Part one
Law of negotiable instruments
Chapter one
Basic Concepts and principles

1.1 Nature and Definition of Negotiable instrument

Documents of a certain type, used in commercial transactions and monetary dealings, are called Negotiable instruments. Negotiable means transferable by delivery and instrument means a written document by which a right is created in favor of some person. The fact that it creates a right impliedly follows that it also creates a corresponding obligation on the person who signs on it and becomes a party thereof.

The term ‘negotiable instrument’ literally means “a document transferable by delivery”. However this definition does not clearly tell us the true nature, characteristics and valid requirements of a negotiable instrument because not all documents transferring a right could be categorized as negotiable instruments.

Regarding a formal definition, you have to bear in mind that negotiable instruments must meet special requirements as to form and content. This element will help us to distinguish between negotiable and non negotiable instruments. The later generally refers to assignment of contract rights and will be governed by the relevant civil code provisions.

A negotiable instrument could be formally defined as “A signed writing that contains an unconditional promise or order to pay an exact sum of money on demand or at an exact future time to a specific person or order, or to bearer.” This definition clearly summarizes the basic requirements for a valid negotiable instrument, which will be discussed later.

The definition given by the Indian negotiable act is restricted in scope which states that “A negotiable instrument means a promissory note, bills of exchange or cheque payable either to order or bearer.” This definition apart from the fact considers only this three types instruments as negotiable, simply enumerates them without giving any indication as to their nature and characteristics.
A definition given by Black’s Law reads as follows. *A written instrument (1) signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or a definite time, and (4) is payable to bearer or order.* This definition is more or less similar with the first definition given above. It clearly summarizes the factors necessary to qualify a certain instrument as negotiable instrument.

Now let’s turn to the definition given in our commercial code. Art 715 of the code which tries to define a negotiable instrument too broadly.

**Art. 715 --- Definitions**

(1) *A negotiable instrument is any document incorporating a right to an entitlement in such manner that it be not possible to enforce or transfer the right separately from the instrument.*

(2) *The law recognizes in particular as negotiable instruments commercial instruments, transferable securities, document of title to goods.*

**Question 1**

Compare the definition given in article 715 to the above definitions. What shortcomings can you list down from the definition given in art. 715? can you think of any other instrument not mentioned in article 715(2), but at the same time fulfills the definition of art. 715(1)

**1.2 Classification, Types And Functions**

**Function of Negotiable Instruments**

Negotiable instruments play a pivotal role in making business transactions too easy and simple. The vast number of commercial transactions that take place daily in the modern business world would be inconceivable without negotiable instruments.

For instance, assume a trader in Addis wants to purchase 1,000 quintals of potato from another trader residing in Gambella. In the absence of negotiable instruments the trader in Addis had to carry perhaps half quintal of money and take it to Gambella to make payment. Transporting large amount of money usually exposes oneself to risk such as looting and destruction due to natural calamities. Additionally it causes inconvenience, delay and waste of time and energy. Using a negotiable instrument as a mode of payment relieves any trader and business of the above worries and difficulties.
The Law governing negotiable instruments grew out of commercial necessity. As early as the thirteenth century, merchants dealing in a foreign trade were using commercial paper to finance and conduct their affairs. Problems in transportation and in safekeeping of gold or coins had prompted this practice. In those early days, these merchants used to keep large sums of money with the gold smiths for safe custody against their signed receipts, known as ‘Goldsmith notes’, embodying an undertaking to return the money to the depositor or the bearer on demand. Over time the merchants started making payment through these ‘notes’ for the transactions they had entered with other traders. The bearer of the note can go to the goldsmith and collect whatever money is stated on the note. In this way, ‘Goldsmith notes’ became payable to the bearer and were transformed from a receipt to a ‘bank note’ payable on demand. Currently unlike the old days business transactions have assumed new dimensions and became too complex but, still now the ancient use and function of negotiable instruments has not been changed.

Generally speaking, instruments function in two ways:-

a) as a substitute for money

b) as a credit device

Debtors sometimes use currency, but for convenience and safety they often use instruments instead. An instrument is being used as a form of payment when a debt is paid by a cheque. For instance, Ato Tessema purchases a table, chair, shelf and TV for a total sum of br. 7,000. If he has current account in one of the nearby banks he can effect payment through a cheque, hence, avoiding the burden of carrying 7,000 in his pocket.

Historically, as stated above, Negotiable instruments grew out of business circumstances and “the substitute for money purpose” was the initial reason, negotiable instruments were created for. In the middle ages merchants deposited their precious metals with gold smiths (“bankers”) to avoid the danger of loss or theft. When they needed funds to pay for the goods they were buying, they gave the seller a written order addressed to the “bank”. This authorized the bank to deliver part (or all) of the precious metals to the seller. These orders, called bills of exchange, were sometimes used as a substitute for money.
Instruments may also represent an extension of credit. When a buyer gives a seller a promissory note, the terms of which provided that it is payable within sixty days, the seller has essentially extended sixty days of credit to the buyer. The credit aspect of instruments was developed in the middle ages soon after bills of exchange began to be used as substitute for money. Merchant buyers were able to give to sellers bills of exchange that were not payable until a future date. Because the seller would wait until a maturity date to collect, this was a form of extending credit to the buyer.

For an instrument to operate practically, as a substitute for money, a credit device, or both, it is essential that the paper be easily transferable without danger of being uncollectible.

