, supra, note # 29 p. 160
[90] Civil Code Article 2234(2)
[91] Ibid, Articles 2251(2); 2234(2) *cum* 2235 & 2252

unequivocally made the duty of the agent in the agency contract in whichever capacity he undertakes to act, i.e. be it as a selling, buying or forwarding agent.

A forwarding agent can agree with himself to carry out the transportation of the goods.[92] On the other hand, because of the resultant conflicting interest of the principal with that of the agent,[93] the principal is given the right to cancel the contract made by the agent in his name where he contracts with himself. As it is expressly stated in Article 2188(3), Articles 2248 and 2252 are exceptions to the rules laid down in Article 2187 and 2188 (1) of the Civil Code.

The right of an agent to enter into agreements in his own name but on behalf of the principal on the one hand and with himself in strictly his personal capacity on the other; will be considered below.

Where a forwarding agent avails himself of his right to contract with himself to carry out the forwarding of goods, he shall have the same rights and duties as a carrier, in which case, the Commercial Code provisions of Articles 561 and the following shall govern the aspect of the carriage of goods by the agent. Save the mandatory provisions of Titles I and II of Book III of the Commercial Code, which parties cannot set aside by their own agreement, there are various circumstances in those two titles of the same Book of the Commercial Code which are left to be regulated by the parties concerned. If those circumstances are to be regulated by the parties, there is bound to arise an issue of how they are to be regulated if the forwarding agent decides to act as a carrier himself through the mechanism of contracting with himself. An easy way out to the problem may be that unless terms and conditions upon which the forwarding agent may act as a carrier may have been supplied by the principal, the purported agreement expected to have been concluded between the carrier in his personal capacity and in his indirect representative capacity would be left to be fixed solely by the agent himself. If the forwarding agent enters into an agreement with himself fixing terms that are manifestly disadvantageous to his principal, there is nothing provided for in the Civil Code which might be put into application to rescue the principal since contracting with oneself is taken as permitted in cases of commission agency for sale and purchase of goods quoted on the Stock Exchange or having a market value, or in cases of forwarding agency. Alternatively, the principal should, at the time of conferring of the agency, make it clear to the agent that he may not enter into agreements with himself as a third party. By virtue of the provisions of Article 2188 (3), it seems that the principal, cannot demand the cancellation of the contract the agent makes with himself if it pertains to commission agency for sale and purchase of goods quoted on the Stock Exchange [94] or having a market value [95] or forwarding commission agency. [96]

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[92] Ibid, Article 2252 (2)
[93] Ibid, Articles 2187 & 2188
[94] Civil Code Article 2248(1)
[95] Ibid
[96] Ibid, Article 2252(2)

Nevertheless, it is submitted that a forwarding agent, who enters into contracts with himself, in the process of which the principal is manifestly disadvantaged, should be responsible towards the principal by virtue of Articles 2208 and following of the Civil Code. According to German law:

> *The stock exchange or market price to be taken is the highest price ruling at the relevant time if the agent buys from the principal, and the lowest such price if the agent sells to the principal. The agent must conclude the contract with the principal at an even more favorable price to the principal if the agent is able by exercising proper care to execute the commission at a better price than the ruling exchange or market price.*[97]

As the carrier and sender of the goods would be the same person where a forwarding agent undertakes to effect the transportation of the goods, the likelihood, it seems, is that he will not issue a consignment note that may be issued in accordance with Article 571 of the Commercial Code.

The issuance of a consignment note, it is provided, may be replaced by any other document such as a receipt delivered by the carrier on the sender having made all appropriate statements provided the sender and the carrier agree.[98] But again, in cases where a forwarding agent undertakes to transport the goods, both the sender and the carrier would be one and the same person. At any rate, Articles 577-582 and Articles 583-586 of the Commercial Code shall, *mutatis mutandis* come into application to regulate the relationship of the parties whenever a forwarding commission agent himself undertakes to transport the goods.

