The Sale of a Business as a Going Concern under the Ethiopian Commercial Code: A Commentary

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Introduction

The sale of a business as a going concern marks the entry into and exit out of a business world. It is an entry point for the buyer who could be a novice in commerce or even for an accomplished businessperson who wants to expand his investment. It is an exit process for the seller who either quits business for whatever reason or plans to take advantage of the market when the value of his business appreciates. Thus, the rules governing this transaction need to be sufficiently clear and articulate enough for those who are involved in whatever capacity. The sale of a business is regulated mainly by the special rules of the Commercial Code as provided under Title Five and Chapter Three of Book I of the Code. The author submits that neither the abstract notion of business nor the special disciplines of the Code governing its sale have sufficiently seen the full light of the day through judicial pronouncements and academic writings. This problem has become more vivid during the revision process (a learning exercise in which the author has participated, albeit in part, especially in the review of Book I) of the extant Commercial Code. This commentary is, therefore, a modest attempt to explain, and whenever necessary and possible critique the special disciplines of the Commercial Code as they pertain to the sale of business as a going concern.

The commentary is divided into two parts. Part I deals with the notion business as a going concern and its constituent elements, for any juridical act one wishes to execute in relation to a business cannot be fully understood independently of the notion of business and its component parts. Part II deals with the specific rules governing the sale of business focusing on the validity requirements of the contract of sale, the respective rights and obligations of the parties to the contract as well as the creditors' protections.

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PART I: THE NOTION OF BUSINESS AND ITS CONSTITUENT ELEMENTS

Like any piece of property, a business once created[1] can be the object of different legal transactions including, but not limited to, sale. This commentary analyzes the rules which govern the sale of a business. When it does so, it will not discuss the rules which pertain to the sale of separate elements constituting a business which can in their own rights be the object of juridical acts. It discusses only the sale of a business as a single unified entity, most specifically as a 'going concern'.

1. Business as an incorporeal property

That 'business' which the Ethiopian Commercial Code minds about in its Book I in general and extensively under Title V in particular may not be congruent to the 'business' which a person on the street normally conceives of in his/her daily experience with the term. The notion of 'business' as employed in the Ethiopian Commercial Code traces its genesis to the French concept of *fonds de commerce.*[2] The Ethiopian Commercial Code defines 'business', rather put appropriately, the French concept of *fonds de commerce* has been translated into English as 'business' in the Code[3] although a French legal writer has made it clear that *fonds de commerce* 'is virtually untranslatable into English'[4] and that it 'has no counterpart whatsoever in English law.'[5] Even under French law the concept seemed to have undergone some sort of 'evolution' before it finally came out as a legal term of art.[6] It was also asserted that 'there is not any single [legal] text which defines

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[1] A French legal commentator argues that the 'going business exists as soon as its constituent elements are present and the owner has commenced operations. Since this determination is a difficult one to make, it is within the court's discretion to determine on a case-by-case basis when the going business has acquired a real clientele. The determination of the date of creation of a going business is important in the context of a sale of a business as well as renewal of a commercial lease.' See Christopher Joseph Mesnooh, *Law and Business in France: a Guide to French Commercial and Corporate Law*, Kluwer Academic Publishers, 1994), p.163.

[2] See Peter Winship, (trans.), *Background Documents of the Ethiopian Commercial Code of 1960*, (Faculty of Law, Haile Selassie I University, 1974), p. 52.

[3] Ibid, pp.50 and 52. Peter Winship translated the French concept of *fonds de commerce* in the original text of the General Report of Professor Jauffret, the draftsman of Book I of the Commercial Code, into English to mean '*business*'.

[4] Walter Cairns and Robert McKeon, *Introduction to French Law*, (1st ed., Cavendish Publishing Limited, 1995), p.87.

[5] Ibid. 75

[6] See Denis Tallon, 'Civil Law and Commercial Law', *International Encyclopedia of Comparative Law*, Vol.VIII Chapter 2 (1983), p.120. According to this author originally it was used to describe the overall business assets of a small merchant, but later developed as a legal term when tax was introduced upon the transfer of all elements constituting a merchant's business. 'It then developed further of the concern to group together under one institution the various elements used by a merchant to acquire and keep his clientele. All these elements can be considered as a whole valued as such for the purposes of successions, balance sheets, etc., for the object of legal transactions according to special rules (for transfer, hire, pledge,

what is meant by business assets (*fonds de commerce*), or which rules apply to them... The result is a certain lack of precision both as to the meaning of the concept and the rules relating to it.'[7] It was also reported that the 'legal institution of business assets has not yet been given a completely defined form in French law'[8] as well as in other civilian traditions.[9] Notwithstanding this, the concept of *fonds de commerce* under French law represents *business assets* which 'denote all the movable goods, whether tangible or intangible, which are used by the trader in operating a commercial activity, and which have the purpose of attracting his customers.'[10] This is more or less identical with the concept of business under Article 124 of the Ethiopian Commercial Code which reads '[a] business is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities specified in Article 5 [11] this Code.'

Classifying property into different categories and then subjecting them to apparently different legal regimes seems to be the result of society's varying value and attitude towards a certain piece of property. The Ethiopian Civil Code classifies property primarily into the broad categories of movables and immovable,[12] a classification to which the law attaches different and important consequences.[13] The Code also sub-divides the movables into corporeal and incorporeal chattels.[14] Movables can also be further sub-classified as ordinary

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succession upon death, etc) and to be protected as such in their own right. ... Nevertheless, in FRENCH law there is not any single text which defines what is meant by business assets (fonds de commerce) or which rules apply to them but only a serious of scattered provisions. The result is a certain lack of precision both as to the meaning of the concept and the rules relating to it. However, there is general agreement that the business assets are made up of those items of movable property, both tangible and intangible which are assembled in order to meet the needs of a particular clientele. Its content thus varies with the purpose of the business. There is no one essential element although case law states that the clientele or the goodwill which a business enjoys is the essential basis of the concept of business asset.'

[7] Id

[8] Ibid, p.119.

[9] Ibid, p.122

[10] Walter Cairns and Robert McKeon, *supra* note 4, p.85.

[11] Article 5 of the Commercial Code is a long and closed list of activities which are deemed commercial either by nature or scale/size. For its drafting history and recent move see *infra* note 49.

[12] Article 1126 of the Ethiopian Civil Code.

[13] For the analysis of the Ethiopian law on classification of property, see generally Muradu Abdo, "Movables and Immovables under the Civil Code of Ethiopia: A Commentary," Jimma University Law Journal Vol. 1, No.2 (2008) and Muradu Abdo, "Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary," Mizan Law Review Vo.2 No.1 (2008).

[14] Article 1127 of the Civil Code.

and special.[15] Although the Civil Code neither defines nor slots 'business' expressly to any of its classifications, Article 124 of the Commercial Code has filled this gap first by defining business as an 'incorporeal' and then by subsequently classifying it as a 'movable', for all intangibles are assimilated to movables under the Civil Code.[16] This is also the case under the French system except that the grouping of business assets into intangible movable property is not as a matter of statute but of case law.[17] A striking feature of the concept of business is that it remains an intangible asset in the eyes of the law although many of its constituent elements are tangible assets, equipments and goods.[18]

The other interesting feature of the concept of business is that even if it is classified as a movable property, business is not an ordinary movable property in that the law, when it comes to transactions involving business, assimilates business more or less to an immovable for the rules governing such transactions are different from and stringent than those applicable to ordinary movables.[19] It is aptly observed that business is 'a special type of movable property linked to a particular locality; they therefore be made subject to registration.'[20]

2. Constituent Elements of a Business

Business, itself being an intangible asset without corporeal existence, nevertheless consists of 'movable property brought together and organized'[21] to serve a particular purpose, which obviously is a commercial activity. These movables in which a business is constituted are both incorporeal and corporeal assets as expressly provided for under Articles 127 and 128 of the Commercial Code. The corporeal elements of a business are equipments, goods or merchandizes as stipulated under Article 128-which varies from time to time depending on the nature of the commercial purpose they are destined to serve. Article 127(2) (a-e) has an open-ended list of incorporeal elements forming a business.[22] Included expressly in the list, however, are goodwill, trade name, trade mark, commercial lease right, intellectual property rights, and under sub-

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[15] Article 1186 of the Civil Code

[16] Articles 1128 and 1129 of the Civil Code.

[17] Denis Tallon cited *supra* note 6, p.120.

[18] A cumulative reading of Article 124 and Article 128 of the Ethiopian Commercial Code clearly leads to this conclusion.

[19] For instance transfer of business has to be made in writing, possession does not prove ownership, mortgage as opposed to pledge is the charge on business, and above all business has to be registered

[20] Denis Tallon, *supra* note 6, p.123.

[21] See Article 124 of the Commercial Code.

[22] The Commercial Code under Articles 130-149 treats each of these elements separately. They are also subject to special laws such as patent law, copyright law, trade mark law and other legislations.

article 2(e) 'such special rights as attach to the business itself and not to the trader.' One such special right that attaches to the business is a non-competition clause that protects a buyer of a business against competition from the seller of the business [23](see Part II, 4.1.E below). It is accorded legal protection under Article 159 of the Commercial Code as an element of a business. One can also validly argue that the open-ended list of Article 127(2) (e) captures such matters like administrative authorizations and licensing agreements.

A question may be raised at this juncture as to whether all the incorporeal and corporeal elements of a business are equally important, or if some element are more important, if not indispensable, than the others. As a matter of legal text French law (the official source of the Ethiopian law of business as employed in the Commercial Code[24]) that is said to have a relatively developed system of business asset compared to other civilian jurisdictions [25] makes no distinction between the different elements constituting a business asset. In this regard it was observed that '[t]here is no one essential element although case law states that the clientele or the goodwill which a business enjoys is the essential basis of the concept of business assets.'[26] The French scholar [27] who drafted Book I of the Ethiopian Commercial Code, however, elevated this case-law-borne distinction to a statutory status under Article 127(1) of the Code which reads 'A business consists ***mainly of goodwill*** (emphasis added), hinting some kind of difference in the order of importance as between matters constituting business. Moreover, sub-article 2 of the same provision as well as Article 128 of the Code have also employed the word ***'may'*** in their rendering that some other 'incorporeal and corporeal elements,' distinct from the goodwill, may also form part of a business. If one were to stick to the traditional legal postulate that ***'may'*** represents some thing permissive, he would hold that it is not mandatory for a business to have as its parts the things mentioned under these provisions; that they do not form the essential elements of a business; that they only have a secondary importance compared to 'goodwill'. In other words a business can exist as a unit and juridical entity in the eyes of the law and a trader can also operate it even if the business has lost some or all of its corporeal and incorporeal components so long as it retains its goodwill. A case for the goodwill as the central element of a business can also be made under Article 151(2) of the Code which can be construed to mean that the sale of a goodwill entails the sale of the entire business while the

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[23]Article 158 of the Commercial Code.

[24]Peter Winship, *supra* note 2, p.52.

[25] For the comparative analysis of the concept business assets in the civilian jurisdictions, see Denis Tallon, supra at note 12, pp.119-126.

[26]Ibid, p.120.

[27] The draftsman of Book I was Professor Alfred Jauffret of the University of Paris.

sale of other elements separately is not even within the scope of commercial sale let alone to imply the sale of the business as a whole.

3. Business and the Immovable Property Serving as its Premise

In the preceding discussion we have seen a business as an incorporeal movable made up of other tangible and intangible movables. Put plainly, the constituent elements of a business, according to Article 124 of the Commercial Code, are all in all movables. It means that immovable property, by definition, is not part of a business. A person who owns the building where he carries on his own business will not factor his ownership right over the immovable into the equation that determines his business assets.[28] Even chattels which are meant to facilitate the economic exploitation of the building where the owner of that building carries on his business are no longer movables, for they are assimilated to immovables by destination.[29] Leaving immovable property at the outskirt of the notion of business is blamed, at least under the French system, on 'the traditional legal approach under which real property is not a matter for commercial law.'[30] Nevertheless, when a person carries on a business in an immovable which he does not own but which is leased to him, his lease right over that business premise constitutes an element of the business.[31] One may legitimately question the logic of maintaining the tradition of excluding immovable property from the concept of business entity both from the point of view of business reality and/or in view of the practical difficulties that may arise when immovables are excluded from the purview of the concept of business. The tradition has been criticised in France as 'paradoxical because it creates a difference between the merchant who is a tenant of the property where he carries on his business and who is well protected and the merchant who is the owner of that property.'[32] The exclusion of immovable property is further criticized on the ground that 'it can give rise to serious difficulties in case of sale of the business, enforcement of judgments, dissolution of marital property regime, succession, etc., because two different sets of rules apply, one for business assets and the other to the immovables.'[33] If business consists of assets (tangible and intangible) brought together and organized for the purpose of carrying out commercial activity, and if the carrying out of this commercial activity requires a premise-an immovable property-then,

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[28]See also Denis Tallon, *supra* note 6, p.121.

[29]Id.

[30]Id.

[31] See Articles 127(2) (c), and 142-147 of the Commercial Code.

[32] Denis Tallon, supra note 12, p.121. In the Ethiopian context, however, it is hardly possible to imagine the case in which a trader who carries on a business in a premise of his ownership is less protected than a trader who carries on business in a leased premise.

[33]Id

what is the logic and reason to consider some of these assets as elements of the business and at the same time refuse to treat other assets which are brought together and organized to carry out that *same business* activity as outside of the business assets? In other words, why does the law have to discriminate between assets brought together and organized for the same purpose, destined to serve the same goal merely because some of the assets are movables and some are immovables?