**Types of Negotiable instruments**

The types of Negotiable instruments are largely determined based upon the scope of definition given to negotiable instruments and specification of the instruments legally recognized as negotiable in that country’s law. In most countries, the scope of negotiable instruments is limited to commercial papers. i.e. to instrument other than cash, entitling the holder or the person whose name is specified on the paper, the payment of money. In this sense, negotiable instruments may be classified as order to pay (Bills of exchange and cheque) and promises to pay (promissory notes). In the first class the person issuing the instrument (the drawer) gives a clear order to another 3rd party (Drawee) to make payment to holder or specified person on the instrument. In the second category there is no order to be given, but the maker of the instrument (promissor) binds himself and promises the beneficiary (the promisee) to pay a specified amount of money.

Negotiable instruments may also be classified as either demand instruments or time instruments. A demand instrument is payable on demand i.e. the moment it is presented to the drawee. An instrument will be payable an demand (1) if it states that it is payable on demand or at sight (2) if it does not state any time of payment. All cheques are demand instruments, because by definition, they must be payable on demand. Generally, A demand instrument is payable immediately after it is issued. Here the term “issue” refers to the first delivery of an
instrument by the maker or drawer, to the payee or holder, for the purpose of giving rights on
the instrument to any person.

A time instrument is payable at a definite future time. For instance, an instrument payable 3
months after date is payable 3 months after the date written on its face. An instrument written
on Meskerem 19, 2000 may state that it is payable on Tahsas 24, 2000. This instrument is a
time instrument because the holder has to wait until Tahsas 24, 2000 to be entitled to collect
the specified amount.

Lastly negotiable instruments may be classified as order instruments and bearer instruments.
Order instruments entitle the payee or any other person to whom order is given in his favor.
for example an instrument which states “payable to Ahmed Dawed or order/ payable to the
order of Ahmed Dawed “ is payable to Ahmed Dawed or any other person in whose favor
order is given by Ahmed Dawed. In other words, Ahmed Dawed can directly collect payment
on the instrument or transfer it to another person. Hence this person will be entitled to collect
payment, if he does not want to cash it, he may also give further order to another person, and
so on.

Bearer instruments without specifying the person entitled to collect, simply give right to any
person who happens to be holder or in possession of the instrument. In this case any person by
simply becoming the holder of the instrument will be entitled to whatever amount of money is
stated on the instrument. For example if an instrument reads simply “pay” , “Payable to bearer
“or” pay to cash will entitle the holder the right emanating from the instrument.

With respect to identifying the types of instrument, as stated above it better is to refer to the
specific legislation of the country giving recognition to specific types of instruments. For
instance, under Indian law only three kinds of instruments are recognized as negotiable
instruments. These are Bills of exchange, promissory notes and cheque.

In America, the uniform commercial code (here in after referred to as UCC), which is adopted
by most states, specifies four types of negotiable instruments, these are: drafts (Bills of
exchange), cheques, promissory notes and certificates of deposit (CDs).
Question 2

In America every State has its own law applicable to negotiable instruments. Can the Regional states in Ethiopia adopt their own law on negotiable instruments?

Now let’s turn to classification and types of negotiable instruments recognized by our commercial code. As stated in the definition part of this note, Ethiopian law has adopted a very broad definition and types of negotiable instruments. Art 715, after defining negotiable instruments, states that the law in particular recognizes three types of instruments as negotiable; these are
  a) Commercial instruments
  b) Transferable securities
  c) Document of title to goods

Question 3

How do you evaluate the terminology used in Art 715(2) which states “in particular”? Does it mean that there is a possibility that an instrument apart from the three categories may also qualify as negotiable instrument? If yes, what other instruments can you mention outside of the three named instruments?
Question 4

Compare the types of negotiable instruments recognizable under Indian and American law with those enumerated in art 715(2) what difference (s) can you suggest regarding their scope?

The three main types of negotiable instruments mentioned in art 715(2) should first be defined and classified to understand their exact nature and meaning.

A) Commercial instruments

Commercial instruments usually referred to as commercial papers could be shortly defined as instruments other than cash, entitling the payee or the holder payment of a specified amount of money. A closer definition is given in Art 732(1) of the commercial code which reads: “Commercial instruments are negotiable instruments setting out an entitlement consisting in the payment of a sum of money”

From Both definitions one can clearly understand the exact scope of commercial papers. The right contained in a commercial instrument is always payment of money and money only. An instrument entitling the holder to property rights or any other right than a sum of money could not qualify as a commercial paper. Even though Art 732 (1) clearly indicates the true nature of commercial papers i.e. their entitlement of the holder to payment of a sum of money, contradicts itself by the wider recognition it gives to the different types of commercial instruments in Art 732 (2). This Article, enumerating the types of commercial instruments states “Bills of exchange, promissory notes, cheques, traveler’s cheques and warehouse goods deposit certificates” shall be considered as commercial instruments under the code. A travelers cheque is a different type of cheque hence, the classification can be reduced to four
categories i.e. bills of exchange, promissory notes, cheques and warehouse goods deposit certificates.

Questions 5

What is a warehouse goods deposit certificate? see arts 2813-2824 of the civil code. Clearly this instrument does not fall under the definition given to commercial instruments in art 732(1). Explain why a warehouse goods deposit certificate can not be considered as a commercial instrument?

Bills of exchange, promissory notes and cheques are regarded as commercial papers in most jurisdictions. A definition and a specimen of these instrummers is given herein below. The best way to define any negotiable instrument is through the basic elements constituting it’s validity. The commercial code without providing any formal definition enumerates the basic requirements of bills of exchanges, promissory notes and cheques in art 735, 825 and 827 respectively. At this stage without going to the detail requirements of each instrument we shall summarize each element and attempt to generally provide common requirements.