In general, there might be a host of problems that may arise out of a forwarding agent's transacting as a third party on his own account and concluding the contract with himself into details of which, I think it is unnecessary for me to indulge.

7. 5 The *Del Credere* Agent

7.5.1 Definition

Neither the Civil Code, nor the Commercial Code of Ethiopia give the definition of what a *del credere* agent is. Consequently, it is a little difficult to know what the term means exactly. All the Civil Code provides, under Article 2241, is:

> *(1) The del credere commission agent is a guarantor jointly liable with the person with whom he contracted.*

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[97] Fritz Staubach, supra, note # 29 p. 147
[98] Commercial Code Article 575

(2) He shall in all cases be liable to the principal for the performance of the contract he entered into unless non-performance was due to the principal's default.

Drawing on some foreign definitions may give some clues thereby helping the reader to get some idea as to what the term *del credere* stands for. According to, Fridman *Del Credere Agents* are mercantile agents. 'Such agents, in return for extra-commission, called a *del credere* commission, promise that they will indemnify the principal, if the third party with whom they contract in respect of goods fails to pay what is due under the contract.'[99] Quoting Lord Ellenborough in the Morris v. Cleasby case, the same author wrote: 'A commission *del credere* is the premium or price given by the principal to the factor for a guarantee, it presupposes a guarantee.'[100]

According to yet another source, a *del credere agent* is "an agent who sells goods for the principal and who guarantees to the principal that the buyer will pay for the goods."[101]

According to Markesinis and Munday,

> *the fundamental characteristics of del credere agency agreements is that the principal will be under no obligation to reimburse the agent if third parties fail to pay under the contract.* [102]

According to Reynolds, a *del credere* agent:

> *is an agent who for a special commission undertakes in effect the liability of a surety to his principal for the due performance by the persons with whom he deals, of contracts made by him with them on his principal's behalf.*[103]

Referring to Article 2 of the Restatement of American Law, the same source offered the following:

> *A del credere agent is an agent who, in consideration of extra remuneration, called a del credere commission, guarantees to his principal that third parties with whom he enters into contracts on behalf of the principal will duly pay any sum becoming due under those contracts.* [104]

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[99] G.H.L. Fridman, The Law of Agency, 2nd ed., Butterworths, 1966, p.28
[100] Ibid
[101] Ronald, A. Anderson, Ivan Fox and David Twomey, Business law: Principles, Cases, Environment, Southwestern Publishing Co., Cincinnati, Ohio,1983, Glossary, p.5
[102] B.S. Markesinis, & R.J.C Munday, supra, note # 30 p. 105
[103] F.M.B. Reynolds, supra, note #15, p.32
[104] Ibid, p. 30

Article 2241 of the Ethiopian Civil Code, though it has embodied in it that a *del credere agent* is a guarantor for the obligations of contracting third parties, it does not, however, mention that what makes a commission agent a *del credere* agent is also the extra-remuneration in consideration of which he assumes the guarantor responsibility.

It is nowhere provided in the chapter dealing with commission in the Ethiopian Civil Code that a commission agent does not guarantee the performance of the contract he enters into in his own name but on behalf of the principal. It is in fact awkward for the Code not to have such a provision because any reasonable person, would, without taking note of the provisions of Article 2212(1) of the Civil Code, think that where an agent enters into contracts with third parties, in his own name, but on behalf of another person, he would be, to use the expression in Article 2197 "enjoying the rights and incurring the liabilities deriving from the contracts he makes with third parties..." In which case, he would, according to their internal relations, be answerable to the principal for the performance of the contract. Quite to the contrary, however,

> *unless otherwise agreed, the agent, notwithstanding that he acted in his own name, shall not be liable to the principal for the performance of the obligation of the person with whom he contracted.*[105]

This, I think, is a provision intended primarily to clear the doubts that would have occurred in cases where an agent who acts in the name of another, in situations of direct agency would have been expected to be responsible for the performance of the contracts he makes with third parties. On its way to clear this doubt, however, the provision also deals with even more controversial situations that would have resulted from cases of incomplete or indirect agency in which a principal would have held his indirect representative responsible for the performance of the contracts he concludes with third parties: The provision, is therefore, put in such a way that it in effect says: Unless otherwise agreed, an agent, who acts in the name of the principal, within the scope of his power, shall not be responsible to his principal for the performance of the obligation of the person with whom he contracted. The same applies to an agent who acts in his own name but on behalf of another, (the principal) despite the fact that he is a party to the contract and it is he who incurs liability and enjoys the rights flowing from his transactions with third parties.