The implication of excluding immovable property as non-constituent element of a business is that any legal transaction involving the business does not affect that immovable property serving as a premise of that business simply because the immovable premise is not part of the business. For instance, the sale of the business does not automatically mean the sale of the premise as well. Thus unless agreed otherwise, and save the case where the seller was carrying out the business in a leased premise, what the seller of a business has to transfer is the business alone; that the buyer cannot claim to continue operating the business in the same premise, that is, he cannot force the seller to transfer the possession and ownership of the business premise; that he has to relocate his business elsewhere. The Federal High Court in the case of *Urgessa Tadesse* (judgement creditor) *vs. Saida Ali* (judgment debtor)[34], however, took a completely different stance and ordered the judgment debtor to transfer to the judgment creditor not only of the business she sold but also of the business premise on the ground that the premise of a business is an element of the business even though it is an immovable property. The Court reasoned out that goodwill constitutes the main element of a business and is highly associated with the location value of the business premise. And the right of lease over the business premise is an element of the business as per Article 127(2) (c) of the Commercial Code. If the lease right over the premise is an element of the business, the premise itself, by analogy, is an element of that business. The Court further argued that even though the premise in which a business is carried out is an immovable property, since it has become part of the business element [by analogy] it shall be considered as a movable property, as the mere fact that a business is said to be an incorporeal movable property does not exclude its premise from forming part of the business element.[35] The Court

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[34] Urgessa Tadesse vs. Saida Ali, (Federal High Court, 2002 E.C., Civil File No.56950), (Unpublished).

[35] In an interview made on November 5, 2010 with Judge Yoseph Aemero, who delivered the opinion of the Court, disclosed that he still believes that immovable property (premise) is not part of a business and sale of a business does not entail the sale of the premise. But Judge Yoseph maintains that the seller's use right over the business premise is part of the business and the seller is duty bound to transfer it to the buyer. And for Judge Yoseph to effect this transfer the seller has to transfer the possession, not the ownership, of the business premise and must also enter into a lease contract with the buyer. Unfortunately neither the original

incredibly introduced a new element of business contrary to the express list of Article 127 of the Commercial Code and the definition of business under Article 124 as a movable property.[36] One may wish to argue that the Court intended, though not clearly articulated, to treat business as a *principal* thing and its premise as an *intrinsic* element thereof. A thing can be an intrinsic element of another thing and thereby loses its own independent existence when[37]: (a) the law has expressly provided to that effect; (b) custom regards a thing as an intrinsic element of another thing; (c) the two things are materially or physically united in such a way that they cannot be separated without destruction or damage. In the case at hand while Article 127 of the Commercial Code does not say that business premise is an element of the business it hosts. And obviously it is hardly possible to imagine a *physical* unity between business and business premise as the former does not have corporeal existence at all.[38] The Court said nothing as to whether there exists a commercial custom in this country that treats a business premise as an intrinsic element of the business. Is it also possible to assume that the Court considered the business premise as an *accessory* of the business in the context of principal-accessory relationship within the meaning of Article 1135 et seq. of the Civil Code?

4. Credits and Debts of the Business

The other things which are associated with business but are excluded from the domain of the business, at least in systems which follow the French model, are credits (accounts receivables) and debts (accounts payables) of the business. Unless agreed otherwise, they remain the personal assets and liabilities of the owner of the business distinct from the business as such.[39] Article 129(1) of the Ethiopian Commercial Code, in relevant part, states: 'A business shall normally not include the assets and debts of the trader...' Conventionally, one can talk of the distinction between the assets which a person acquires and the debts which he contracts in his civil status-like any ordinary member of the community- from those assets acquired and debts contracted in his status as a trader (a professional) and in connection with his profession, i.e., the business he carries

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decree nor the ruling on the execution file contains a single phrase conveying this intention even if this line of argument is not also sound on many counts.

[36] The other way in which the Court's decision becomes controversial is its assimilation of immovable thing into a movable object. The Court's characterization does not fit to the theory of 'movables by anticipation,' for the business premise was not made the subject of any agreement anticipating its demolition sooner or later; rather things are to the contrary.

[37] See Article 1132 of the Civil Code.

[38] Unless one argues that the material unity under Article 1132(2) of the Civil Code should be liberally interpreted to cover economic unity/relations between intangible asset and another tangible object and that the intangible's economic value will considerably be affected by any attempt to separate the two.

[39] Id. See also Christopher Joseph Mesnooh, *supra* note 1, p.164.

out. The first group of assets and debts are no doubt out of the domain of the business. This is because one carries out a business with the goal of making profit and he allocates the necessary capital to achieve this goal, brings together and organizes tangible and intangible assets that constitute the said capital. Save for the exceptions[40] he is compelled to keep accounting records of his business transactions.[41] And a glance at Articles 74 and 75 of the Commercial Code shows that the contents of the balance sheet in terms of assets and liabilities are restricted to those which are directly related to the business and by definition exclude assets and liabilities of the person which are not directly related to his business. Whether the business has made profit or loss will figure out in the final balance sheet to be prepared at the end of the financial year.[42] Based on the outcome the person will make a rational business decision. Normally this decision should be made independently of what he owns and owes personally in matters not related to the business. The equation will not be balanced if he includes his personal assets and liabilities and tries to calculate whether his business is thriving or failing. This, the author thinks, is a matter of simple logic.
The thorny issue, however, is the rule that excludes from the domain of business those assets and debts of the trader which are acquired and contracted by him in the course of carrying out his commercial activities. The civil law system is sharply divided on this subject between those represented by the French model on the one hand, and that of the German model on the other hand, leading to contrasting consequences on the transferability of the credits and the debts to subsequent buyers and on matters of creditor protection schemes (see Part II, Section 5 below). France alluded to its tradition of single patrimony to justify the exclusion. In this regard it is observed that:

> By virtue of the principle of FRENCH law that a person can only have one patrimony (*patrimoine*, i.e. the legal total of his assets and liabilities), the business assets cannot be regarded as a separate entity with its own assets and liabilities (*universalite de droit)*, nor as a separate patrimony (*patrimoine d' affectation)* forming a distinct whole separate from the other assets and liabilities of their owner.[43]

Contrary to this French approach to patrimony, the German legal system admits the ideals of multiple estates or plurality of patrimony and was said to adopt the

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[40] Article 64 of the Commercial Code exempts what it calls 'petty traders' from the duty to keep accounts on specific conditions determined by law.
[41] See Articles 63, 65-85 of the Commercial Code.
[42] See Article 67(2) of the Commercial Code.
[43] Denis Tallon, *supra* note 6, p.121.

first modern legislation that attempted to depersonalize obligations[44] which means credits and debts of the business are treated as elements constituting the business.

The Ethiopian law, following its French source, however, recognizes some exceptions in which credits and debts of the business are considered parts of the business itself and hence transferable. The first exception is 'the right to the lease of the premises.'[45] The second exception is non-competition clause.[46] The third exception is outstanding claims of employees of the business.[47] The fourth exception is the right to compensation when the business benefits from compensation insurance.[48] These are the credits and debts which are depersonalized by the law and shall, upon the sale of the business, will transfer to the buyer as constituent elements of the business sold. He can claim these rights and is also held answerable for these liabilities as well.

5. Business and Commercial Activities

The notion of business under Article 124 of the Commercial Code is intrinsically linked to two other important concepts clearly spelt out in that same provision: the concepts of 'commercial activity' and 'trader' without which the notion of business is incomplete. Article 124 defines every business as an incorporeal movable property. But for an incorporeal movable property to constitute a business of the type defined under this provision, it must have been destined to serve a particular purpose i.e. the carrying out of a commercial activity. Obviously every activity is not a commercial activity; it has to be expressly designated as such under Article 5 of the Commercial Code. Article 5 has a long, but closed list of activities it deems commercial (a recent move is towards making the list only indicative, though[49]). While some activities are commercial by nature, others become one when they are commercially operated.

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[44] S. A. Bayitch, "Transfer of Business: A Study in Comparative Law," American Journal of Comparative Law, Vol. 6, No.2/3(Spring-Summer 1957), p. 286.

[45] See Article 129(1) second limb of the Commercial Code.

[46] See Article 129(2) cum Articles 158 and 159 of the Commercial Code.

[47] See Article 23(2) of the Labor Proclamation No. 377/2003 that governs the employment relation of the workers of the business and the employer operating the business. See also Article 129(2) of the Commercial Code cum Article 2587 of the Civil Code.

[48] See Article 673 of the Commercial Code.

[49] For the drafting history of Article 5 see Peter Winship, *supra* note 2, p.50. Making the list under Article 5 both long and closed was the deliberate policy decision of the draftsperson to avoid problems of interpretation-administrative as well as judicial-as to what constitutes a commercial activity, and hence falls within the scope of the Commercial Code. However, it has been recommended that 'the list should only be taken as indicative and not exhaustive in the face of an expanding economic transformation that is taking place in the country as opposed to the time of the promulgation of the Commercial Code.' See Tilahun Teshome and

6. Business and Traders

The other important concept with which the notion of business is inseparably associated is the concept of traders, which refers to the owners of the business. The analysis of this concept is not the central objective of this commentary. But as this work is about the sale of a business, it requires not only defining the object of the transaction as has already been done above, but also identifying the owner/seller of the object itself. The latter is important at least in two respects. Firstly, it helps us determine whether a person has a title to transfer as normally sale should result in transfer of ownership from the seller to the buyer because only traders can own and operate a business under Ethiopian law.[50] Secondly, it might throw some light on the concept of business itself and further our understanding of this abstract notion.

Traders under the chapeau of Article 5 of the Commercial Code are defined as persons who professionally and for gain carry on any of the activities listed under its sub-articles (1-21) as acts of commerce.[51] These persons can be physical or juridical. For a person to acquire the status of a trader three cumulative conditions must be fulfilled. First, the person must engage in an activity the law deems commercial as indicated above under sub-section 5. Secondly, the person must carry on that activity professionally, which means the engagement in the activity must be habitual, or as a matter of course; it must not be a onetime affair so to say. Thirdly, the engagement has to be for gain,[52] i.e. it has to be profit-driven as a matter of conventional wisdom.

Tadesse Lencho (eds.),'Position of the Business Community on the Revision of the Commercial Code of Ethiopia,' *PSD Hub Publication Series* No.8, (Addis Ababa Chamber of Commerce and Sectoral Association, 2008), p.9. The chapeau of Article 5 of the Draft Revised Version of the Commercial Code which reads: 'Any person who, as his regular profession and for gain, carries on any production and service activities is a trader. In particular:..' and goes on listing the activities has already made the list of commercial activities indicative leaving it open-ended employing the phrase 'in particular' which can be taken in that context to mean not limited to the listed indicated.

[50] Article 5 of the Commercial Code.

[51] The new Commercial Registration and Licensing Proclamation No.686/2010 like its predecessor Proclamation No. 67/97 employed the phrase 'business person' instead of the word 'trader' without, however, introducing a new definitional element to the notion of trader except that it indicated the possibility for an activity to be designated by law as an act of commerce though not originally listed under Article 5 of the Commercial Code. It rather addressed the concern that the list of Article 5 should not be exhaustive.

[52] In the context of reviewing Article 5 of the Commercial Code a member of the reviewing team emphatically argued that the 'gain' as employed in this Article should not be limited to the narrow accounting concept of profit, that it should be understood broadly to include any economic gain.

Freedom of trade, subject to such legal restrictions and prohibitions, is expressly recognized and protected under the Commercial Code in that every person has the right to carry on any trade of his choosing.[53] This is also recognised under the Federal Constitution.[54] There are, however, groups who do not enjoy this freedom of carrying on trade. These include minors and the incapable majors.[55] Article 25(1) of the Commercial Code also prohibits civil associations (NGOs) from carrying on any trade the violation of which leads to their demise as provided under sub-2 of the same provision. The recent Charities and Societies Law has mitigated this harsh position of the Code, though, without still considering them as traders.[56] Obviously, they are not considered as traders even if these activities are listed as acts of commerce under Article 5 of the Commercial Code.

In some jurisdictions such as France and Franco-phone African nations, the so-called liberal professionals such as lawyers, accountants, physicians, architects, etc as well as civil servants and employees of public bodies and those of state-owned enterprises are not allowed to engage in trade activities as a matter of legal prohibition.[57] The Ethiopian Commercial Code does not expressly exclude these groups from its own domain as the law of traders and acts of commerce. It, in general terms, states the possibility of restrictions and prohibitions on the freedom to carry on trade, but has chosen to leave the details for other (administrative) laws to provide. No specific law, as far as this author knows, is out there expressly prohibiting this group of professionals from engaging in trade activities. Nevertheless, as the list of commercial activities under Article 5 is an exhaustive one and the so-called liberal professions are no where in the list, those who engage in these professions are therefore indirectly prohibited from acquiring the status of traders. They are excluded by definition although the recent move seems to commercialize them as proposed under Article 5 of the

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[53] See Articles 22 and 23 of the Commercial Code.

[54] See Article 41(2) of the Ethiopian Constitution which reads: 'Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.'

[55] See Article 11(1) of the Commercial Code.

[56] See Article 103(1,2&4) of the Charities and Soceities Proclamation No.621/2009.Upon the written approval of the regulating body they are allowed to engage in income generating activities the proceeds of which should not be distributed to members or beneficiaries but used only to advance the cause for which they are established. They are also required to keep a separate account for these activities. However, it is not quite clear if the income generating activity in which a non-profit making association is allowed to engage in as per this law should be one that is incidental to its core service/activity, or it can be anything else so long as its proceeds can be used to finance its service. Article 103(1) of this Proclamation refers to 'activities ...incidental to the *achievement* of their purpose' (emphasis added).

[57] Boris Martor, Nanette Pilkington, Savod S. Sellers and Se^{s}bastien Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process*, Kogan Page Ltd., London, 2002), pp.31-32.

draft version of the Commercial Code prepared by the Ministry of Justice which listed 'any consultancy service' as an act of commerce. Although the practice of the so-called liberal professions does not constitute a trade activity under Article 5 of the Commercial Code, this should not be taken to mean that the professionals cannot operate a side business listed under the same provision and thereby acquire the status of traders.