Bill of exchange (draft)

A bill exchange (called draft in some jurisdictions) can be defined as “any instrument drawn on drawee that orders the drawee to pay a certain sum of money usually to a third party (the payee) on demand or at a definite future time “

Section op 5 of the Indian Negotiable instrument act of 1881 also defines it similarly in the following way.

“A Bill of exchange is an instrument in writing containing an unconditional order, signed by maker, directing a certain person to pay sum of money only to, or to the order of a certain person or to the bearer of the instrument”
Black’s law dictionary also defines a Bill of exchange as “An unconditional written order signed by one person (the Drawer) directing another person (the drawee or payer) to pay a certain sum of money on demand or at a definite time to third person (the payee) or order.”

All the above definitions, although slightly employ different words, could be regarded as the correct definitions, of Bills of exchange.

**Question 6**

Compare the three definitions and clearly indicate the common elements and what is missing from any one of the definitions?

As you can see from the above definitions there are three parties in Bills of exchange. These are the Drawer, Drawee and payee. The maker of a bill of exchange is known as the Drawer. He is the party that initiates a bill of exchange, thereby ordering the drawee to pay. The person who is ordered or directed to pay is called the Drawee. He is the party who receives order from the drawer to make payment to the payee. A payee is the person who will receive the money. In other words, he is the party to whom the instrument is made payable.

The nature of the order given by the drawer or the nature of the right to be received by the payee is only a right expressed in terms of money. The money to be paid should be fixed or certain. Regarding the time of payment, the payee will collect the money at the time clearly specified by the drawer. The time may be on demand i.e. immediately after the issuance of the Bill or it may be at a future time which is exact or definite.
Specimen of a Bill of exchange

1-1-1999

To Denbegnaw Hisabu
Jigjiga
Pay to Fitsum Fiker order
2,000.00 Br (Birr two thousand) one
month after Date.

Genanaw Tibebu
Dire Dawa
(Signed)

Payee

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Cheque

A cheque (in America written as check) is a bill of exchange drawn by a drawer ordering the
drawee bank or financial institution to pay a certain amount of money to the holder on
demand. A similar definition is given in section 6 of the Indian negotiable instruments act of
1881 reads,
“A cheque is a bill if exchange drawn upon a specified banker and payable on demand.”
Lastly black’s law dictionary defines it as” A bill of exchange signed by the maker or drawer
drawn on a bank, payable on demand, and unlimited in negotiability “

Question 7

Compare the definitions given to a bill of exchange and cheque and list down the basic
differences between the two.
All the above 3 definitions of a cheque, unanimously recognize it as one type of Bill of exchange, hence the meaning given to a bill of exchange is similarly applicable to cheque. However, as indicated in the above definitions there are also peculiar characteristics which distinguish a bill of exchange from a cheque. Firstly the Drawee of a cheque is always a Bank. Any other person or organization is excluded from accepting order and make payment on a cheque. This element is clearly provided in Art 829 of the commercial code which limits the drawee on a cheque to only a banker or an institution or establishment regarded by law, as a banker.

Secondly, the special feature attached to cheque is the time of payment. A cheque could only be paid on demand or at sight or presentment. The holder of the cheque has the right to immediately cash it without the need for waiting any further time. The same idea is conveyed in Art 854 of the commercial code which states that a cheque is payable at sight. The term “at sight” means on demand or the moment it is presented.

Promissory note

A promissory note is a written promise made by one person (the maker) to pay a fixed amount of money to another person (the payee or a subsequent holder) on demand or a specified date. Section 4 of the Indian negotiable instruments act of 1881 defines promissory note as “an instrument in writing (not being a bank note or currency note) containing an unconditional
undertaking signed by the maker, to pay a certain sum of money only to, or to order of a certain person, or to the bearer of the instrument.” Lastly the definition given by black’s law dictionary reads: “a promissory note is a written promise by one party (the maker) to pay money to another party (the payee) or to bearer.

Question 8

Compare the definitions given to promissory note with that of bill of exchange. Then list down all the differences between the two.

A promissory note (sometimes shortly referred to as note) is a two party instrument unlike a bill of exchange and a cheque which are three party instruments. The person who makes the promise to pay is called the maker (or the promissory). He is the one who promises to pay a fixed amount of money to the holder. He is the debtor and must sign the instrument. The person who will get the money (the creditor) is called the payee (or promisee). Apart from the fact that in promissory notes, there is only promise from one party to another, unlike order given to 3rd party in case of bill of a bill of exchange and cheque, the other requirements as to statement of fixed amount money & time of payment, and designation of payee are equally applicable to promissory notes.

Specimen of a promissory note

1-1-2000 E.C.

I promise to pay to Tinishu Yibelatel
Or order the sum of Birr 750 on 6-5-2000 E.C

Tileku Ashenafi (signed)
Question 9
Read the following famous saying by an American jurist John B. Gibson (1780-1853) “A negotiable bill or note is a courier without luggage.” what do you understand from the statement?

1.3 Basic Requirements for Negotiability

Every negotiable instrument to qualify as such must meet special requirements relating to form and content. These are mandatory requirements for the validity of the instrument. The absence of any one of such requirements renders the instrument non negotiable. On the other hand if it fulfills, it becomes negotiable i.e. transferable from one person to another person by delivery. The term ‘negotiability’ here refers to the capacity of the instrument being transferred by delivery or endorsement and simultaneously entitling the transferee rights and entitlements emanating from the instrument. When there is a valid negotiation the right and the document together, pass on to the transferee. As you can see from article 715(1), this very essence i.e. inseparability of the document Vs the right, is used as a key element in defining negotiable instruments by the commercial code.