Article 2212(1) is, therefore, a warning provision to principals in general and especially to principals who either are undisclosed or who employ commission agents that if they wish to hold their agents liable to them for the performance of the contracts they make with third parties, they should see to it that in the agency conferring agreement, a clause is included which makes the agent responsible to them for the performance of the contracts their agents enter into with third parties.

Article 2212(1) is applicable to commission agencies or in general to indirect agency cases by virtue of Article 2234(2). A commission agent, generally, is not responsible for

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[105] Civil Code, Article 2212(1)

the payment or the performance of other obligations by the persons with whom he contracted unless he acted as a *del credere* agent.

7.5.2 Distinguishing Features of a d*el credere* Agent

It is clear from the provisions of the Civil Code that a *del credere* agent, whether he gets that status by contract or through the imposition of the law, is a commission agent responsible for the payment or the performance of other obligations by the persons with whom he contracted. In other words, cases of *del credere* agents automatically become exceptions to the sweeping provisions under Article 2212(1) of the Civil Code and hence, internally, a principal can always hold his *del credere* commission agent responsible for the default of third parties with whom the agent had entered into contractual relationships in his own name but on behalf of the principal.[106] The only ground given by the Code on which a *del credere* agent may be relieved from liability towards the principal for the performance of the obligations of third party contractants is where he proves that the non-performance, or, the default, of the third party was caused by the fault of the principal.[107] In all other cases, the *del credere* agent shall be responsible towards the principal.

The nature of the liability of the *del credere* agent is stated as: "a guarantor jointly liable with the person with whom he contracted."[108] Although Article 2240(1) of the Civil Code, the sub-article that was supposed to deal with the guarantor position of the agent, at least taking the title of the Article, does not spell out what Article 2241(1) spells out; the guarantee given by the *del credere* would be such that the creditor, (in our case the principal) may sue the *del credere* agent without previously demanding payment or performance from the debtor (in our case the third party). Article 2240(1) mandatorily makes the *del credere* responsible whereas according to the first sub-article of the next Article, there would, at least, be the discretion given to the principal to first sue the third party debtor thereby demanding payment or performance from him.[109] Procedurally, or even practically, it could be disadvantageous or even impossible for the principal to proceed against the third party first and then against the *del credere* agent.

The Civil Code deals with two types of commission in which there may be the possibility of an agent assuming the position of a *del credere* which will be treated separately, but briefly herein below.

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[106] Ibid, Article 2242(1)
[107] Ibid, Article 2241(2)
[108] Ibid, sub-article (1)
[109] Ibid; see also Article 1933(1)

7.5.2.1 Commission Entrusted with Sale and Purchase of Securities

The Civil Code, in Article 2240(2), lays a rebutable presumption that a commission agent entrusted with the purchase or sale of securities is a *del credere* agent.[110] The presumption is rebutable because the same provision gives discretion to the parties to agree otherwise. It, therefore, follows that if the parties agree to opt out the presumption they should see to it that a clause is included in their internal agreement, which exonerates the agent from guaranteeing performance pursuant to the provisions of Article 2240(2).[111]

A person who accepts the offer of a principal to act as a commission agent for sale and purchase of securities, or whose offer to act as a commission agent for sale and purchase of securities has been accepted by the purported principal should, therefore, bear in mind that he is not an agent covered by the provisions of Article 2212(1), but one subjected to that of Article 2240(2).