The fact that the concepts of 'business' and 'trader' are inseparably intertwined in that one does not exist independently of the other should not, however, overshadow the clear distinction between the two. Business by definition is a property, albeit a special type of property which does not have a corporeal existence, an abstract notion which exists only as a legal fiction yet assimilated to the class of movables for purposes of legal transactions. As such business is the object of rights and obligations. Trader on the other hand is a person under the law, the subject of rights and obligations-the owner of a property called business. Of course, the law attaches important legal consequences to the status of a trader as opposed to other civilians engaged in other activities. Firstly, traders are required to register in the commercial register[58]; consequently they also need to have trade names.[59] Secondly, they are bound to keep books of accounts[60] save for the 'petty traders.'[61] Thirdly, only traders can be declared bankrupt under Ethiopian law.[62]

PART II: THE SALE OF A BUSINESS

Although the autonomy of commercial law is well asserted in Ethiopia, i.e. the country has a Commercial Code separately from the Civil Code to regulate traders and commercial transactions, there is, however, no distinction between civil sale and commercial sale in that the same set of general rules of the Civil Code are applicable for any type of sale. But when it comes to the sale of a business the bulk of the rules are legislated in the Commercial Code Articles 151-170. These are special rules for a special type of incorporeal movable property called business. These special rules do not, however, necessarily obviate the relevance of the Civil Code's principles on contracts in general nor its specific stipulations on matters of sale contract. Article 1 of the Commercial Code has already reserved enough room for the application of the principles of the Civil Code on matters of the status and activities of traders. Moreover, Article 150 of the Commercial Code has called out specifically for Articles 2266-2367 of the

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[58] See Article 100(1) of the Commercial Code and Article 6(1) of the Commercial Registration and Licensing Proclamation No.686/2010.

[59] See Article 135 *et seq* of the Commercial Code.

[60] See Article 63(1) of the Commercial Code.

[61] See Article 64 of the Commercial Code.

[62] See Article 968(1) of the Commercial Code.

Civil Code dealing with contracts of sale to apply in the special circumstances of the sale of a business. Thus, we have at least two sets of laws governing the sale of a business in Ethiopia: the civil law and the commercial law.[63]

1. What Constitutes the Sale of a Business under the Commercial Code?

In a bid to delineate the scope of application of the special rules on the sale of a business, Article 151(1) of the Commercial Code has outlined the contours in such a general way that any sale, any assignment, and any distribution in exchange for payment are all subject to the disciplines of the Commercial Code dealing with sale of a business, even when these transactions are concluded in a disguised form, or whether they relate only to a branch or the goodwill of the business alone. The distinction between individual elements of a business as opposed to the business itself-taken as a juridical entity, as a unit, as a whole- with its implications for legal transactions involving each group is also reflected under Article 151(2). Pursuant to this provision the sale of individual part of a business, whether that element is tangible or intangible is, as a matter of rule, not subject to the disciplines of the Commercial Code; the sale of all or any of the individual elements of a business does not imply the sale of the business as an entity; that the sale of an element of a business is governed rather by a special laws, if any, relating to that specific property.

Nevertheless, Article 151(2) admits two exceptional cases where the sale of an element of a business is considered as the sale of the business entity thereby calling for the application of the disciplines governing the sale of business under the Commercial Code. The first case is when the sale relates to the goodwill of the business. This is precisely because business consists mainly of goodwill as stated under Article 127(1) of the Commercial Code. One cannot sell a business separating it from its goodwill nor can he sell the goodwill of a business without at the same time selling the business. The two are inseparably intertwined for purpose of legal transaction. The second exceptional case is where the apparent

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[63] The application of the civil law takes two forms: on matters not specifically provided under the commercial law, its application is automatic and independent; on matters expressly covered by the rules of commercial law, its application is both concurrent and complementary, but it should not offend the special norms of the commercial law. For instance, on matters such as consent and contractual capacity as well as object of the contract of sale a business it is the general rules of the Civil Code that apply automatically and independently of the sales provisions of the Commercial Code as the latter are silent on these subjects. Whereas, on issues such as formality requirements and the respective rights and obligations of the seller and the buyer including creditors' protection which are specifically covered by the Commercial Code the general principles of the Civil Code on sale contract will be resorted to basically where the former does not exhaustively address them leaving a lacunae to be filled in by the latter.

sale of an individual element of a business entails or conceals the real underlying sale of the business entity or its goodwill. This is intended to catch disguised sale which the parties might not want to divulge. But how does the sale of an element of a business entail or conceal the sale of the whole business or its goodwill? What does concealment constitute? For instance, Article 139(1) of the Commercial Code provides that trade name, which is one of the elements of business per Article 127(2) (a), may not be assigned except together with the business it designates. The question is what will be the legal effect of assigning a trade name without the business? Is the assignment null and void or is it to be considered as an entailment or a concealment (whichever is the case for both have the same consequence) of the assignment of the business that automatically triggers the rules of the sale of a business by operation of Article 152(2)?

In the preceding discussion we have said that the sale of the goodwill of a business, which is only one of the elements of a business, albeit the major one, entails the sale of the business. And the sale of a business normally means the sale of all elements of that business, tangible and intangible assets included, unless the parties have agreed to exclude some elements save for the goodwill.[64] But does the sale of the goodwill of a business then necessarily entail the sale of all or some of the elements of that business in the absence of agreement (express or implied) to that effect? For example, can the buyer ask the seller to transfer other assets, say intellectual property rights forming part of the business, in addition to the goodwill sold where the contract is silent on this matter? The fact that the goodwill of a business can be the object of a sale contract tells us at least two things. Firstly, as an element of a business and also as any other piece of property it has an economic value capable of being priced (no matter how difficult the pricing might be) because pursuant to Article 2266 of the Civil Code one cannot talk of a valid sale contract without a price expressible in money. Secondly, it is capable of being priced independently of or separately from other elements of the business because no exactly two elements of a business listed under Articles 127 and 128 are identical-each is capable of being priced independently of the other and also sellable separately from the others. Else Article 151(2) would not have thought of excluding the sale of each element taken separately as not falling under the rules of the Code governing the sale of business. According to Article 130 of the Commercial Code goodwill is the value that results from the creation and operation of the business and highly attached to the customer base of the business. It is the economic value of the reputation of the business. It is defined as the additional value of the business over its other

[64] See Article 155(2) of the Commercial Code; incidentally it is good to note that this provision is out of place. As it deals with the scope of sale of a business, it ought to have been treated somewhere in relation to Article 151.

assets.[65] Thus, if business is composed of different elements, and if each of these different elements is capable of pricing and selling independently of the other element, it follows that the sale of the goodwill of a business does not, unless stipulated otherwise by the parties, necessarily entail the sale of other elements[66] of the same business.

2. Formality Requirements

It is an axiom that contracts can be validly concluded orally or even by conduct without the need for any special form except where either the applicable law or the parties themselves has expressly stipulated that the contract has to comply with certain form.[67] If there is a legal or contractual stipulation for a special form, it has to be observed as it affects the validity of the contract. Failure to comply with the special formality required by law or by the parties renders the contract a mere draft or incomplete that does not have any binding force on the parties.[68]

Article 152 of the Commercial Code explicitly requires a special form for the validity of the sale of a business in that it 'shall be null and void unless evidenced in writing.' The word 'evidenced' in this provision sounds a bit misleading because it could also be taken to mean that if the existence of the contract is disputed, it has to be proved by document, and this document may not necessarily be the deed that created the contract but any other document such as invoices, correspondences, etc so long as it proves that the underlying transaction is the sale of a business. This reduces the whole issue to that of evidentiary or probative value rather than a validity case. But the reading of Article 153 which provides for the contents of the contract of sale of business easily establishes the case for validity requirement. Further more, through Article 1 of the Commercial Code which allows the application of the Civil Code rules where they are not inconsistent with the special rules of the Commercial Code, one can bring in to the sale of a business additional validity requirements of Article 1727 of the Civil Code that the written contract for the sale of business must also be reduced to a special document signed by the seller and the buyer and attested by two capable witnesses. The contract of sale of a business must

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[65] Denis Tallon, *supra* note 6.

[66] Whether this equally holds true for a trade name is controversial although Article 139(2) of the Commercial Code seems to suggest to this effect by prohibiting the buyer from using the prior trade name unless he adds a prefix that indicates he is not the one who first established the business! However, the possibility of selling and transferring the goodwill of a business without at the same time transferring the trade name which designates the very business-that in turn consists mainly of the goodwill-sounds logically absurd unless it can be said that for the buyer to benefit from the goodwill of the business he bought he does not necessarily have to retain and use the prior trade name by limiting the application of Article 139(2) to cases where the seller was using his family or surname as a trade name.

[67] See Article 1719 of the Civil Code.

[68] See Articles 1720(1) and 1726 of the Civil Code.

also contain certain particulars and it must also be published, but not as matters of validity requirements as we shall see below.

4. Obligations of the Seller and the Buyer

This Section discusses the major legal and contractual obligations of the seller and the buyer focusing on matters covered by the Commercial Code and related issues which the Code does not explicitly address but which warrant special attention due to the peculiar nature of business as an intangible asset.

4.1. The Obligations of the Seller

A. Disclosure Obligation

A contract for the sale of business is not only required to be made in writing but it shall also specify the following information:[69]

- Turnover and profits during the last three years of operation, or since its creation or acquisition if this took place less than three years before date of sale,
- Where the business is carried on in a premise let out for hire, date and duration of the lease including the name and address of the lessor, and
- The mortgage,[70] if any, on the business.

The question is whether the requirement to include these particulars in the sale contact is of a validity issue. It only constitutes disclosure obligation of the seller as these particulars are supposed to be within his/her knowledge. It does not seem to affect the validity of the sale contract even if it is not complied with although the law uses a mandatory tone to state the requirement. It can only give the buyer the right to seek, within one year from date of contract, judicial cancellation of the contract or the corresponding reduction in the purchase price upon proof of injury arising from the failure to disclose the said particulars or the inaccurate representation made in relation to them.[71] Accordingly, once the sale contract is validly concluded the buyer cannot take any unilateral action on account of the omission or inaccuracy of the above particulars. Only judicial

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[69] See Article 153 of the Commercial Code. Obviously these are the minimum facts that the sale contract carries. The name and addresses of the parties, the description of the business sold including its location and whether the sale includes all of the elements of the business or whether some elements are excluded, the agreed price, time and place of payment, etc are all vital particulars which the parties will have to provide for in their agreement. If they fail to do so, some of the missing particulars could easily be filled by the law itself, making the contract as complete as it can be. But there are also gaps which the law may not be able to fill on behalf of the parties. In such instances the contract becomes null and void or inoperative.

[70] As mortgage may not be the only encumbrance on the business, this provision should be interpreted widely to cover any third party claim over the business which down the road can be set up against the buyer leading to his dispossession or disturbance of peaceful enjoyment of the business he bought. For the history of how the term 'mortgage' is used in relation to business, see *infra* note 129.

[71] See Article 155 of the Commercial Code. Sub-articles 1&2 of this provision should be lumped together to avoid repetition.

remedy is available and the court has the discretion either to order the cancellation of the contract or the reduction of the purchase price.[72] Both remedies have completely different effects. When the contract is cancelled the seller and the buyer will, as far as possible, be reinstated back to the economic position they would have held had it not been for the sale contract and acts done with a view to discharging one's obligation under the contract produce no legal effect.[73] Whereas, in the case of reduction of the purchase price the contract keeps on producing its legal effects as between the parties (and even upon third parties affected) but the buyer will simply not bound to pay full price; the price will be reduced at least in proportion to the amount of damage he sustains because of the omitted or the inaccurately described particular pertaining to the commercial operations of the business, the existence of lease on premise and third party encumbrance on the business.

How does the judge, then, make a rational choice between ordering the cancellation of the contract one on the one hand, and ordering the reduction in the purchase price on the other hand especially when the buyer files suit primarily for cancellation of the sale contract? In other words, what principles guide the judge in the exercise of his discretion on this specific issue? One can hardly find any clue from Article 154 of the Commercial Code. All it talks about is the 'opinion' of the court measuring the injury sustained by the buyer due to the seller's default. But it can be argued that the primary intention of parties to any valid contract is to perform their obligations due under that contract, not to withdraw from their obligations. Contracts are entered into primarily for performance, not for cancellation. So, the judge has to give precedence to ordering reduction of the purchase price to cancelling the contract. In jurisdictions with comparable laws as in Ethiopia "cancellation is possible if it can be shown that the purchaser's rights are affected to such an extent that he would not have entered into the agreement if he had been aware of the true circumstances."[74] Nevertheless, the threshold of injury that leads to reduction in the amount of the purchase price, or the cancellation is still not an easy task to determine.

B. Duty to Transfer Possession

In any contract of sale the seller has the duty to transfer both the possession and the ownership of the thing sold. Article 155(1) of the Commercial Code provides

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[72] Under the French Commercial Code Article L141-3 2nd§ "Intermediaries, drafters of the contract and their agents shall be jointly and severally liable with the seller if they are aware of the inaccuracy of the information provided."

[73] See Article 1815(1) & (2) of the Ethiopian Civil Code.