The general part of the commercial code (articles 715-731) does not provide any common standard by which the negotiability of negotiable instruments can be measured. Rather it only provides specific requirements applicable to bills of exchange, promissory notes and cheques. Since all these instruments are commercial papers, we will in general examine the basic requirements applicable to all, at the same time comparing and contrasting them with the specific requirements of each instrument. The negotiability requirements of bills of exchange, promissory notes and cheques are indicated in article 735, 823 and 827 respectively.
Question 10
Read articles 735, 823 and 827 thoroughly. Then list down the common elements applicable to all of them.

A— Written Form

Negotiable instruments must be in written form. Clearly an oral order or promise can create the danger of fraud or make it difficult to determine liability. Negotiable instruments must possess the quality of certainty only formal, written expression can give. The mode of writing can be handwritten, typed or printed.

We don’t find any explicit requirement of writing in the commercial code provisions. However articles 735, 823 and 827 impliedly require the instrument be in writing. All these articles begin by the phrase “…shall contain” and then enumerates the specific requirements. these specific requirements statements to be written by the drawer or maker. Hence the code makes it apparent that an oral order or promise could not be considered as a commercial instrument. Additionally article 715 defines a negotiable instrument as “any document”, making it clear that only a written instrument may qualify as negotiable.

There are practical limitations concerning the writing and the substance on which it is placed. The writing must be on material that lends itself to permanence. Instruments carved in blocks of ice or recorded on other impermanent surfaces would not qualify as negotiable instruments.

The writing must also be portable. If an instrument is not portable, it can not meet the requirement that it be freely transferable. For example Abera writes on the side of a dog “I Abera promise to pay Almaz or order 1,000 birr on demand.” Technically this meets the
requirements of a negotiable instrument, but as a dog can not easily be transferred in the ordinary course of business, the instrument is non negotiable.

Permanence and portability are not spelled-out legal requirements under the commercial code. If disputes related to permanent and portability are brought before our courts the judge has to construct whether a given instrument is negotiable or non negotiable, guided by the undraping role and function of instruments in facilitating business transaction. Avoiding risk of loss and making business easy and simple, that is the overall relevance of instruments. Moreover, the judge should also take into account the intention of the parties, custom of business in the area and other relevant circumstances attached to the case and rules of interpretation which could help him reach at correct and fair conclusion.

**Question 11**  
When we think of a cheque, we normally envision a preprinted form with the “normal” terms and phrases on it, including the bank’s name and address, “pay to the order of,” and so on. The commercial says nothing to indicate that negotiable instrument must be typed or printed or placed on any specific of material, a part from the fact that it impliedly requires that it be in writing.

It is also silent as to whether the writing must lend it set to germane, and the writing must be portable.

Do you regard the following cheques as valid or negotiable provided the written content fulfills all the requirements of Art 827?

a) cheques written on
   - naplans
   - menus
   - tablecloths
   - shirfs
   - an egg shell
   - a water melon
   - on your registration slip/grade report
   - on a greeting card
B-Signature Arts 735(h),823(g),827(e)

The issue of signature is very important in the law of negotiable instrument, because it has varying implication for each party starting from issuance of the instrument to each successive stages of the negotiation. First of all signature by the maker or drawer makes the instrument valid and binding creating duties on the person who initiates it and immediately creating rights upon delivery to the holder. Secondly, it has to be emphasized that the key to liability on a negotiable instrument is a signature. Every party who signs a negotiable instrument is either primarily or secondly liable for payment of that instrument when it comes due.

Having said so, let’s examine as to who should and how a negotiable instrument should be signed so as to be called a valid instrument. Generally for an instrument to be negotiable, it must be signed by:

1) the maker if it is a promissory note (Art 823(g)
2) the drawer if it is a Bill of exchange or a cheque(Arts 735(h) and 827(e) respectively.)

If a person signs an instrument as the agent for the maker or drawer, the maker or drawer has effectively signed the instrument, provided the agent has the appropriate authority.

In general terms Art 734(1) of the code requires Declarations made by commercial instrument to bear the signature of the person making it (i.e. the maker or the Drawer) since a negotiable instrument create a duty on the person signing on it, it is self evident that he should have legal capacity to perform juridical acts.

Determining what constitutes a signature, in some cases may become difficult. The word signature includes” any symbol exempted or adopted by a party with present intention to authenticate a writing. Art 734(1) after imposing a general requirement of signature with out defining “signature” typically acknowledges that signature may be made by a hand written mark or by mechanical process such as stamp. However a thumb mark by a physical person unable to sign, should be verified by an authentic declaration to bind that person. [(Art 734(3)]. Although this rule seems applicable to a physical person unable to sign, it has to be
similarly applicable to any physical person even literate and able to sign, as far as he chooses a thumb mark as his signature.

The rules in Art 734 are limited to the manner of making signature, they do not indicate as to what a mark, word or symbol could be validly called a signature. Hence as far as it unequivocally manifests the intention of the maker or drawer, a very brand interpretation should be given as to what mark, symbol or may be properly called as signature. According to the American uniform commercial code any name, including a trade or assumed name, word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing is regarded as a signature. Thus, initials, an x mark, a trade name or assumed name is sufficient.

The Location of the signature on the document is unimportant, though the usual place is the lower right hand corner. Although, there is no clear indication as to the right location of the signature in the commercial code any mark or symbol on the body of the instrument should be regarded as a valid signature. The intention of the person putting his signature on the instrument and avoiding any uncertainty should be taken as key factor in determining the validity of any signature.