7.5.2.2 Commission Entrusted with the Purchase or Sale of Goods

A commission agent entrusted with the purchase and sale of goods is not, automatically and as the one entrusted with the sale or purchase of securities, presumed to be a *del credere*. He is presumed to be one when either one of the following two conditions is fulfilled or where both of them are fulfilled. The two conditions are: 1) where it is the custom of trade in the place where the agent resides and 2) where the commission agent has agreed. It may be worthwhile to look at the two separately.

7.5.2.2.1 Where it is the Custom of Trade in the Place where the Commission Agent Resides

This is one of the few instances where the Civil Code makes reference to custom, although this is of trade, thereby curbing the effect of the sweeping provisions of Article 3347 of the Civil Code that repeals and replaces all customary rules pertaining to matters provided for in the Civil Code, including commission agency. It is, in other words, recognition by the Code of the already existing trade custom. The expert draftsman of the Code and the then Codification Commission took the stand not to disturb the existing trade usage with respect to the topic under consideration.

As the application of the Code is only viewed in the context of domestic commission agency relationships, the expression "the custom of trade in the place he resides" refers

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[110] See the discussion offered on pages 22-24, supra, on sell and purchase of transferable securities

[111] The argument offered might sound that the writer is propagating for an express agreement otherwise to avoid the presumptuous effect of article 2240(2) of the Civil Code. Let it, however, be noted that it is, at least arguable that an implied agreement may, as well, be possible to contract out Article 2240(2) of the Civil Code

to the custom or usage in a given trade locality[112] in Ethiopia. It specifically refers to the established trade pattern in the place where the commission agent entrusted with the sale and purchase of goods resides. The residence of a person is the place where he normally resides.[113] Casting some doubts as to the propriety of the formulation of Article 174 of the Civil Code, it seems that the residence of a person is the place where he normally lives. It may, however, be noted that a commission agent entrusted with sale and purchase of goods may have more than one residence[114] in which case one of the several residences may have the character of principal residence.[115]

I am also of the opinion that the phrase that runs: "the custom of trade in the place where he resides" in Article 2240(3) of the Civil Code, should have instead been the custom of trade of the place of his domicile. This, I believe, should have been so, because residence and domicile, for all practical purposes, could be different and the more important one for the point being discussed seems to be the domicile and not the residence. Nevertheless, this little problem could be deemed to have been solved because Article 180 of the Civil Code provides that the place where a person carries on trade shall be deemed to be a residence of such person and a commission agent being a trader by virtue of Article 60 cum 5(19) of the Commercial Code, the place of the seat of his business should be his residence. On the other hand, what if the commission agent has an established place of residence? Does the presumption laid down in Article 180 apply irrespective of the fact that he has such a place? Or does it only apply in cases where there is no place of residence of the trader or there is no doubt as to which one of the two places is the principal residence? Or is it simply a sweeping provision that produces the effect that for a trader there is no need to attempt to identify his residence provided he has a place where he carries on his trade?

The above discussion need not be necessary except in cases where difficulties might arise in determining the residence of a commission agent entrusted with the sale and purchase of goods, because if there is an answer to the question where is the residence of the commission agent? Then the problem may at least be half solved.

The other aspect of the condition under consideration i.e.; that it is the custom of trade in the place where a commission agent resides, to act as a *del credere*, is that a problem that might sometimes arise in determining whether or not acting as a d*el credere* for a commission agent entrusted with the sale and purchase of goods is a custom of trade in the locality where the agent "resides" or does his business as a commission agent. If acting as a commission agent for the sale and purchase of goods is inseparably linked

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[112] Although Jacques Vanderlinden, in his book on the Law of Persons on page 57 wrote: "The concept of 'locality' is, in the usual sense of the word, larger than that of 'place', which I think, is right, I nevertheless would prefer 'locality' to 'place' because, I believe, 'locality' better indicates circumstances of there being 'custom' than the word, 'place does.'

[113] Civil Code, Article 174

[114] Ibid, Article 177(1)

[115] Ibid, sub-article (2)

with acting, as a *del credere* then there might not arise the problems of determination of whether acting, as a *del credere* is the custom of trade.