[74] Boris Martor, Nanette Pilkington, David S. Sellers and Sebastien Thouvenot, *supra* note 57, p.46, note 86.

for seller's duty to 'hand over' the business he sold to the buyer. But it is not clear whether the term 'hand over" as employed here refers only to transfer of possession or it does also include transfer of ownership as the Commercial Code does not use both terms explicitly nor does it expressly provide for rules governing transfer of ownership separately. It simply contains some specific rules on the mode of the 'hand over' or at least rules on what is to be handed over. Perhaps, recourse to the gap filling provisions of the Civil Code could help resolve the matter. Pursuant to Article 1143 of the Civil Code delivery of the thing sold effects transfer of possession. Under Article 2274 of the same Code delivery is the 'handing over of the thing and its accessories.' Thus one would surmise that Article 155 of the Commercial Code was referring to seller's obligation to transfer possession of the business sold when it used the phrase 'duty to hand over' even if one could hardly rule out categorically its application to some issues of transfer of ownership.

The assertion that Article 155 of the Commercial Code provides for transfer of possession, however, would pit us against another difficult issue in the law of property: whether possession applies to intangible assets. Ethiopian law defines business as an incorporeal movable property; can we then talk of possession of an incorporeal asset which is beyond the reach of the natural senses of human beings? Is it possible to talk of the delivery and transfer of possession of something intangible? How is it possible to effect delivery of intangible assets? The answers to these questions depend arguably on the way we define possession. Article 1140 of the Ethiopian Civil Code defines possession as 'the actual control which a person exercises over a thing.' The issue is whether this control extends to intangible assets, business included. Muradu Abdo has the following to say supporting the view that possession applies to intangibles under Ethiopian law:[75]

> ...the concept of possession in Ethiopia covers both tangible and intangible things. Under the [Civil] Code, what can be the object of property rights can be the object of possession. We say Ethiopian law of possession applies to both corporeal and incorporeal goods because Article 1140 uses the term ``thing`` which must be seen in light of Article 1126, which should be construed to cover incorporeal things. *Hence*, under the Code, the scope of the subject matter of possession extends to tangible things and intangible things. The intangible things over which control is established may or may not have connection with material things.

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[75] Muradu Abdo, *A Text-Book of the Property Law of Ethiopia* (unpublished, on file with author), pp.113-114.

Once the case for the application of the law of possession for business is made the next question will be the mode of transferring possession of this intangible asset. How would the seller transfer the *actual control* of the business as envisaged under Article 1140 of the Civil Code? Article 155(1) of the Commercial Code obliges the seller to handover the business to the buyer. Sub-article 2 of this provision has laid down the principle that "unless otherwise agreed the sale of a business implies the sale of all the constituent parts of such business." Thus, the seller is expected to transfer the possession of all the tangible and the intangible assets forming the business except those excluded by the agreement of the parties (which certainly does not include the goodwill of the business[76]). If the sale of a business implies the sale of all its component parts, it follows that the seller has to transfer the possession of each of these component parts and that the transfer of possession of the business becomes complete when all these elements are put under the *actual control* of the buyer. And the transfer of possession of each component part has to be carried out *individually* unless the transfer of one element is deemed to entail the transfer of other constituent elements which is not the case, though. This is because in the first place there is no express provision of the law to that effect. Secondly, no exactly two elements of a business are identical to warrant the transfer of one means necessarily the transfer of the other as well. Unfortunately, however, the Commercial Code rules dealing with the handing over of business are sketchy. Only goodwill, patent and copyrights are addressed, the latter two merely tangentially. Other elements constituting the business are apparently left unattended by the Commercial Code although one can argue that the gap might be filled by special laws dealing with these elements of business.

Transferring the tangible elements can easily be done, depending upon the nature and the size of the business, by taking inventory of the assets, checking and cross-checking of what are or are not available and finally handing over the items actually or constructively [77] whenever this is possible.

Article 155(3) provides for mode of transferring goodwill: 'The seller shall enable the buyer to take over the goodwill by handing to him all necessary documents and information.' This provision in a way tells us the location of goodwill, that is, in certain *documents*. Goodwill is the quality of a business to attract and retain customers; it is the clientele base of the business that arises from the creation and operation of the business, and its reputation in the minds and heats of customers. What are these *documents*, then, the transfers of which entail the handing over of the goodwill of a business? Surprisingly enough, they are not books and

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[76] See Articles 127(1) & 151(2) of the Ethiopian Commercial Code.

[77] See Article 1145 of the Ethiopian Civil Code.

accounts as well as commercial correspondences on record prior to the date of sale. The seller is not even required to give these documents to the buyer at all; the latter has the right only to inspect the documents for a period of two years from date of purchase.[78] If goodwill is all about the clientele of the business, these documents must be related to the customers of the business, documents which contain, for example, the lists of customers, the outstanding orders of customers, suppliers, etc.

As we have seen in Part I above, immovable property does not make an element of a business. So, if the seller of a business owns the business premise, in the absence of otherwise agreement the buyer has to move the business out of that premise and relocate it elsewhere. But if the seller carries on the business in a leased premise, since the right to the lease of that premise constitutes an element of the business[79] it shall transfer to the buyer by operation of the law as a protection to commercial lease. And any agreement between the lessor and the lessee preventing the latter from assigning this right or from sub-letting the premise to the buyer of his business shall be of no effect.[80]

As discussed above handing over of the business sold involves dealing with each element of the business *individually*. The law, however, treats business as a distinct property, as a unit, a whole, an entity with juridical status. Thus, can we then talk of the transfer of possession of business as such, i.e., as a unit, a whole, entity without dismembering it into its constituent elements i.e. without talking about the 'summation' of the transfer of all individual possessions of each element as finally establishing the totality of transfer of possession of the business? Furthermore, a question may even validly be asked whether transfer of possession of the business is said to be complete at the conclusion of the transfer of each element of that business. In other words, does the transfer of all elements of the business necessarily mean that the buyer is in full possession of the business, i.e. in the *actual control* of the thing as that term is used in the Civil Code? Can we say that the buyer is in that *actual control* merely because the handing over of all the constitutive elements of the business is complete? When do we say that the buyer is in the *actual control* of the business? To answer these questions one must first understand the concept of *actual control* itself. The word *control* is not defined under the Civil Code, nor is it a term of art. In this situation we may accord such word its ordinary meaning.[81] The word *control* has multiple meanings but the definition that is most proximate to our purpose is the one that

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[78] See Articles 156(2) & 157 of the Ethiopian Commercial Code.

[79] See Article 127(2) (c) of the Ethiopian Commercial Code.

[80] See Article 145(1) of the Ethiopian Commercial Code.

[81] Yule Kim, 'Statutory Interpretation: General Principles and Recent Trends,' available at http://assets.opencrs.com/rpts/97-589_20080831.pdf last accessed on August 7, 2010.

relates to management. It means to manage, to exercise power or authority over something such as a business or nation, or it refers to the ability or authority to manage or direct something.[82] The *control* under Article 1140 of the Civil Code must also be *actual* meaning real and effective. The question now is what it means to be in an *actual control* of a business? Definitely, it does not mean the physical control over the business for business is an intangible asset beyond the reach of the natural senses of human beings. It should rather be understood to mean the exercise of real and effective power and authority over the management and administration of the day-to-day affairs of the business. In short it means effective transfer of management of the business entity. In the context of sale of a business transfer of possession should include not only the handing over of tangible and intangible assets constituting the business but also putting the buyer in a position where he can effectively assert his authority over the administration/management of the business including hiring and firing of workers, receiving and executing customer orders, placing new orders to suppliers, making and receiving payments. This can be made possible though a number of ways such as allowing the buyer to take over the business premise including the seat of the management plus all the necessary documents that relate to the administration of the business. This author submits that the buyer who is not able to exert such powers in relation to the business he bought cannot be said to be in the *actual control* of the business which constitutes possession under Ethiopian law.

C. Duty to Transfer Ownership

The Commercial Code does not directly address the seller's duty to transfer the ownership of the business sold. Thus, the bulk of the rules governing issues of transfer of ownership are those principles of the Civil Code which pertain to sales in general[83] although the application of other relevant laws cannot also be sidestepped.

Pursuant to Article 2273(2) of the Civil Code the seller of a business shall transfer an unassailable ownership right,[84] meaning a right which third parties cannot easily controvert or question. It goes without saying that the seller must be the owner of the business sold in order for him to transfer an ownership right which is not assailable. The Latin maxim *nemo dat quod non habet*-that no one can

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[82] See Encarta Dictionaries.

[83] See Articles 1 and 150 of the Commercial Code referring respectively to the general and special provisions (Article 2266-2367) of the Civil Code on matters not covered by the Commercial Code and/or so long as they are not inconsistent with the latter.

[84] See Article 2281 of the Ethiopian Civil Code.

transfer a better title in property than he himself has-[85] is well acknowledged under Ethiopian law.[86] This principle which protects the true owner admits certain exception that secures commercial transactions when the buyer has acted in good faith as clearly specified under Article 1161 of the Ethiopian Civil Code- an exception which does not benefit the buyer of a business for two reasons. Firstly, business is not an ordinary corporeal chattel to fall under Article 1161. Secondly, even if it could be argued to cover business, the buyer of a business cannot be presumed to have acted in good faith believing that the seller was the true owner of that business as a person who is in possession of a business cannot be presumed to be the owner of the business unlike the case for ordinary movables where possession is equivalent to ownership.[87] Business is the property of the trader as it is only traders who are allowed to carry on commercial activities.[88] It follows, then, that the seller of a business normally is trader.[89] As it is a must for any trader who operates a business in Ethiopia to register in the commercial register which is open for public access and inspection,[90] whosoever holds himself out as a trader has to show his certificate of registration that raises the presumption that he is a trader[91] and subsequently that he is the owner of the business designated therein. In other words ownership of a business is proved by the certificate of registration in the commercial register. The Commercial Code under Article 120(2) has made it clear that third parties are presumed to know entries in the commercial register and that they are not permitted to adduce any evidence to rebut this presumption of knowledge of the facts entered in the commercial register. The import of this provision is that any person who wants to buy a business has to first consult the commercial register to see whether the seller is the trader who owns and carries on that business. If he fails to do so and happens to deal with someone who does not have title in the business, he cannot, within the meaning of Article 1162(1&2) of the Civil Code, be considered to have acted in good faith believing that he is contracting with a person entitled to transfer the business because there is contrary evidence in the commercial

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[85] Trayner's Latin Maxims(4th ed., Universal Law Publishing, Indian Economy Print, 2005), p.375.

[86] See, for instance, Articles 2282 and 2884 of the Code where a buyer risks dispossession by the true owner.

[87] See Articles 1186(1) and 1193(1) of the Ethiopian Civil Code.

[88] For the interdependence and relationship between business, commercial activities and traders see *infra* Part I of this Commentary.

[89] A non-trader may become the owner of a business as an heir or as a donee. If this person is not allowed to carry on trade under the law, it seems that he has no option than selling or leasing the business.

[90] See Article 100 of the Commercial Code and Article 6(1) of the Commercial Registration and Business Licensing Proclamation No.686/2010.

[91] See Article 117(1) of the Commercial Code.

register. It is rightly argued that the "publicity [in the commercial register] has destroyed any claim of good faith on the part of the buyer."[92]

In conclusion one can safely say that in Ethiopia you can validly buy business only from its lawful owner and there is no way that you will get protection when you buy it from someone without title to the business. The law protects property ownership in business. This should not, however, be taken to mean that the law does not protect the security of commercial transactions in business when it denies protection to good faith purchasers. The institution of registration of traders and their business in the commercial register itself offers ample protection to third parties as the register contains important particulars about the business and its ownership. The register is open for inspection by interested persons. They are warned to check out the commercial register in advance; if they fail to do so, they do it at their own peril.

In the foregoing paragraphs we have seen that it is the owner alone who can transfer an unassailable ownership right in business. We have also seen that transfer of possession does not cause the transfer of ownership of the business sold. So, what is that which causes the transfer of ownership of the business sold, then? In other words, when is that a title in business is said to have been transferred from the seller to the buyer? The following pages will address this issue.

Article 2281 of the Civil Code states that the 'seller shall take the steps necessary for transferring to the buyer unassailable right over the thing.' What are the steps currently required by law to transfer ownership of the business from the seller to the buyer? Any interested investor can buy a business for sale, but to carry on the commercial activity involved in that particular business in his own name the buyer must always have to be a trader himself for whom registration is mandatorily required.[93]Thus, the buyer of a business has to get that business registered in his own name as a trader and new owner thereof. This requires cancellation of registration of the former trader i.e. the seller as aptly stated under Article 102 of the Commercial Code. It is the seller's duty to facilitate his own deregistration from the commercial register so that the buyer will step in. He has to apply for deregistration at the latest within two months from the date of sale or from date of his ceasing to carry on trade in his own name which ever

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[92] Muradu Abdo, 'Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary,' *Mizan Law Review*, Vol.2, No.1 (2008), p.83.

[93] See Article 100 of the Ethiopian Commercial Code and Article 6(1) of Proclamation No. 686/2010. The buyer must also fulfill the legal requirements for carrying on the trade in respect of which he seeks registration. See Article 97(1) of the Commercial Code.

is earlier.[94] It is when all these requirements are fulfilled that the transfer of title from the seller to the buyer will be officiated by cancelling the name of the former and entering that of the latter.

Moreover, pursuant to Article 41(2) of the Commercial Registration and Business Licensing Proclamation No.686/2010 the buyer shall at his own expense cause the publication, in advance of the transfer of ownership, of the notice of sale in a newspaper. This law has not provided for the details of the notice to be published nor has it expressly referred to relevant provisions of other laws, such as Articles 164-170 the Commercial Code if it involves sale. It does not, for example, provide for the purpose of publication, the particulars to be published, the newspaper in which the publication appears and the place where and the time within which the targets of the notice should react to it, etc. In Addis Ababa, for instance, the publication appears in the daily *Addis Zemen* in which buyers call upon third parties in general requesting them to appear before the sub-city's [where the business is located] office of trade and industry within 30 days of the publication of the notice should they have objections to the sale, or else title to the business and/or the license thereof shall be transferred to the buyers.[95]

In concluding this sub-section, it is worth noting that the Commercial Code does not contain a comparable provision as Article 1185 of the Civil Code which rules that ownership in immovable property is said to have transferred by registration in the register of immovable property. But a close reading of the whole architecture of the law of commercial register would reasonably lead one to argue that it is the deregistration of the former owner/seller and the registration of the buyer of the business that officiate the transfer of ownership to the latter. It follows that the buyer of a business who wants to avail himself of an unassailable

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[94] Article 112 of the Commercial Code refers only to lease and cessation of trade, but there is no reason why the sale of a business should be left out. And there could be difference in time between the date of sale and the date of cessation of trade because the transfer may take some time during which the seller still operates the business in his own name in which case he can be said to have failed in his duty to apply for deregistration only after he handed over the business to the buyer and ceased to operate it.