C-Unconditional promise or order to pay – (Art 735(b), 823(b), 827(a))

For an instrument to be negotiable, it must contain an express order or promise to pay. A promise is simply a pledge to transfer money. For the purpose of negotiable instruments a promise must be express and unconditional. A mere acknowledgement of debt, which might logically imply a promise, is not sufficient to constitute valid promise. The promise must be an affirmative, not acknowledgment.

Example:

“Ato Zinabu, I.O.U Br 1,000”. Here I.O.U stands for , “I owe you.” This is only an admission of indebtedness or acknowledgement of debt. There is no promise to pay and there fore the instrument is not a promissory note.
Question 12
Is the following instrument a valid promissory note?

“I promise to pay br 1,000 to the order of Ato Adunga (the seller) for the purchase goods from him.”

Order that is associated with three party instruments i.e. bill of exchange & cheque can be defined as command to another to transfer money. An order instrument orders, or directs, a third party to pay the instrument as drawn. It must be more than an authorization or request.

When the drawer issues a cheque, the word pay (to the order of a payee) is a command to the drawee bank to pay the cheque deducting from his account when presented. The order is mandatory, but sometimes it may be written in a courteous form with words “please pay” or “kindly pay”. The bottom line is the language used by the drawer must be a precise and express one.

Question 13.

Is the following instrument a cheque?

Commerical Bank of Ethiopa
Harar Branch
I wish you would pay Ato Amsalu Birr 1,000 or order.
Gelila Tilahun
(signed)

D-Unconditionality of promise or order

A negotiable instrument’s vitality as a substitute for money or as a credit device would be dramatically reduced if it had conditional promises attached to it. It would be expensive and time consuming to investigate conditional promises or orders and therefore the transferability of the negotiable instrument would be greatly restricted. Substantial administrative costs also would be required to process conditional promises. Furthermore, the payee or the holder of the instrument would risk the possibility that the condition will not occur.
Examples:-

i. “I promise to pay X Birr 3000 deducting there out any money which he may owe me”

ii. “Pay to Y Birr 1745 on D’s Death provided D leaves you enough money to pay him.”

iii. “I promise to pay Z Birr 400, seven days after K’s marriage”

All the above instruments are not negotiable because the promise and order is coupled with a condition. No one could safely purchase the instrument without investigating whether the conditions have materialized. Even then, the facts disclosed by the investigation might be incorrect. To avoid such problems Arts 735 (b), 823(b) and 827(a) of the commercial code provide that only unconditional promises or orders can be negotiable. However when it comes to what constitutes an unconditional instrument the code is silent.

According to Indian law promise to pay at a specified time or at a specified place or after the occurrence of an event which is certain to occur, or payment after calculating interest at a certain rate is regarded as negotiable.

Example:-

i) “I promise to pay Birr 1,000 on January 1st, 1980.”

ii) “I promise to pay X Birr 125 on demand at Dire Dawa.”

iii) “I promise to pay Z Birr 500 seven days after the death of C”

Question 14

Read Art 735 (d & e) , 823 (c & d), 827 (c ), Art 769 & 825 (1) (b), can a commercial paper indicating specified time or specified place for payment and or making the payment conditional upon an event certain to occur (like the example given in iii above) be regarded as a valid instrument? State your reason(s).

The uniform commercial code specifying what constitutes an unconditional instrument states
“A promise or order is unconditional (and negotiable) unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing or (iii) that rights and obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.”

 Although the UCC provides a broader definition of what is ‘unconditional’ it recognizes certain conditions which do not make the instrument conditional to prevent certain necessary conditions commonly used in business transactions. One such condition is statements of consideration. The instrument may state the terms of the underlying agreement or refer to the condition paid for.

For instance, the words “as per contract” or “this debt arises from the sale of goods X and Y”

**Question 15**

Read Arts 800
Do you think stating the underlying contract giving rise to the issuance or negotiation of the bill, makes the Bill of exchange conditional, hence non negotiable? Why?

The UCC also provides that mere reference to another agreement does not affect negotiability, if, however the instrument is made subject to the other agreement it is rendered non negotiable. A statement that an instrument’s payment is secured by collateral will not render an otherwise negotiable instrument non negotiable.

The UCC states that if the terms of an instrument provide that payment can be made only out of particular fund or source, such terms will not render the instrument conditional, it remains negotiable. It allows market forces to determine whether the instrument will be marketable. A note dated march 3, 1995, for example, reads. “Gilbert corporation promises to pay to the order of the Miami Herald Br, 500 on demand, payment of said obligation is restricted to
payment from accounts receivable.” In this case, payment is restricted to one particular source i.e. account receivable.

Lastly, a simple statement in an otherwise negotiable note indicating that the note is secured by mortgage does not destroy its negotiability. However, it should be noted that the statement that a note is secured by mortgage must not stipulate that the maker’s promise to pay is subject to the terms and conditions of the mortgage. Art 729 of the com. Code in a similar fashion, states that an instrument may contain an endorsement in pledge indicating to the effect that the instrument is secured by a pledge. Although the title of Art 729 refers to cases of pledge, the sub article clearly shows that it is similarly applicable to pledge. However, article seems applicable only at the time of endorsement which does not cover inserting similar statements at the time of issuance by the drawer or maker. The wording of Art 729 is not intended to govern the case of condition at all. The message conveyed by the article is about one form of endorsement called restrictive endorsement.