There would, however, definitely be debatable cases where it might not be easy to determine that it is the custom of trade in the area where the agent entrusted with sale and purchase of goods is considered to be *del credere*. This could, in certain respects, involve the determination of what constitutes "trade custom" or in other words when does a certain commercial behavior become a custom? Is there a time factor involved for a given commercial pattern to become a trade custom? What percentage of persons in commerce should acquiesce to and use a given way of doing business for it to be known as a trade custom?

7.5.2.2.2Where the Commission Agent Guaranteed the Solvency of the Person with whom he Contracted

Article 2240 also provides that a commission agent entrusted with the purchase or sale of goods shall be deemed to be a *del credere* where he guaranteed the solvency of the persons with whom he contracted. This is, of course, different from the cases where a commission agent directly guarantees the payment or the performance of other obligations by the persons with whom he contracted. The former i.e., the situations where an agent guarantees the solvency of the third parties with whom he concludes contracts seems to be narrower than the latter which could embody all reasons for non-performance including the insolvency of the other party. That there is difference between payment of money debts and the performance of other obligations can be inferred from Article 2240(1) of the Civil Code itself.

Where a commission agent entrusted with the purchase or sale of goods guarantees the payment of monetary obligation, or to put it otherwise, money debts of his contracting partner, and hence, it is doubtful if it includes "the performance of other obligations" by the person with whom he contracted other than the payment of money debts. On the other hand, it is doubtful if this argument of mine is correct in the face of Article 2212 of the Civil Code. To once again bring it to the attention of the reader Article 2212 provides:

> (1) *Unless otherwise agreed, the agent, notwithstanding that he acted in his own name, shall not be liable to the principal for the performance of the obligation of the person with whom he contracted.*
>
> *(2) The provisions of sub-article (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.*

Pursuant to sub-article (1) of Article 2212, an agent including a commission agent,[116] does not guarantee the performance of the obligations of the other contracting party unless otherwise agreed. In the regular, direct or complete agency, the agent cannot be held liable for the performance of third parties' obligations unless he has willfully covenanted to guarantee performance. In the indirect agency cases, the same applies except that for commission agencies, the law intervenes in certain additional ways to put the responsibility for performance on the agents' shoulders and that an agent has to be a *del credere* to be subjected to such responsibility.

Pursuant to sub-article (2) of Article 2212 on the other hand, the agent's being aware of the other contracting party's insolvency or even where he ought to have been aware of such insolvency, the sweeping mandatory provisions of sub-article (1) does not apply and hence the agent shall be responsible for the performance of the obligations of the persons with whom he contracted. To go back to my above-stated argument, therefore, Article 2212 purportedly holds an agent who was, or who ought to have been, aware of the insolvency of the third party at the time of the making of the contract responsible for the general all-embracing performance of the obligations of the third party and not only for the payment of money debts. In other words, if sub-article (2) of Art. 2212 is meant to except sub-article (1), which appears to be the case, then whether awareness by the agent of the actual or expected insolvency of the other party or guaranteeing insolvency by agreement under Article 2240 (3); this applies to the failure of the other party to perform his obligations other than the payment of money.

A look at the Commercial Code,[117] makes it clear, for instance, that a trader who has suspended payments and has been declared bankrupt shall be deemed to be bankrupt;[118] and that suspension of payment shall result from ``any fact, act or document showing that the debtor is no longer able to meet the commitments related to his commercial activities.''[119] Insolvency, on the other hand, is, "the inability to pay debts as they mature or the inability to pay debts in the usual and ordinary course of business."[120] Bankruptcy is also the same thing and it is the "state or condition of one who is unable to pay his debts as they are or become due."[121] The difference is that insolvency could be the factual suspension of payments or the factual inability to pay debts as they mature or in the usual and ordinary course of business, whereas for the state of bankruptcy there to be, it has to be preceded by the declaration of a court of jurisdiction to that effect.[122] In other words, insolvency is the state of the factual inability of a trader to meet commitments related to his commercial activities, whereas, bankruptcy