[95] This author has reviewed all the publications of sale that appeared in the daily *Addis Zemen* in the year 2002 E.C. Despite repeated efforts the author is unable to ascertain what practical action the trade and industry office of a certain sub-city administration in Addis Ababa takes when third parties objecting the sale appear as required by the notification. Does it conduct a hearing on whether the objections are valid, or does it simply refuse to cause the transfer of the business to the buyer merely because someone has objected? As some of the notices require the third parties to produce a court order prohibiting the transfer while some others do not so require, one cannot definitely tell what specific action it takes although it can be argued that office should not decline to process the transfer except where there is a court order to that effect.

ownership right has to bring the certificate of registration as proof of his ownership even if one may not find an express provision to this effect unlike Article 1195 of the Civil Code where a duly issued title deed raises presumption of ownership for immovable property.[96]

D. Duty to Warrant Against Dispossession

The seller's obligation is not limited to transfer the ownership of the business he sold; he has the duty to make sure that the title he transfers is unassailable by third parties and that the buyer's peaceful enjoyment is guaranteed.[97] The right of the buyer of a business can be assailed by third parties at least in three ways: First, if the seller does not himself have a valid title to transfer to the buyer as one cannot transfer more than what he owns.[98] However, the possibility of a person having to buy a business from someone who is not the lawful owner of that business in Ethiopia should, as a matter of law, be a rare phenomena because of the institution of commercial register and the publicity that attends it save the case where someone acted on behalf of the true owner without having a valid power of attorney. Secondly, even when the seller's ownership is perfect, unless it is transferred to the buyer in the manner prescribed by the law he may not be able to avail himself of the protection of the law as the owner of the business. For instance, ordinary creditors of the seller wish to attach the business in the hands of the buyer on the ground that the business is still the property of the seller so long as it is found registered in his name.[99] Even if the contract of sale of business is validly concluded between the seller and the buyer, it may not affect the interests of third parties creditors even if their claims are not secured by the business (either under the rules of Commercial Code or that of the Civil Code) until ownership of the business is transferred to the buyer in a manner prescribed by the law. The third group which pose actual threat to the buyer is creditors of the seller who have secured their claims by a mortgage on the business sold. This is explicitly provided under Article 190(1) of the Commercial Code which reads: 'A secured creditor may claim the business from a third party, as the mortgage follows the business into whatever hands it may fall.' In this case the buyer could be dispossessed of the business in the process of the creditors realizing their security even if all the formal requirements of transfer of

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[96] It is along this line of argument that a commentator held the view that the law treats business as a special movable property elevating it to the status of immovable property; see for example, Muradu Abdo, *supra* note 92, pp.81-82.

[97] See Article 2281 of the Civil Code.

[98] See Articles 2282 and 2884 of the Civil Code.

[99] See for instance Articles 170(1) of the Commercial Code where creditors of the seller including those which do not have formal mortgage on the business may take action that leads to the eventual dispossession of the buyer.

ownership have long been complied with and the buyer has got the business registered in his own name.

It is therefore the seller's duty to warrant the buyer against all forms of dispossession or assail by third parties exercising their legitimate rights that existed at the time the business was sold.[100] This warranty imposes two obligations upon the seller. Primarily, when the buyer is sued for dispossession the seller will be called upon to intervene in the suit to make his warranty good,[101] that is, to prevent the dispossession from happening so that the buyer will retain the business he bought. When dispossession could not be prevented the seller, unless agreed otherwise, would be required to return the purchase price in whole or in part depending on whether the dispossession was total or partial.[102] For instance, there will be partial dispossession when the mortgage attaches only some elements of the business,[103] or at times it may not even be necessary to sell the whole business when the proceeds from the sale of some parts of the business is sufficient to meet the claims of the creditors,[104] thus leading only to the partial dispossession of the buyer.

A cumulative reading of Articles 2282-2285 of the Civil Code tells us that the seller's warranty obligation is due all the time unless legally and/or contractually excluded or restricted. Warranty is legally excluded where the buyer daringly enters into the contract of sale of the business with prior knowledge of the risk of dispossession down the road.[105] In this case the seller has satisfied his disclosure obligation and informed the buyer of the rights of third parties on the business. The idea that prior knowledge of the buyer of the risk of dispossession excludes warranty by operation of the law itself suffers some exceptions, though. Firstly, warranty is still due if the seller has expressly agreed to warrant despite the existence of third party rights on the business posing the risk of dispossession.[106] It means that the seller has made the buyer to count on his words and led him into signing the contract which the buyer would have otherwise avoided.

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[100] See Article 2282 of the Civil Code.

[101] See Article 2285(1) of the Civil Code.

[102] See Article 2284(2) of the Civil Code.

[103] On the possibility of partial mortgage of a business see Articles 191(2), 178(2) and 175(2) of the Ethiopian Commercial Code.

[104] The idea that there should be proportionality between creditor's claim and debtor's property subject to attachment and sale has been clearly recognized under Ethiopian law. Article 394(2) of the Civil Procedure Code states: 'The value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.' Article 439(1) of the same Code suggests the possibility of selling only that part of an immovable property which so long as it is sufficient to cover the decreed amount.

[105] See Article 2283(1) of the Ethiopian Civil Code.

[106] Id.

Secondly, since it is the seller's obligation to disclose any mortgage on the business at the time of sale as required under Article 153(3) of the Commercial Code, prior knowledge on the part of the buyer that the business was encumbered by such a mortgage does not exonerate the seller of his warranty obligation as explicitly stated under Article 2283(2). For stronger reason, when the buyer was not 'aware' of the existence of mortgage on the business at the time he entered into the sale contract, the seller's warranty obligation should still due although it is hardly possible to imagine a buyer ignorant of a mortgage on a business as mortgage is always required to be registered for its validity[107] and that the register of mortgage is open for public access and inspection.[108] How about the case where the buyer is dispossessed under Article 170(1) of the Commercial Code by a court, ordering the sale by auction of the business where the price for which it was originally sold to the buyer was insufficient to meet the claims of the creditors? This provision seems to cover mortgagees as well as other ordinary creditors who do not have formal mortgage over the business but who still have the right to claim their money from the business. Obviously if the buyer is not aware of the existence of the latter class of creditors he should be warranted against dispossession pursuant to Article 2282 of the Civil Code. After all it is the seller's obligation to disclose to the buyer any form of third party right encumbering the business at the time of sale although Article 153(3) of the Commercial Code mentions only of mortgage which, in my opinion, should be construed in a manner that serves its purpose of putting the buyer on guard so that it covers cases such as those of the above class of creditors stipulated under Article 170(1). But what if the buyer is aware of the existence of an Article 170(1)-creditors because the seller has disclosed this as a matter of fact or he should be presumed to have known as the existence of creditors armed with such right is already a matter of public knowledge, legislated in the Commercial Code the ignorance of which may not be an excuse? Can we say that the buyer waived his warranty protection under Article 2283(1) of the Civil Code on the ground that he was aware of the risk of dispossession at the time he entered into the sale contract, or can we hold that Article 2283(2) of the Civil Code which forces the seller to make his warranty good in case of dispossession due to the falling in of mortgage be construed widely to cover an Article 170(1)-creditors? This author supports the latter side of the argument because he does not see any rational for the law to discriminate between creditors of the seller when such discrimination defeats the whole purpose of warranty due by the seller in a manner prejudicial to the buyer.

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[107] See Articles 171(3), 175, 178, and 184 of the Ethiopian Commercial Code. See also Proclamation No.98/98 on Business Mortgage on specific rules that cater for the special interests of commercial banks lending money on the security of business.

[108] See Article 184 of the Ethiopian Commercial Code.

So far we have seen how the law itself excludes/limits warranty although the parties can still make the warranty due by contrary agreement. Let us now turn to the circumstances under which warranty is contractually excluded and/or restricted. While the law under Article 2284(1) of the Civil Code recognizes party autonomy to exclude or restrict warranty due from the seller against dispossession of the buyer it also explicitly states the rule of the thumb for interpreting that contractual clause in the event of dispute as to its scope in that such clause shall be 'construed strictly.' As we have seen earlier, warranty against dispossession is due as a matter of principle; hence its exclusion or restriction comes into picture only as an exception. And exceptions have to be interpreted narrowly so that they do not themselves become the principle. This is to mean that the judge has to adopt a narrow approach to the terms, expressions, words etc used by the parties so as not to create the exclusion or the limitation of warranty against dispossession by way of implication. Interestingly enough, even when the parties agree to exclude or restrict warranty against dispossession, it does not mean that the seller's obligation to return the price of the business if the buyer is dispossessed down the road is extinguished. The seller can avoid returning the price in whole or in part only if there is an express agreement by the buyer waiving this right.[109] This author believes that such an agreement of the buyer itself should also be construed narrowly. Finally, per Article 2284(3) of the Civil Code an agreement excluding or restricting the warranty against dispossession (be it preventing third parties from dispossessing the buyer or returning the price in the event of dispossession) produces no legal effect where the seller has intentionally concealed that a third party had a right on the business sold or dispossession is due to the act of the seller simply because one should not benefit from his culprit conduct. That right of a third party which, if concealed, would defeat the agreement to exclude or restrict warranty apparently is not a mortgage on the business for its registration and the accessibility of the register to any interested person makes it a matter of public knowledge which the seller cannot be accused of concealing. And it is also immaterial whether the seller conceals it or not as dispossession arising from the falling in of mortgage is always warrantable.[110]

Lastly, for the buyer to avail himself of the seller's warranty obligation he must put the seller on notice when third parties start exercising their right that will eventually leads to his dispossession. For instance, when the buyer is sued for dispossession, he must call upon the seller so that the latter shall join the proceeding and make good his warranty.[111] The seller will join the suit as a third

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[109] See Article 2284(2) of the Civil Code.

[110] See Article 2283(2) of the Civil Code.

[111] See Article 2285(1) of the Ethiopian Civil Code.

party defendant for the purpose of disputing the third party's claim for dispossession against the buyer.[112] The seller has to take this stance because of the derivate liability that characterizes the relationship between the three of them i.e. the third party (the plaintiff), the buyer (the principal defendant), and the seller (the third party defendant) in which the liability of the principal defendant to the plaintiff triggers the liability of the third party defendant to the principal defendant. In our case where the buyer(the principal defendant) is held liable for the third party dispossessor (the plaintiff) and instructed to give the business back to him, the seller(the third party defendant) will be held liable for the buyer (the principal defendant) in the form of returning the purchase price in full or in part. Thus the seller has got an interest in joining the litigation on the side of the buyer to keep his liability at bay. Hence, depending upon the nature of the suit for dispossession the seller could defend the buyer and prevent the dispossession by invoking defences available to him in his personal relation with the third party dispossessor (the plaintiff), for example, by asserting that he was the true owner of the business at the time the contract was entered into, or that the claim of the third party (seller's creditor) was extinguished or no more enforceable, or that the mortgage on the business is not valid, etc. He can also raise defences available to the buyer himself against the third party. It is in this sense that the seller makes good his warranty within the meaning of Article 2285(2) of the Civil Code which also requires the joinder of the seller to be made in 'due time' for joinder as a procedural device is both time and state precluded in civil litigation.[113] Generally the seller who is joined as a third party defendant will attempt primarily to secure a judgment favourable to the buyer so that the latter will retain the business he has bought. But if the third party prevails, the seller will return the purchase price in full or in part depending upon the extent of the dispossession.

Article 2285(2) of the Civil Code, however, relieves the seller of his warranty obligation when his timely joinder could not deliver the ultimate because dispossession came about due to the act of the buyer himself despite the seller's relentless effort in the fight against the third party in the judicial proceeding. Apparently the case was lost on a procedural and/or substantive point because of the fault of the buyer. For instance, the act of the buyer leading to his eventual dispossession might have rendered an otherwise strong and fruitful defence of the seller quite impotent, meaning the seller either was not able to invoke the defence successfully because of the act of the buyer; or even if he was able to

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[112] See Articles 43 and 76(1) of the Ethiopian Civil Procedure Code.

[113] A defendant is allowed to bring in another person as a third party defendant only if he pleads this in his statement of defense which is filled on or before pre-trail hearing save the case for amendment of pleading; see Articles 43(1) and 91 of the Ethiopian Civil Procedure Code.

raise the defence he could not purse the defence to its logical conclusion because the buyer aborted the judicial process, say, by entering into a compromise agreement with the third party without the knowledge and consent of the seller. And acknowledging the right of the third party outside judicial proceeding or entering into a compromise agreement with him without the prior knowledge and consent of the seller militates against the seller's ability to prevent dispossession and a buyer does this at the pain of losing his warranty due by the seller unless the buyer can show that under the circumstances the seller himself could not have prevented dispossession.[114]

When the seller was not joined (in due time or not at all) without any fault on his part and that the buyer lost the case to the third party and was dispossessed as a result, the seller would be released from his warranty obligation (that is, he would not be asked to return the price in full or in part) provided that he could show that the proceeding might have had a more favourable outcome had he been joined in due time.[115] The seller is expected to prove that there was chance for the buyer to win the case. This may not be an easy task as predicting what the verdict of the judge is a treacherous terrain in its own right. In any case, to relieve the seller of his warranty obligation on this count we need to consider the issue on a case-by-case basis taking into account the relative strength of the case of the third party, and the nature and availability of defences which the seller could have invoked against that third party, and the relevance and admissibility of his evidence in relation to the said defences.