E--- A Fixed Amount of money

The amount of money to be paid by a negotiable instrument should be fixed and stated with certainty. If the instruments’ value were stated in terms of goods or services, it would be too difficult to ascertain the market value of those goods and services at the time the instrument was to be paid. Art 735(b), 823(b) and 827(a) all require that commercial instruments be paid wholly in money. “Money” here refers to any medium of exchange adopted as currency by Ethiopia or foreign government. The fact that in Ethiopia commercial papers may state the amount of money in a foreign currency can be inferred from Article 777, (Bills of exchange) and Article 862 (cheque). However, there is no such reference with respect to promissory notes making it difficult to consider it as negotiable if the amount of money is stated in a foreign currency. (Still the mistake could be attributable to ‘bad’ drafting)

If the amount on the bill of exchange or cheque is payable by a foreign currency, the drawee has an option to make payment through the stated foreign currency or the equivalent value in terms of Ethiopia Birr. The rate of exchange as a matter of principle is to be calculated according to the rate on the date of maturity. Since cheque is payable on demand, the rate will
be calculated according to the rate at the time of payment i.e. on the date of presentment. Whenever there is a default by the drawee to pay a Bill of exchange at maturity or to pay a cheque on the date of presentment, the holder at his option may demand payment according to the rate on the day of maturity or the day of payment in case of Bill of exchange, and with respect to cheque according to the rate on the day of presentment or day of payment.

The amount on a commercial instrument can include stated amount of interest. In the absence of any indication as to the rate of interest (For example if it simply states “with interest”, no interest will be payable (see Arts 739, 825(2) and Amharic version of Art 836.) The commercial code deviates from the general provisions of contract with regard to the effect given to statement such as “with interest “ or “legal interest” while Art 1751 and of the civil code clearly recognize agreement by the parties stated as “interest “or “legal interest “as bearing 9% interest on the total sum. Contrary to this, the commercial code does not give effect to interest unless the rate is specified by the parties (Art 739 (2) and 825.) The code also limits payment of interest even if the rate is specified on the Bill of exchange and promissory note unless they are payable at sight or at a fixed period after sight (Art 739(1) cum 825(2). It will be difficult to reasonably justify why interest rate specified on the remaining types of instruments (i.e. payable at a fixed period after date and payable at a fixed date) is excluded by the code. The same can be said with respect to prohibition of speculation of interest in cheques. (see article 836 of the Amharic version of the code) In all instruments irrespective of the time of payment it is possible to calculate interest staring from the date of the instrument or some other date specified by the drawer or the maker. Art 739(3) clearly applies this same mode of calculation of interest. Hence it can safely be argued that the limited approach followed by the code to interest on negotiable instruments is not due to any logical and practical problems emanating from business transactions.

**Question 16**

Determine in which of the following instruments does the statement of the amount make it non negotiable.

a) “I promise to pay B Birr 769 and all other sums which shall be due to him”

b) “Pay Z or order some money sufficient for his education”.

22
c) “pay M or order Birr 250 including 9% interest three months after Date”

F. Payable on Demand or at a definite time Arts 735(d) 758,759,769,825)

The commercial code after generally stating the requirement of specification or indication of the time of payment of Bills of exchange and promissory note (Art 735(d) cum 823 (c), lists down four types of time of payment in Art 769 cum Art 825(b). The time of payment for cheque is always on demand or at sight (Art 854).

Generally speaking a commercial instrument may be payable a) on Demand or b) at a definite time. Clearly to ascertain the value of a negotiable instrument it is necessary to know when the maker, drawee or accepter is required to pay. It is also necessary to know when the obligations of secondary parties will arise. Further it is necessary to know when an instrument is due, in order to calculate interest (If interest is specified on the instrument) and also to determine when the period of limitation may apply.

A) Payable on demand

An instrument may be payable on demand in two cases. First when it says nothing about when payment is due. [736(a), 824(a)]. Secondly, when the instrument expressly states that it is payable “on demand”, “at sight” or “on presentment.” A cheque is always regarded by law as payable on demand or at sight (Art 854). It is by definition a demand instrument. When an instrument is payable on demand, the holder is entitled to collect payment any time he presents it to the drawee. However, he must present it within the period of time prescribed by law for presentment. For instance Bill of exchange and promissory note payable at sight or on demand should be presented for payment within a year of their date (Art 770(a) an 825(1)(b)] This time may be shortened both by the drawer and the endorsers. However, only the drawer can extend this one year period of time. He can also prohibit presentment before a fixed date.
Example
Pay X or order Birr 1,000. Do not present before 3-6-1996.

In the above instrument the holder is not entitled to present it for payment before 3-6-1996. He can present it at any time within year after the expiry of 3-6-1996. According to art 770(2) the one year period for presentment shall run from 3-6-1996. The period of time for presentment for payment of a cheque is six months. The law requires that it should be presented within six months (Art 855). Unlike Bills of exchange and promissory notes the drawer or subsequent endorsers are not given the right to shorten or extend this period of time. The 6 months period shall run from the date written on the cheque. A cheque dated 1-6-1999 may be actually be issued (be delivered by the drawer to the payee) on 1-4-1999. since the 6 months period runs from 1-6-1999 the last date of presentment will be 1-12-1999.

B) Payable at a definite time

If an instrument is not payable on demand to be negotiable it must be payable at a definite time specified on the face of the instrument. The maker or the drawee is under no obligation to pay until the specified time. Art 769(1) of the code enumerates 3 types of a definite time.

C) Fixed period after sight

This refers to a definite period of time starting from the time it is presented to the drawee for acceptance. The exact time is calculated by first determining the date of presentment for acceptance. Such types of instruments are required to be presented within one year of their date save any change by the drawer or endorsers (Art 759)

Example
Pay to the order of Almaz 3 months after sight

The time of payment of the above instrument is 3 months after it is presented by Almaz to the drawee for acceptance.
D) Fixed period after Date
The period of time in this case runs from the date appearing on the face of the instrument.