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[116] This, however, does not rule out cases where the law lays down presumptions that a commission agent shall be deemed to be a *del credere* which means he shall guarantee the performance of the obligations of third parties with whom he enters into contracts
[117] See Book V of the Commercial Code in general
[118] Commercial Code, Article 969
[119] Ibid, Article 971
[120] Black's Law Dictionary, supra, note # 27, p.716
[121] Ibid, p. 134
[122] Commercial Code, Article 970(1)

technically is the legal declaration which subjects a trader to the application of Bankruptcy law which, in our case, is Book V Title II of the Commercial Code.

The "obligation of a contract" is meant to be "that which the law enforces when a contract is made obliges parties to do or not to do and the remedy and legal means to carry it into effect. ... It is also the duty of performance. The term includes everything within the obligatory scope of the contract and it includes the means of enforcement."[123]

A further look at the Civil Code provisions dealing with contracts in general, reveals that the terms `debtor` and `creditor` apply to all types of primissor/promisee relationships.[124] "A debt is a fixed and certain obligation to pay money or some other valuable thing or things either in the present or in the future... it is that which is due from one person to another, whether money, goods or services;"[125] and a debtor is one who owes a debt, he who may be compelled to pay a claim or demand anyone liable on a claim, whether due or to become due.... he is "the person who owes payment or other performances of the obligation secured, whether or not he owns or has rights in the collateral and includes the seller of accounts or chattel paper."[126]

It could, therefore, be argued that if a commission agent entrusted with the sale or purchase of goods guarantees the solvency of the other parties with whom he enters into contract, it does not, although it might look like, mean that he would only be guaranteeing the payment of money debts owed by the other contracting parties to the principal but also the performance of other obligations. In other words, a commission agent entrusted with the purchase of goods, who guarantees the solvency of the persons with whom he contracts guarantees, without prejudice to the payment of damages, that the other contracting party, at least delivers the goods as agreed and free of warrantable defects and warrantable non-conformity. This, in effect, may mean that if the other contracting party fails to perform his obligations, the agent himself effects performance[127] of the contract and personally proceeds later on against the defaulting third party contractant.[128] It may also be taken as meaning that the principal may directly sue the agent for the performance of the obligations assumed by the contracting third party. The commission agent who is entrusted with the sale of goods, on the other hand, where he guaranteed the solvency of the persons with whom he contracted, ensures that the purchasers pay the prices of the goods they take delivery of as agreed and in accordance with the law.

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[123] Black's Law Dictionary, supra, note # 27

[124] See, generally, Title XII of the Civil Code and especially, Articles 1740-1762

[125] Black's Law Dictionary, supra, note # 27

[126] Ibid

[127] It is so, in Germany, See Staubach, supra, note # 29

[128] This is, all the more true from the point of view of the fact that a *del credere* agent is a "guarantor jointly liable ..." and, hence, Articles 1933-1951 of the Civil Code become applicable to it

For a commission agent entrusted with the sale or purchase of goods to be a *del credere*, he has to guarantee, which, I think, should be through an undertaking of some sort given by the agent to the principal. In the absence of the first that it is the custom of trade in the place where the agent resides, for a principal to avail himself of *a del credere* guarantee of his commission agent entrusted with the sale or purchase of goods; he has to see to it that the agent has covenanted to guarantee the solvency of the persons with whom he contracts. I am of the opinion that the agent enters into a joint guarantee obligation towards the principal presumably when he accepts the offer for a commission agency for sale or purchase of goods. The way sub-article (3) of Article 2240 is formulated, however, casts some doubt as to the correctness of the above-stated opinion of mine. The last part of Article 2240(3) reads:"Where he guaranteed the solvency of the persons with whom he contracted" which, I suppose, could as well be taken to mean the agent promising to contracting third parties that he guarantees their solvency for the purposes of the performance of their obligations towards himself but for the benefit of the principal. It may be said that this argument flows from the fact that the word "contracted" is used in its past tense in both sub-articles (1) and (3) of Article 2240 and in sub-article (1) of Article 2241.