E. Duty to Refrain From Competing with the Buyer

A person who buys a going business is just investing and expects a reasonable return on the capital he committed to the investment. The law has different schemes of protecting such investment from different risks including unfair commercial competition. It does also protect the buyer of a business even from a lawful or legitimate competition if that competition comes from the very person from whom the buyer acquired the business. The source of the seller's duty not to compete with the buyer by operating a business similar to the one he already sold could be a stipulation of the law itself or the agreement of the parties. In some jurisdictions the law prohibits the seller from competing with the buyer but the parties can agree otherwise to derogate from the terms of the law. In others, the prohibition does not come from the law directly; it arises from the agreement of the parties which is enforceable at law.[116] Ethiopia seems to have adopted the

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[114] See Article 2286 of the Ethiopian Civil Code. For more on compromise see also Articles 3307-3317 of the same Code and Articles 274-277 of the Civil Procedure Code.

[115] See Article 2285(3) of the Ethiopian Civil Code.

[116] For the rules in some Francophone African states, see Article 123 of the Uniform Act of OHADA which provides that '[t]he non re-establishment *clauses* (emphasis added) shall be

first approach[117] as stated under Article 158 of the Commercial Code (titled *seller prohibited from competing*) which reads:

1) During five years from the sale, the seller shall refrain from doing any act of competition likely to injure the buyer. He may not carry on, in the vicinity of the business sold, a trade similar to the trade carried on by the buyer.
2) The contract of sale may specify the extent of such prohibition which shall in no case exceed five years.

The scope of protection Article 158(1) affords the buyer of a business appears wide enough at first glance. On top of unfair commercial competitions which are prohibited, it even seems to cover all forms of legitimate and fair competitions from the seller. But a closer look at the phrase 'likely to injure' in sub-article 1 first sentence has put a limitation on the scope of prohibited acts of the seller by injecting a necessity test or causation in that the buyer must prove actual or potential damage to his business arising from the seller's acts of competition. Thus, one can safely argue that it is not each and every fair commercial competition from the seller that the law sanctions; the seller is free to engage in fair commercial competition with the buyer of his business as long as that competition is not injurious to the buyer. Stated otherwise this is to mean that the seller is not totally prohibited from operating a business similar to the one he sold to the buyer; he can carry out similar business subject to legally as well as contractually imposed limitations (see below). It is totally nonsensical to talk about a competition injurious to the buyer if the seller is disallowed to engage in a similar business as he sold, for only similar businesses do compete against each other and lead to injury when abused. It is only within the context of competing businesses that Article 158(1) first sentence conceives acts of competition which are allowed or disallowed.

The question, then, is what are those fair commercial competitions from the seller which are injurious to the buyer, hence become unlawful and prohibited under Article 158(1) first sentence and whether there should be some sort of *de minims*

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valid only where they are limited, either in time or space in space; one such limitation is enough to make the clause valid.' See also Section 16601 of the California Business and Professions Code as quoted in Dan Woods and Tim Rusche, 'Enforceability of Covenants not to Compete in California', available at http://www.whitecase.com, last accessed on August 15, 2010.

[117] Some people suggest that the Commercial Code should leave the issue for freedom of contract which essentially means the parties at liberty to conclude non-compete agreements enforceable at law; absent such agreement, seller is free to compete with the buyer at any time and place. Any way, parties are still free to disregard the application of Article 158 by a contrary agreement.

as to the level of injury to the buyer? In the absence of some kind of guideline Article 158(1) first sentence could be very difficult to apply to concrete cases leading to its abuse or disuse. For instance, in California where parties can enter into a non-competition agreement comparable to Article 158 of the Ethiopian Commercial Code, a court held that '... not all competitive activity is absolutely prohibited. Competition, or to carry on a similar business, generally means substantial competitive business activities, and not merely isolated or occasional transactions.'[118] Arguably, Article 158(1) first sentence should include competition in the form of soliciting customers of the business especially former customers which essentially constitute the base of the goodwill of the business the buyer acquired. However, the seller's act of soliciting his former key employees does not seem to be outlawed under Article 158(1) first sentence even when there is an agreement between the seller and the buyer to this effect as this could be contrary to freedom of work already guaranteed under Article 41(2) of the Ethiopian Federal Constitution which reads: 'Every Ethiopian citizen has the right to choose his or her means of livelihood, occupation and profession.'

The protection the buyer enjoys against the seller operating a similar business is never meant to be absolute. It is limited not only in terms of its scope as highlighted above, but also in time and space. The seller's obligation to refrain from competing with the buyer of his business by operating a similar business remains in force for a maximum period of five years from the date of sale[119]; parties can agree only to shorten this period. The other important element of the seller's obligation is that it is enforceable only within a given geographic area, which is the *vicinity* of the business he sold as stated under Article 158(1) second sentence. What does this concept of *vicinity* cover? Article 158 does not define it. It is for the court to determine unless parties agree on its coverage. It can cover a small area, or a large area, or all parts of the country, or even the whole globe when the business is traded on the Internet. So long as the public policy behind Article 158 is the protection of the legitimate business interests of the buyer without any intention of depriving the seller of his equally, if not more, legitimate right to earn a livelihood the controlling factor in the equation to delineate *vicinity*, in my opinion, should be the 'commercial presence'[120] of the

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[118] Swenson v. File (1970) 3 Cal.3d 389, 397.) as quoted in, 'California Non-Compete Agreements', available at 'http://www.andersenalumni.net/%5CCalifornia%20Non-Compete%20Agreements.pdf', last accessed on August 15, 2010.

[119] It has been proposed that the prohibition of Article 158 shall take effect 'within five days following the sale'; see Dominique Ponsot, *Title V: Business: Comments and Proposals of Amendments*, (unpublished, on file with the author), p.12.

[120] This concept is borrowed from Article I (2) (c) of the WTO's General Agreement on Trade in Services where it refers to the third mode of delivery of service in which a firm offers service by establishing office, branch or subsidiary in a foreign country.

buyer in a particular locality, that is, whether the buyer sells goods produced by or supplies services of that very business-not any other similar business-he has bought from the seller in a given market. Any other place where the buyer is not commercially present is definitely outside the *vicinity* for purpose of Article 158(1) second sentence.

Article 158(2) allows parties to specify the extent of the prohibitions stipulated under sub-article 1 pertaining both to the nature of acts which are considered unlawful competitions as well as the geographic area within which they are treated as illegal. Thus, they are free to list down specific acts as illegal, and leave the rest as permitted, or vice versa. They can agree to allow the seller to operate similar business in the same vicinity, of course under different trade name,[121] of the business sold with or without attaching conditions such as compensation for the buyer and limiting the business to a specifically defined location in that vicinity. They can also specifically define the vicinity as narrowly as naming a particular locality (or a supermarket for which the seller can supply or even specific customers) or as widely as they wish. But the apparently unlimited party autonomy under Article 158(2) should not offend the overarching public policy that protects only legitimate commercial interests of the buyer and hence it should not be taken for granted that every agreement under this provision is enforceable at law so long as it does not exceed the legally limited five years. There is no point for the buyer to seek protection in a place where he is not commercially present.

This pits us to another controversial issue of whether the court should rewrite the terms of the agreement so as to bring it within the limitations of the law, or whether it has to void that part of the agreement in total where, for example, it is unreasonable or where the parties agree for a term of more than five years. Article 158 is not explicit on this subject. The gap filling provision of the Civil Code Article 1716(1) provides that where the obligation of a party is unlawful it shall be of no effect making it clear that there is no room for courts to rewrite that part of the contract to make it lawful and enforceable. But it is also equally harsh to totally disregard the public policy that protects the legitimate business interest of someone who has invested his capital and put him off guard merely because the agreement under Article 158(2) of the Commercial Code is entered into for more than five years which can be reduced to five years so that it serves its intended purpose. Moreover, an unreasonable term of a contract is not always unlawful as it is possible for a contractual term to be unreasonable and lawful at the same time. The court should resort to getting the intention of the parties

[121] See Article 139(2) of the Ethiopian Commercial Code.

acting in good faith and construe the term in such a way as to balance the competing and conflicting interests of the seller and the buyer.

Finally, Article 158 of the Commercial Code does not expressly address the case where the seller competes against the buyer indirectly through third party which he controls and is capable of injuring equally, if not more, as a direct competition from the seller himself. It is rightly proposed that this provision should extend to "cases of trading through a straw man or a legal entity owned or controlled by the seller."[122] Lastly, to make the protection complete, Article 158 should also cross refer to Article 134 of the Commercial Code and expressly sanction the seller's failure to refrain from competing against the buyer.

4.2. Obligations of the Buyer

The buyer of a business under Ethiopian law has important obligations not only towards the seller but also towards third parties such as the seller's creditors and former employees of the business he bought. The discussion in this section is limited only to his obligations towards the seller focusing on the duty to pay the purchase price and the seller's guarantee of payment. His obligations towards third party creditors of the seller will be discussed in the next section. The employment and tax consequences of the sale of business both upon the seller and the buyer are obviously outside the scope of this commentary.

A. The Buyer's Duty to Pay the Purchase Price and the Seller's Guarantee of Payment

i. The Duty to Pay the Purchase Price

The principal obligation of the buyer in any sale contract is the payment of the agreed purchase price. As we have seen in Part I of this commentary, business is composed of tangible and intangible assets each with the attribute of independent valuation for the purpose of legal transactions. But Ethiopian law does not expressly require the separate pricing of these elements of the business unlike its French counter part where 'separate prices shall be established for fixed assets of the business, the equipment and the goods'[123] which has implication for the seller's legal mortgage that guarantees the payment of the purchase price as we shall see below. Thus under Ethiopian law the purchase price of the business which the buyer is bound to pay is the aggregate value of each of the elements of the business covered by the sale contract although

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[122] Dominique Ponsot, *supra* note 119, p.12.

[123] See Article L141-5 third paragraph of the English translation (unofficial) of the French Commercial Code available at http://www.legifrance.gov.fr, last accessed on August 18, 2010. See also Christopher Joseph Mesnooh, *Law and Business in France: A Guide to French Commercial and Corporate Law*, Kluwer Academic Publishers, 1994, p.165.

practical convenience could require parties to price each element separately as there is nothing that restricts party autonomy in this regard.

The parties are at liberty to determine the terms and conditions of payment. In the absence of agreement otherwise, payment shall be made in cash,[124] and the sale is not considered one on credit. The implication of this is that the buyer can request the seller to deliver the business only upon payment of the full purchase price because performance has to be simultaneous for both parties as stipulated under Article 2278(1) of the Civil Code. Interestingly, however, even if the seller offers to deliver the business he has sold or has actually put it at the disposal of the buyer and that the buyer is also ready to effect payment to the seller, the seller does not have the right to collect his money automatically and directly. The seller's right to receive payment is subject to the complex schemes (see section 5 below) put in place to guarantee the claims of third party creditors.[125] Any direct payment made to the seller in breach of these schemes will not affect third parties; it rather leads to the joint liability of the buyer himself.[126] So, the buyer is expected to withhold payment of the purchase price unless a specific third party, for instance a blocked or escrow account with a bank,[127] is named in the sale contract to serve as a trustee in which case the buyer can discharge himself of his obligation towards the seller by depositing the money with that third party.[128]

ii. Legal Mortgage: Seller's Guarantee of Payment

The seller's security right that gives him the status of the most preferred creditor of the buyer is well recognized under the Ethiopian Commercial Code. Article 163 of the Code declares in part that 'until he is fully paid, the seller shall be secured by a legal mortgage...' This is further elaborated under Article 173(1) of the same Code which reads: 'Where a person sells a business and the price of the sale is not fully paid to him, the payment of the price or such part thereof as is still due shall be secured by a legal mortgage on the business sold.' One may, however, validly raise a question at this juncture: is it appropriate to talk of 'mortgage' instead of 'pledge' in relation to a business? Business is defined as a movable property under Article 124 of the Commercial Code and the concept of 'mortgage' is used, under the Ethiopian legal system, in relation to immovable property, while 'pledge' is employed for a charge on movables. The draftsman,

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[124] See Article 160 of the Ethiopian Commercial Code.

[125] See Articles 160 second sentence, 161, 162, 164-170 of the Ethiopian Commercial Code on third party protections.

[126] See Articles 162(2) and 167(4) of the Ethiopian Commercial Code. For a comparable provision in France, see Article L141-17 of the French Commercial Code.

[127] See for example Article 125 of the Uniform Act of OHADA. It also provides for a notary to serve as a trustee

[128] See Article 162(3) of the Ethiopian Commercial Code.

Alfred Jaufferet, deliberately opted to deviate from this conventional approach to use the term 'mortgage' to a security one creates over a business. For him, this was some kind of 'innovation' justified in the following words:[129]

> The principal innovation it [Chapter IV of Book I of the Commercial Code] introduces is to recognize the existence of mortgages on a business. Certain laws, at least the French and Belgian laws, allow a business to be pledged (nantissement) but this pledge is so similar to a mortgage (hypthe^{s}que) that it is preferable to provide frankly that there can be mortgage of the business. If mortgages are provided for, then it is much simpler to consider the privilege of the seller as a legal mortgage. By another innovation I also recognize a legal mortgage on the business of the bankrupt in favor of the universality of creditors.

Whether Jaufferet's innovation has in practice made the collection of the purchase price simpler and more efficient is a matter to be tested by an empirical survey. This commentary will, however, focus on the formal analysis of how the principles of the seller's legal mortgage are designed to operate.