Example
Pay Gebru three months after date. Let’s assume this instrument is dated 27-03-2005. Hence the date of payment will be 3 months from such date which is 27-06-2005.

E) Fixed date
A fixed date refers to an exact future time indicated by the drawer for payment

Example
Pay Almaz or order birr 100 on January 1,1981.

G- Payable to order or Bearer

The very essence of a negotiable instrument lies in its transferability. Its payment is not limited to the one whose name is specified but extends to any other person designated by the first specified person. So as to assure proper transfer, the instrument must be “payable to order or to bearer “at the time it is issued or first comes into the possession of the holder. If an instrument is neither order nor bearer paper, then it is non negotiable and there fore only assignable and governed by contract law.

Order instruments
An instrument is payable to order if is payable
i) to the order of an identified person or e.g. “pay to the order of zinabu or order”
ii) to an identified person or order e.g. “pay to zinabu or order”

The General part of the code dealing with negotiable instruments (Art 719,721,724) makes a reference to bearer and order instruments. But the manner the instruments becomes bearer or order. There is no clear indication the code.

The specific rules governing Bills of exchange and promissory note (Arts 735(f)(823(e) require that both instruments should indicate the name of the person to whom it is payable or a statement
that the note is payable to Bearer. Art 827 which enumerates the valid requirement of a cheque does not have any similar provision like to Art 735 (f) and Art 823 (e).

A cheque, if not payable to order or bearer cannot be considered as negotiable instrument. As stated above the very essence of any negotiable instrument lies in its transferability. The words “to order” or “to bearer” are the element which make the instrument negotiable. An instrument payable to x or order is payable to x or any other person designated by X. If it is payable to bearer, the person who happens to be in possession of the instrument will be entitled to collect payment.

Deviating from some other jurisdictions the code gives effect not only to “order” and ” Bearer ” instrument but also considers a commercial instrument payable to a specified name with out any qualifying words “to order” or” to the order of” as negotiable. (Art 735(f),823(e), 842(1)

**Example**

“Pay to Fikadu “or” I promise to Zinabu” is negotiable under Ethiopian law but not according to Uniform commercial code.

Any other instrument other than “to a specified person” to order or to bearer is non negotiable.

**Example**

i) Pay to Hussein Ahmed only

ii) Pay to Hussein Ahmed, not to order.

In the first case payment of the instrument is limited only to Hussein Ahmed. He cannot negotiate or transfer it to any other person. Similarity in the second example the drawer of the instrument has clearly limited its negotiability by expressly inserting the words “not to order” In both examples the instrument could be transferred to another person only through Assignment, which is governed by the general provisions of contract (see Art 746(2), 825(1)(a), 842(2) Transfer by Assignment entitles the transferee only those rights of the transferor. Whereas transfer through negotiation gives a better title to the transferee provided he takes the instrument in good faith and for value.
Bearer instruments

A bearer instrument is an instrument that does not designate a specific payee. The term bearer refers to a person in possession of an instrument. The maker or drawer of a bearer instrument agrees to pay anyone who presents the instrument for payment. The commercial code in general makes reference to ‘bearer instruments [(see Articles 721,735(7),746(1),823(e),825(1)(e),833(1),(c ) ]. What constitutes ‘bearer instrument’ is not dealt by the code.

Generally any instrument containing the following terms is a bearer instrument:

- “payable to the order of bearer.”
- “Payable to Almaz or bearer”.
- “Payable to bearer”
- “Pay cash”
- “Pay to the order of cash”

The above 6 requirements are the basic minimum standard to make a certain instrument negotiable. The commercial code expressly or impliedly requires the fulfillment of all the requirements, even though it does not provide common requirements applicable to bills of exchange, promissory notes and cheques. It only lists down list of factors for each corresponding type of commercial instrument.

To avoid unnecessary controversy the code has followed a very cautious approach to validity requirement for negotiation by imposing additional mandatory criteria other than mentioned above. Art 735 (a), 823(a) make it mandatory that the terms “Bill of exchange” and “promissory note” be in the body of instrument (i.e. Bill of exchange and promissory note respectively). if it is to be considered as negotiable. No such requirement is provided for cheque. Although such designation may be taken as an asset avoiding any subsequent confusion, it will not help to settle real disputes.
Example.

| “Promissory note” to Zinabu Zenebe | 1-2-2000  |
| Kombolcha       |           |
| Pay to Damenaw Damene or order Br 500 |     |
| 2 months after Date |    |
| Tsehay Esatu     |       |
| Harar             |       |
| (signed)          |       |

Is the above instrument a promissory note or a Bill of exchange?

Is it a negotiable instrument? Clearly if we rigidly stick to the requirements of Bill of exchange in Art 735, it can not be qualified as such, since what should be written in the body is the term ‘Bill of exchange’ not ‘promissory not’ It is also not a promissory note, since it does not fulfill any of the requirements in Art 823. Strict interpretation will also lead to the conclusion that the instrument is not a negotiable instrument. Hence the designation requirement in Art735(a) and 825(a) has not served any practical purpose here. The law should bother only to the Declaration of intention by the parties i.e. maker or drawer and determine whether this declaration constitutes a Bill of exchange, promissory note or cheque. In other words, it is the law, which should give a name to the instrument not the parties.