One point worth noting, at this juncture, is that Article 2240(3) on the one hand, and Article 2212(2) on the other, might end up creating confusion, or to put it in other words, the relationship of the two, in actual application of the provisions, might call for some interpretation. The second limb of Article 2240(3) imposes the duty of *a del credere* on a commission agent entrusted with the sale or purchase of goods, only where he guaranteed the solvency of the persons with whom he contracted, his guaranteeing being either when he accepted the offer to act as a commission agent, or at the time he entered into a contract with a third party. On the other hand, Article 2212(2) imposes on the agent, the duty of guaranteeing performance "where he contracted with a person whose insolvency he knew or ought to have known at the time of the making of the contract". The latter one counts on the actual knowledge, or objectively the expected knowledge or awareness of the agent of the insolvency of the other party. Where a commission agent entrusted with the sale or purchase of goods guarantees the solvency of the persons with whom he contracts, there will arise no problem of interpretation or confusion because Article 2240(3) cum 2240(1) cum 2241(1) make it clear that he is responsible to the principal.

The confusion, I think, arises when a commission agent entrusted with the sale or purchase of goods doesn't guarantee the solvency of the persons with whom he agrees. In this latter case, definitely, Article 2240(3) does not apply. If sub-article (3) of Art. 2240 does not apply, then could one argue that Art. 2234(2) cum 2212(2) apply? Whether or not a commission agent who, by covenant, does not guarantee the solvency of the persons with whom he contracts may be taken as a guarantor otherwise may be dismissed as an academic issue because of the easy way out consisting in the rule of interpretation: "the special derogates over the general." However, there would still be

the possibility of the principal or even a third party insisting that the commission agent knew or ought to have known the solvency of the person with whom he contracted and hence should not be relieved from liability merely on the strength of the application of Article 2240(3). A principal or a third party may further substantiate his arguments by saying that Article 2212(2), *a fortiori*, applies in commission agency cases, which, by definition, presupposes that the activity of such an agency is commercial in nature and that the agent is a person who professionally and for gain is engaged in such an activity in the capacity of a trader. For stronger reasons again, such an agent should know or ought to have known the insolvency of the persons with whom he contracts, and hence, omission to guarantee insolvency does not relieve him from being held liable. To put it again, but otherwise, would the canon of interpretation, "the special derogates over the general", that is actually provided for in Article 2234(2), come automatically into application and the principal's or a third party's insistence that a commission agent who knew or ought to have known the insolvency of the persons with whom he contracted should be held liable be dismissed? How far is Article 2240(3) "a special" provision and an exception to the rules governing agency which also apply to commission agency? This, I leave to the courts.

Before finalizing the sub-topic on "*del credere* agency", I would like to say that there is no ready answer in the Civil Code as to whether there may be undertakings (there are at least no legal presumptions) to proceed as a *del credere* in commission agency relationships consisting in the sale or purchase of fungible things or in forwarding agency situations. It would also be good to note that the Civil Code does not expressly say that there may not be guaranteeing of the payment or performance of other obligations by the persons with whom a commission agent entrusted with the sale or purchase of fungible things or a forwarding commission agent contracts. In the absence of an express legal provision prohibiting, I would take the liberty to argue that it is possible for a commission agent entrusted with the sale or purchase of fungible things or the one who undertakes to enter into contracts in his own name but on behalf of the principal to forward goods to proceed as a *del credere*.