A business is capable of being mortgaged[130] to secure the payment of a debt. On the basis of their sources, three different types of mortgages can attach a business: legal mortgage[131] that arises from the operation of the law itself; contractual mortgage[132] which parties create by agreement; and judicial mortgage[133] where the business is encumbered by a court order in the context of court proceedings to secure the eventual execution of a decree.

The right of the seller of a business to have his claims for the payment of the purchase price secured by a mortgage right over the business he sold is a typical case of legal mortgage as it arises from the Commercial Code provisions without the need for the agreement of the parties. Nevertheless, it is valid against third parties only if the sale of the business is made in writing and that the mortgage has been registered[134] within one month from date of sale[135] featuring all the particulars listed under Article 175(1) (a-h) of the Commercial Code including

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[129] See Peter Winship(trans.), *supra* note 2, P.53. footnote omitted.
[130] See Article 171(1) of the Commercial Code.
[131] See Articles 171(2), 163 and 173 of the Commercial Code.
[132] See Articles 172(2) and 177 of the Commercial Code.
[133] Generally see Articles 151 *et seq.* of the Civil Procedure Code.
[134] On the manner and conditions of registration of mortgage see Articles 3-12 of the Business Mortgage Proclamation No.98/98.
[135] See Article 173(2) of the Commercial Code.

the possibility of bringing a suit for cancellation of the contract of sale and the scope of the mortgage.

In the case of a contractual mortgage on a business, pursuant to Article 182 of the Commercial Code, registration has the effect of securing the claim only for five years-meaning the creditor will simply remain an ordinary creditor on equal footing with other creditors-unless it is renewed for additional time before the expiration of the five years. But in the case of the seller's legal mortgage on the business nothing has been explicitly stated unless one argues that Article 182 is equally applicable to legal mortgage as well, which however seems to be at loggerheads with Article163 of the Commercial Code that purports to secure the seller *'until he is fully paid'*(emphasis added). This means the seller's mortgage right, once registered does not need any renewal and keeps on producing effect until such time that the seller is fully paid. The purpose of having to register the seller's legal mortgage is to warn third parties and not to subject the seller's right to payment of the purchase price or cancellation of the contract when payment is denied on the condition of registration of his legal mortgage.

As for the substantive contents of the seller's legal mortgage as per Article 189(1) of the Commercial Code, a creditor has the right to realize his security in the even the debtor defaults subject to the legal procedures protecting the interest of the debtor; the creditor will move the court to attach the security device and sell it by auction, out of which proceeds the creditor will be paid.[136] An argument can be made that this provision is applicable to the seller's legal mortgage. But that is not what the relevant provisions of the Commercial Code dealing with the seller's legal mortgage provide, at least expressly, although pushing them to their logical conclusions may not necessarily exclude this possibility (if the seller so desires). Articles 163 and 174 establish the seller's right to cancel the contract when the purchase price is not fully paid, while Article 176(1) openly states in part that '[t]he seller who cancels the contract on the ground that he has not been fully paid... shall, whatever part of the price still due, take back the whole business in its condition on the day of cancellation...' Thus cancellation and the subsequent reinstatement of parties back to their former position is the consequence of the seller exercising his mortgage right. One can argue that the seller is entitled to cancel the contract and get his property back under Article 2348 of the Civil Code even without the need for the technicalities of the legal mortgage under the Commercial Code, questioning the importance of the institution of legal mortgage as far as the relationship between the seller and the buyer is concerned. One does not need, in the opinion of this author, the

[136] For banks foreclosing their mortgages following a different track see Property Mortgaged or Pledged with Banks Proclamation No.97/98.

'invention' of the institution of legal mortgage on a business he sold to request payment of price and to cancel the contract when payment is not effected. The seller's legal mortgage becomes meaningful guarantee to the seller for the payment of the purchase price when the buyer has transferred the business to third parties or when he encumbers the business with third party claims short of transfer of title. In short, legal mortgage of the seller becomes meaningful when there are claims of third parties competing against that of the seller over the business. In that case the legal mortgage of the seller shall rank before contractual mortgages as clearly stated under Article 192(3) of the Commercial Code. Thus, the seller's cancellation of the contract as an exercise of his mortgage right can go far beyond his relationship with the buyer and affect third parties who have got interest in the business. He can claim the business from a third party, as the mortgage follows the business into whatever hands it may fall.[137] In effect, third parties will be dispossessed of the business if they are in possession, or their claims will rank second to that of the seller as a result of the latter's legal mortgage.

The law does also protect the interest of third parties against the seller who wishes to cancel his contract as an act of exercising his legal mortgage when the buyer fails to pay the purchase price. For this legal mortgage to affect third parties it is not enough that that the underlying sale contract is made in writing and that the mortgage itself registered. The seller's reservation to bring legal action for cancellation of the contract if the buyer fails to pay the price in full has to be entered also in the register of mortgages.[138] In the absence of such a pubic warning, the effect of the seller's cancellation of the contract will be confined only as between him and the buyer. The other side of this requirement is that the seller cannot unilaterally cancel the contract; only a court can order cancellation on account of the seller's legal mortgage. This affords third parties another layer of protection because when the seller brings an action against the buyer in a bid to exercise his mortgage right, interested third parties are entitled to intervene in the suit to assert their right as the outcome of the suit will certainly affect their interests.[139]

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[137] See Article 190(1) of the Commercial Code.

[138] See Article 174 of the Commercial Code. For a comparable position in France, see Article L141-6 of the French Commercial Code. Under Article 136 of the Uniform Act of OHADA, the seller who intents to file a suit for cancellation of the contract has the duty to notify such action to registered creditor of the business at the elected domicile.

[139] See Article 41 of the Ethiopian Civil Procedure Code. The seller can also directly join the buyer and the third party in possession of the business in one suit under Article 35 of the Civil Procedure Code instead of suing the buyer alone.

It can also be argued that on the basis of Article 190(1) of the Commercial Code the seller of the business has a direct right of action against any third party in possession of the business where the buyer fails to pay the price. But in this case it does not seem appropriate to talk about 'action for cancellation of the contract' as there was no contract concluded between the seller and the third party.[140] It seems rather a suit for dispossession against the third party on theory of extra-contractual relationship.

The other protection to third party is the scope of the legal mortgage itself which has to be specified in the entry in the register of mortgage per Article 175 (1) (g) of the Commercial Code. As business is composed of different elements the seller is expected to make clear whether he intends to extend his legal mortgage to all those elements which form part of the business sold, or whether the mortgage is limited to some specific elements alone. Articles 175(2) and 191(2) have slummed shut the door on legal mortgage by analogy in that they expressly limit the application of the mortgage 'to such parts only of the business as are expressly specified in the entry.'[141] The import of this is that a successful action for dispossession by the seller exercising his mortgage right results only in the partial dispossession of the third party and that the latter will retain those elements of the business which are pretty much out side the scope of the mortgage although the mortgage might sill have affected substantial part of the business leaving no room good enough for the third party to comfort himself in. In contrast to the scope of the effect of a suit for dispossession by the seller against third party in which the latter is dispossessed only those elements of the business which are within the scope of the mortgage, the effect of cancellation for nonpayment of price against the buyer will result in the dispossession of the *whole business* as it stands on the day of cancellation and subject to a settlement that takes into account the values of the elements of business on that date; of course, new parts acquired after the contract was made are excluded [142] to prevent unjust enrichment to the seller. It means that as against the buyer, the seller's right extends to each and every element of the business sold for 'whatever the part of the price is still due.'[143] The Ethiopian Commercial Code does not provide for separate pricing of the elements of business at the time of sale, thus the seller's right to payment is secured by the whole business as an

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[140] For a contrary view on this, see Menber-Tsehai Tadesse, *Mortgage: Wastina Yetenefegaw Ya Wastina Higi*,(unpublished, on file with the author), p. 69.

[141] Under French law, however, legal mortgage covers all elements of the business listed in the sale contract. See Article L141-5 and Article L141-6 of the French Commercial Code under Article 134 of the Uniform Act of OHADA the seller has a preferential right over the business sold as a whole, without limiting it to those elements listed in the registry.

[142] See Article 176(1) of the Commercial Code.

[143] Id.

entity.[144] When the seller takes back the whole business as it stands on the day of cancellation, restitution shall be made taking into account the increase or reduction in the value of the business elements covered in the sale contract.[145]

5. The Seller's Creditors in Relation to the Business Sold

In the sale of a business between the seller and the buyer, third parties may, however, come into picture on both sides of the transaction. In section 4.2.ii above, we have seen how the law guards third party creditors of the buyer when the seller enforces his legal mortgage. Here the institution of registration of mortgage which is accessible to the public gives third parties a prior warning as to what claims are already encumbering the business which they wish to deal with.

The interests of third party creditors of the seller are also affected when the seller disposes of the business precisely because debts of the business (accounts payables) will not be transferred, unless agreed otherwise, to the buyer as they do not by definition form part of a business.[146] Creditors may not be able to get their money very smoothly if the seller transfers his business without the transferee being held answerable for the debt. It must be this non-transferability of the debt of the business to its buyer that led the French law to adopt a very complex scheme of protection to the seller's creditors [147] which are also replicated in Ethiopia.

There are two major schemes that protect the seller's creditors under the Ethiopian Commercial Code. The first one is the right of creditors to block the direct payment of the purchase price to the seller so that they will share the proceeds among themselves. The second one is the right to have the sale contract cancelled and have the business put up for auction sale in order to raise more money when the original price is insufficient to meet their claims. In order for them to be able to make use of these schemes, the law has imposed certain obligations upon the buyer. We shall deal with each scheme turn by turn, but let's first consider the buyer's duty that triggers the schemes. That obligation of the buyer which emanates from the operation of the law (Articles 161and 164 of the Commercial Code) is the duty to cause the double publication of the notice of sale. The publication has to be made in the official commercial gazette and in a newspaper empowered to carry legal notices circulating where the head office of

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[144] For a different approach under in France, see Article L141-5 of the French Commercial Code.

[145] See Article 176(2) of the Commercial Code.

[146] See Article 129(1) of the Commercial Code.

[147] See generally Articles L141-12 to L141-22 of the French Commercial Code. These institutions are absent in the German system where debts of the business are transferable to its buyer; see also S. A. Bayitch, *Supra* note 44.

the business sold is located.[148] Ethiopia never established an official commercial gazette, and the idea of having one in the future seems dropped.[149] The purpose of publication of the sale is just to notify third party creditors of the seller as to the sale of the business so that they can lodge their objections that the seller should not receive the selling price directly. If this is the case, the Commercial Code must remain content with a single publication provided that it is effective and efficient enough to inform the creditors. The notification includes:[150] the names and addresses of the seller and the buyer; the type and address of the business; addresses of branches covered by the sale contract; the date and nature (whether it is credit or cash sale) of the contract; the agreed price; and the address for serving legal papers at the place where the business is located. The name and address of a third party, if any, designated as escrow agent under Article 162(3) should also be published (although it is not listed under the law) for the same reason that creditors need to know the name and address of the buyer of the business (see below under sub-section i). The sale must also be published within one month from the date of signature of the contract of sale.[151] The law validates even a late notice, that is, after the expiration of the one month period but makes the buyer liable for any damages caused by reason of the delay.[152]

The current practice in Addis Ababa is to publish the notice of sale in the daily *Addis Zemen*. The author has reviewed all the notices of sale of business that appeared in this newspaper in the year 2002 E.C. Buyers simply call upon third parties in general requesting the latter to appear before the sub-city's [where the business is located] office of trade and industry within 30 days of the publication of the notice should they have objections to the sale, or else title to the business and/or the license thereof shall be transferred to the buyers. While one can validly assert that the notice caters for those who object the transfer of the business (for instance, the true or joint owners of the business who did not consent to the sale), it is hardly possible to claim that the notice is the prototype envisaged under Article 167 of the Commercial Code which directly targets creditors of the seller. This is because firstly, the notice calls for those who object

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[148] See Article 164(1) of the Commercial Code.

[149] The Draft Revised Commercial Code prepared by the Ministry of Justice has also dropped commercial gazette, see Article 164 of the Draft, on file with the author.

[150] See Article 165 of the Ethiopian Commercial Code.

[151] Article 166(1) provides that '[n]otice under Article 164 shall be published during the month within which the sale took place.' The phraseology of this provision sounds confusing at best. The sale of a business has to be made in writing and should be considered to have taken place from date of signature by which parties express their consent to conclude the contract, and the one month period should reckon from this date.

[152] See Article 166(2) of the Commercial Code.

the sale of the business. Certainly, creditors of the seller cannot lodge such kind of objection simply because they do not have the substantive right in this regard. Their right is only to claim the payment of debts from the proceeds of the sale of the business. And this right, as we shall see in the subsequent sub-sections to follow, will not be affected by the sale. Secondly, even if we overstretch the notice to make it cover creditors of the seller, they are not required by the law to appear before a government agency, such as the trade and industry office of sub-cities in Addis Ababa, to lodge their objection. Since the only purpose of their objection is to prevent the seller from collecting the purchase price until their claims are satisfied and not to forestall the transfer of ownership, there is no need for them to appear before an organ that handles the transfer of ownership and not mandated to hear whether creditors have valid claim against the seller nor empowered to enjoin the buyer from effecting payment of price to the seller. (On the nature of the creditors' objection and to whom they are directed, see below).

i. Blocking the Payment of the Purchase Price to Share the Proceeds

This is a scheme which gives creditors of the seller the priority to satisfy their claims from the proceeds of the sale of the business before the seller is able to collect the purchase price from the buyer. It is triggered by the buyer's publication of the notice of sale as described above. Article 167(1) of the Commercial Code provides that 'within one month from the publication of the last notice, any creditor of the seller may, even where his claim is not due, move the court to set aside the proceeds of the sale and shall notify the buyer at his address for service.' Creditors are expected to file their application within the prescribed time from the date of publication at the pain of losing the right if filed out of time unless there wasn't publication made or that it did not contain the particulars listed under Article 165 of the Commercial Code in which case the application could be made at any time[153] so long as the price was not paid to the seller. But there is no point talking about objection if the buyer has already paid the seller in which case the remedy is just to hold him liable for the creditors directly.

In addition to the buyer, a third party designated as escrow agent under Article 162(3) should also be notified of any objection to the payment of price even if Article 167(1) makes no mention of this. It is only logical to instruct the creditors to file their application (which shall show their names and addresses as well as the amount and basis of their claim[154]) within a definite period of time and attach legal consequences if they fail to act accordingly. Expecting creditors to communicate their objections to the buyer alerting him that they are after their

[153] See Article 167(3) of the Commercial Code.
[154] See Article 167(2) of the Commercial Code.

right, that he shall not effect payment directly to the seller is also understandable, or even desirable as the buyer may not in fact know the existence of such legal prohibition in the first place. However, to require the creditors to file their application objecting the payment of the price with a court of law as stated under Article 167(1) of the Commercial Code petitioning the court to order the buyer set the proceeds of the sale aside is, in the opinion of this author, both unnecessary and meaningless. It is unnecessary because Article 162(1) of the Code has already prohibited the buyer explicitly from paying the seller until the time fixed for objection expires or until settlement is reached following the objection. Article 162(1) reads: 'After the sale, the price of the sale shall not be paid to the seller until the period of time for making application to set aside expires or, where any such application has been made, until the rights of the creditors have been settled by agreement or by the court and such creditors have been paid.' The law has already created and imposed upon the buyer the obligation of not paying the seller. And if a buyer contravenes this obligation and effects payment to the seller, Article 162(2) rules that such a payment shall not affect third party creditors of the seller [which means the buyer is jointly and severally liable with the seller for these creditors!]. If the law has already prohibited the buyer, there is no reason for the court to repeat the same instruction as granting the injunction adds no value. The court cannot claim to have created what has been already there nor can it claim to have enforced it because the court cannot physically prevent the buyer from effecting payment at all; buyer can do that at his own peril. Obviously, the court cannot order payment to the creditors merely based on their motions under Article 167(1) unless the creditors have a civil decree in their own hands, which is not also the case here. These applications are also inherently different by their nature from a formal lawsuit instituted with a view to having the court determine their claims against the seller. The court is not hearing the merit of the case on the basis of such applications. Thus, procedurally speaking, the court cannot order the seller to enter defense on the substance of the dispute and go to trial based on applications filed under Article 167(1) of the Commercial Code. Even an order of the court granting an application filed under Article 167(1) is not an instruction to the buyer to pay the creditors from the proceeds of the sale for this amounts to a sheer denial of due process to the seller who has the right to contest the claims of the third party creditors. And finally, if the creditors who use the institution of objection under this provision were already in possession of a decree in their favor, no reasonable person would think of objection under Article 167(1) as the rules of execution of money judgment are obviously shortcut and more effective.[155]

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[155] See Articles 394, 395, 409(3) of the Civil Procedure Code of Ethiopia.

In conclusion, it is worth noting that requesting the creditors to move the court to set aside the proceeds of the sale per Article 167(1) is meaningless and serves no purpose of protecting the creditors except increasing the cost of transaction to recover their claims. The purpose of filing objection with the court cannot be obtaining a summary judgment that establishes the claims of third parties as against the seller, nor is it a summary execution of a money judgment. Hence, there is no need for the seller's creditors to file their objection with a court. So this idea should be dropped out in the would-be Revised Commercial Code of Ethiopia.[156]

The other problem related to the issue of directing third party creditors to file their objection with a court is Article 167(4) which purports to prohibit the buyer or any person with whom the proceeds of the sale has been deposited from effecting payment to the seller 'until the application is decided.' As we have seen above literally there is nothing that awaits the decision of the court under Article 167(1). Such a prohibition will have meaning and effect only if it is made part of Article 168 which provides for the right of the seller[157] to challenge, before a court of law, the objection lodged by third party creditors for want of form (e.g. it does not contain the particulars required under Article 167(2)), or that the objection was made out of time, or it was made with out good cause, i.e., without the third party having any legitimate claim against the seller. In effect the seller is asking the authorization of the court to receive payment under Article 168. The court then hears the creditor to determine whether the objection to payment is valid or not. If the court finds that the objection is not valid due to any one of the above reasons, it allows the seller to receive payment and instructs the buyer or the third party escrow agent to release the payment. But if the court rejects the seller's application and sustains the objection as valid, the seller will not be able to get the payment of the price until he reaches settlement with his creditors or until the court lifts(see below) such objection. In any case pending the application of the seller the buyer or the third party escrow agent are under the prohibition of the law from making payment to the seller as stipulated under Article 162 to which Article 167(4) itself refers.

The blocking of payment by the creditors through their objection, however, is not forever. When the seller and his creditors are unable to settle the claims amicably, there must be a mechanism which ends the deadlock, or else blocking payment for indefinite time is prejudicial for both parties alike. It should be

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[156] Article 167(1) of the Draft Revised version of the Code prepared by the Ministry of Justice, however, maintained the extant text as it was.

[157] Article 168 refers to 'buyer' not 'seller' but this seems to be a slip of the pen as there is no reason for the buyer to go to court with a view to challenging the objections of third party creditors.

noted that the blocking of payment is a sort of interim measure of protection,[158] not an end in its own right. Its objective is to keep the purchase price in the hands of the buyer until the creditors of the seller have got the opportunity to discuss their claims with the seller on the one hand and as between themselves, if they are many, so as to settle their claims amicably. If they are successful, they will share the proceeds of the sale as between themselves by agreement, or failing such agreement, the court will divide the proceeds for each according to their rank.[159] Secured creditors will rank first as opposed to ordinary creditors and they shall rank as between themselves according to their order of registration of their mortgage on the business.[160] Ordinary creditors shall rank concurrently and division of the proceeds of the sale left from the secured creditors should be made *pari passu* i.e. ratably in proportion to their claims.[161]

Nevertheless, this may not always be the case. The seller might contest not only the existence but also the amount of the claims third parties are asserting against him, and negotiations could fail as well. When the seller denies liability to all or some of the creditors either in whole or in part, they normally file a formal law suit to have their claims determined. But as exercising their right is purely within their discretion it should not bother the seller under normal circumstances. However, when he is prohibited from receiving payment of the purchase price until their claims are finally settled there must be some mechanism which forces his creditors to file a formal suit as soon as possible for the ability of the seller to receive the price solely depends upon the outcome of such suit. It will be to the determent of the seller if the creditors, on the one hand, object to the seller's right to receive payment and are not willing to act upon their claims, on the other hand, leaving the seller in a complete limbo. Unfortunately, there is nothing in the Ethiopian Commercial Code that puts pressure upon the creditors so that they take their objections one step further when amicable solution is not reached with the seller. In jurisdictions where there is a comparable system of creditors' objection this concern is addressed by instructing the creditors to file a formal law suit within a certain period following notification of the objection failing which the objection shall be set aside by the court.[162] This author suggests that the would-be Revised Commercial Code of Ethiopia has to adopt this approach

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[158] See also Boris Martor, Nanette Pilkington, David S. Sellers and Sebastien Thouvenot, *supra* note 57, pp.46-47.

[159] See Article 169 of the Commercial Code.

[160] See Article 192(1) and (2) of the Commercial Code.

[161] There is nothing to this effect under the Commercial Code or under the Civil Code of Ethiopia. Article 403 of the Civil Procedure Code might have intended for *pari passu* but not explicit or even complete.

[162] See Articles 128 and 130 of the Uniform Act of OHADA where the objection has only a conservatory effect until the creditors file a law suit with a court of law.

and it also has to clearly state the purpose of the objection as protection to the interests of the creditors until they will be able to settle their claim by agreement; and failing the agreement until they will be able to file a law suit which has to be made within a definite period at the expiration of which the seller should be allowed to receive the payment of the purchase price.

ii. Reselling of the business by a public auction

The publicly declared price, [163]which is blocked in the hands of the buyer or the third party escrow agent, if any, to be shared among the creditors as per Article 169 of the Commercial Code, may not be sufficient to meet their claims. If this is the real market value of the business at a point in time, there is nothing to be done. But if the business is underpriced deliberately or because the seller is out-bargained, or if the publicly declared price is not the actual price negotiated between the seller and the buyer, the creditors have the right under Article 170(1) of the Commercial Code to request the judicial cancellation of the contract of sale and the reselling of the business by auction so that it fetches better price from which they will be paid off their claims. The procedure of reselling the business, however, is not fairly clear. What sets the reselling process in motion in the first place? Is it the result of the mere contention of the creditors that the publicly declared price of the business is insufficient to meet their claims? Or are they required to establish a *prima facie* case of the business being underpriced or the negotiated price is concealed to their detriment? The latter seems to be the case from the title of Article 170 which reads 'overbid by creditors' but there is nothing specific to this effect from any one of its three sub-articles detailing its contents. To initiate the process of reselling these creditors have to 'overbid' the original buyer-and nobody else at this stage-by offering a price better than the one offered by him. The issue is about the amount of the new bid price. Article 170(2) mandates the court to 'order the sale by auction' provided that 'the price of the sale shall be higher by one-tenth than the price specified in the contract of sale.' A close reading of this provision leads us to the interpretation not only that the bidders are the creditors (that the auction is thus among them) themselves but also that the figure represents the bid price they have to make to set the reselling process in motion. What follows from this point onward is not also clear. Can we say that the auction is now over and the court shall order the sale of the business to the creditor who has made the offer as sub-article 2 seems to suggest, or is the business going to be put up for a sale by an auction to the general public as sub-article 3 apparently conjures up, which is the case under some jurisdictions.[164] In the Ethiopian case, Article 170(3) provides that 'where no

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[163] See Article 165(e) of the Ethiopian Commercial Code.

[164] See Articles L141-19 to L141-20 of the French Commercial Code and Article 131 of the Uniform Act of OHADA.

third party presents himself at the sale, the business shall be sold to the creditor making the highest bid.' This reference to 'third party' indicates that the reselling is by a public auction in which the creditors can participate on equal terms with other members of the public. In this case the business will be sold for the highest bid. If the public auction, however, fails to fetch more price the business will be sold to the creditor who has offered the highest bid. In both cases the business cannot be sold for a price which does not exceed the original purchase price by one-tenth as stipulated under Article 170(2).

The other important issue in relation to the reselling procedure is the need for some kind of caveat to prevent the creditors from abusing their right to cancel the original sale contract and request for reselling the business especially when all or some of them are commercial competitors of the buyer in the same or related area of business or even by the ill motive of the seller who thinks that he was out bargained by the buyer. The law has to equally cater for commercial security as well and should try to strike the balance between conflicting interests of the seller's creditors whose action will lead to the eventual dispossession of the buyer, on the one hand, and the interests of the buyer who transact with the seller in good faith and want to reap the fruit of his investment, on the other hand. Firstly, as highlighted above, the allegation by the creditors that the original purchase price is insufficient to meet their claims by itself should not warrant cancellation of the first sale. They must be asked to establish a *prima facie* case not only by offering a better price the threshold of which should be clearly spelled out but also by depositing the same with the court.[165] Secondly, it must be used as an alternative to the sharing of the proceeds of sale as stated under Article 169; it should not come after the sharing of the proceeds proved a failure. The two schemes should be made available at the same time and the creditors should choose one of them within the same defined period following the publication of the sale contract.[166] Thirdly, the idea of public auction should be dropped altogether unless the creditor who originally offered a better bid is forced to buy the business at that price and other creditors are held liable jointly and severally for any damages sustained by the seller and the buyer for canceling the original sale contract but failed to buy or resale the business for a better price. Basically the purpose of the law under Article 170 is to protect the creditors of the seller against backdoor arrangements between the seller and the buyer. It should not be used to inject insecurity to or perceived as a threat to genuine commercial transactions. So, it should be redrafted in a way that articulates its purpose as a shield, and not as a sward.

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[165] This is the requirement under French law and the Uniform Act of OHADA, see Id.
[166] This is the approach under French law and the Uniform Act of OHADA, see Id.

Conclusion

This commentary sets out to explain and, whenever possible, critique the rules that govern the sale of a business under the Ethiopian Commercial Code. Nonetheless, it claims neither to have advanced nor refuted a specific central thesis. Yet it has raised and grappled with a host of diverse questions. The Ethiopian law recognizes the abstract notion of business as a going concern as a special type of movable property composed of both tangible and intangible assets, mainly its goodwill. While this approach can be praised as commendable, the tradition of leaving immovable property at the outskirt of business particularly where the immovable is destined to serve the business as its premise needs policy reconsideration.

The sale of business as a special type of movable property without a corporeal existence is subject to special disciplines under the Commercial Code although the general rules of the Civil Code are also applicable in many respects. What is peculiar about these disciplines mainly is the scheme of protection accorded to third party creditors of the seller: the price of the business sold is the security of the creditors; thus the seller is not allowed to receive payment until the creditors' claims are settled. The buyer is required not only to withhold payment of price (even if he has taken delivery), but is also supposed to look for creditors of the seller by publishing notice of sale at his own cost. These are restrictions on simultaneity of performance, which is the norm under general law of obligations, arising from the underlying rule that the debts and credits of the business do not constitute its elements and hence do not transfer to the buyer of the business. That complex architecture of creditors' protection can easily be avoided by allowing the transferability of the debts and credits of the business to the buyer and making both the seller and the buyer jointly and severally liable to third parties. This, however, may discourage buyers who need to acquire a business on a clean plate.