Incidental to the above, I feel it is worthwhile to say something on cases of *del credere* and contracting with oneself. As mention has already been made, it is provided that a commission agent entrusted with the sale or purchase of goods quoted on the Stock Exchange or having a market value may, in the absence of contrary instructions by the principal, effect the transaction as a third party on his own account and conclude the contract with himself.[129] The same applies as provided in Article 2252(2) of the Civil Code, to a commission agent, shipper or forwarding agent, who undertakes to enter into contracts for the forwarding of goods in his own name but on behalf of the principal. The Code, this time quite justifiably, is silent on this matter also. However, it goes without saying that any party who enters into a legally valid and binding contract shall have to be bound by the consequences flowing therefrom. *Pacta Sunt Servanda*. A commission agent entering into agreement with third parties, in his representative

[129] Civil Code, Article 2248(1)

capacity, on the one hand, and in his own personal capacity, on the other, becomes a party to the contract and he cannot avoid his personal obligations flowing from such contracts which he negotiates and makes all with himself and all by himself. It, therefore, follows that there need not be a legal presumption nor a trade custom in the place where the agent resides or an undertaking to guarantee his own solvency, for a commission agent is permitted by law to enter into contract with himself to be held responsible for the performance of his own personal obligations towards a principal. A commission agent who contracts with himself, in the circumstances recognized by the law, therefore, acts as a *del credere* towards the principal. As it is to be remembered, Article 2212(1) is meant to clear out doubts harbored by third parties or principals that an agent is not, unless otherwise agreed, even where he acts in his own name, liable for the performance of the obligations he enters into. And the latter article, taken at its face, is limited to situations where an agent transacts with another person either in the name and on behalf of the principal or in his own name but on behalf of his principal.

However, what if as a commission agent entrusted with the sale or purchase of goods quoted on the Stock Exchange, or having a market value, in the absence of contrary instructions by the principal, or a forwarding commission agent, who concludes contracts with himself wearing his two or even three caps at the same time, argues: "In the absence of an undertaking that I entered into to guarantee performance or where no legal presumption appears in the Code to the effect that an agent permitted to contract with himself and who does so, is a *del credere*, the mere fact of contracting with myself does not make me responsible for the performance of the contract I entered into?" What if he continues and further argues that "even Article 2212(1) clarifies that it is only in cases of agreement by the agent otherwise that he would be responsible for performance or failing that where he contracted with a person whose insolvency he is aware of or ought to have been aware of and goes on to say that he was neither actually nor expectedly aware, as far as he knows, that he was insolvent at the time of the making of the contract? Would the argument be considered and be dismissed as a fantasy? If an agent, who contracts with himself is not responsible for the performance of the obligations flowing there from, who shall be responsible? Would the law allow contracting with oneself and at the same time let the agent who contracts with himself get away without being responsible for the performance of the obligation he shoulders in his personal capacity? I personally do not think so. If the law does so, it would be a disservice to commercial interests the law intends to protect. If agents contracting with themselves are not to be held responsible, then, "contracting with oneself" remains to be impracticable and undesirable. Hence, a commission agent who concludes a contract with himself acts as a *del credere* without there being an undertaking given by him or a legal presumption to that effect. Cases of contracting with oneself, therefore, are exceptions to Articles 2212(1), 2248(1) and 2252(2).

A cautious principal, who is properly advised, would instruct his agent not to conclude contracts with himself. In the absence of contrary instructions, by the principal, a commission agent may avail himself of Articles 2248(1) and or 2252 (2) of the Civil Code, but the principal would, at least, be taking the risk of the agent's being insolvent

unless he secures himself otherwise. As mention has already been made earlier, in commission agency cases, the principal cannot make use of the cancellation provision of Article 2188(1) and (2) although he can apply for cancellation in other cases.

VIII. Conclusion

Commission agency, which is a kind of agency according to which an agent acts and/or transacts with third parties in his own name but for the benefit of the principal; is normally governed by the principles applying to direct complete representation situations. Commission agencies, however, have their own idiosyncrasies among which are the issues that pertain to acting in the name of the agent, preservation of goods, which happen to be in the hands of the agent, and most of all the issues pertaining to liability of agents towards the principal.

A commission agent may be *del credere* depending on the duty with which he is entrusted or sometimes his conduct in the course of discharging his duties by entering into agreements with third parties. By way of exception, a commission agent is permitted by law to contract with himself though the law discourages contracting with one self and that such contracts are subject to invalidation.