1.3.1 Rules of Construction

( Factors not affecting Negotiability)

The essential validity requirements of a negotiable instrument must be fulfilled cumulatively to make it negotiable. Absence of any one of the factor makes the whole instrument non negotiable or invalid. However there are certain ambiguities or omissions which do not affect the negotiability of the instruments. The commercial code provides rules for clearing up ambiguous terms. However, in some instances there are no specific provisions; hence any gap should be filled through interpretation.
A. Joint notes and bills

As a matter of principle, the code requires that the maker, drawer, drawee and payee of a commercial instrument be specified. All these persons except the payee should have contractual capacity to bind themselves by a commercial instrument (Art 733). The payee as far as he does not transfer it to another person through endorsement can validly be a minor or any other person lacking capacity. Capacity is required according to Art 733 to create an obligation, not to be a recipient of right or be a beneficiary. For example a bill of exchange issued to minor is a valid & negotiable instrument. This being the case the code is silent as to the possibility of more than one maker, drawer, drawee or payee. To have an idea, let’s examine the following instruments.

i. I promise to pay X and Y or order Br 500
   To Almaz and Abera

ii. Pay X or order Birr 500 2 months after Date. Commercial Bank of Ethiopia.
    To Harar Bank

iii. Pay X or order Birr 500
    Hana (signed)
    Getachew (signed)

In the first case the promissory note is issued jointly in favor of X and Y. Abera and Almaz are jointly ordered to pay by the drawer in the 2nd example, hence they are joint Drawees. In the last example a cheque was issued by joint drawrs, Hana & Getachew. In the absence of any provisions in the commercial code governing such cases, one has to look for an answer in the general rules of contract. Art 1896 of the civil code co-debtors have joint and several liability. Therefore the joint drawee in the second example and the joint drawers in the 3rd example will assume joint and several liability, and the instruments are valid and negotiable, in the 1st example the promissory note is issued in favor of X and Y making them according to Art 1910 of the civil code joint creditors. Joint creditors are not entitled to claim payment jointly and severally. Each joint creditor may require the maker or drawer of the instrument to pay him half of the total amount. (Art 1911 (2) civil code)
B- Date

The date when the instrument was made is one of the negotiability requirement in Articles 735(9), 823(f) and 826(d). The code does not make any exception to undated Instrument. The date of an instrument is necessary to determine a definite time for payment and to calculate interest, if there is any specification of interest rate. If the instrument is a demand instrument date may not be necessary to determine the time of payment of the instrument. But even in demand instrument date is necessary to determine whether it is overdue or not. An instrument becomes overdue if it is presented for payment after the expiry of the period of time provided by law for its presentment. A Bill of exchange or a promissory note payable at sight should be presented within a year of its date (Articles 770 and 825 (1) (b)]. Similarly a cheque should be presented within six months of its date. Unless the instrument contains a date it will be impossible to determine whether the payee or the holder has presented it with in one year or six months.

Therefore, the conclusion we should reach concerning Ethiopian law is that an undated commercial instrument is not negotiable. According to Indian law a negotiable instrument without a date is not necessarily invalid. If the legal requirements for the validity of an instrument are fulfilled, the instrument is valid and the date of execution can be proved by oral or other evidence. The holder in due course or the payee can insert the true date on the instrument and such insertion is not considered to be a material alteration. According to the uniform commercial code, unless the date of instrument is necessary to determine a definite time for payment, the fact that an instrument is undated does not affect its negotiability.

The stringent rule of the commercial code regarding date is also relaxed in some exceptional circumstances. An undated Bill of exchange, promissory note or cheque at the time of issuance, becomes valid or negotiable, if a date agreed by the maker or drawer to be filled in, is inserted by the payee or subsequent holder (Arts 744, 825(2), 841)
**Example**

On January 1, 2006, Ato Abera issues an undated cheque to Almza or order. Abera has clearly informed Almaz that she should write the date on the cheque as “January 26, 2006”. Almaz by inserting this agreed date can make the otherwise non-negotiable cheque, negotiable.

In the absence any clear instruction by Abera as to the date, Almza should write the true date of issuance of the instrument (i.e. January 1, 2006) the silence of the drawer constitutes an implied agreement that the true date of issuance will be inserted.

Sometimes, for different reasons, the payee or holder may write a date contrary to the one expressly agreed to by the maker or drawer. For instance Almaz may write the date as “February 19, 2006”. In this case Article 744,825(2) and 841 tell us that this fact may be raised as a defense against the one who wrote contrary to the agreement (in our example against Almaz.) The defense is not to make the instrument invalid but should be limited to issues attached to date of payment. Hence insertion of a date contrary to the agreement may be raised by Abera against Almaz, if there is any dispute regarding time of payment, time of presentment (whether it is overdue or not) or calculation of interest, if any.

The defense could be raised only against the person who wrote the instrument and any subsequent holder who acquires it in bad faith (for instance one who has knowledge that a different Date was inserted by Almaz). It could not be raised against the holder in due course meaning the person who acquires it in good faith and without knowledge.

**Postdating or antedating**

A postdated instrument is one that bears a date after the date of its issue and is payable on or after the stated date.

**Example**

On Meskerem 6, 1996, Ato Hussein issues a cheque dated Hidar 27,1996. This instrument is a postdated cheque. It will be payable to the payee or holder on Hidar 27, 1996 or anytime after Hidar 27,1996 up to the following six months (which is a period of time of its presentment). An antedated instrument (which is the opposite of postdated) is one that bears a date before
the date of its issue and is payable after the stated date. In the example given above if Ato Hussein on Meskerem 6,1996, issues a cheque dated Hamle 19,1995, The cheque will be payable on Meskerem 6, 1996 (i.e. on the date of issuance, because it is a demand instrument) or any time after Meskerem 6,1996. For the purpose of calculating the period of time for presentment (i.e. 6 months) the time runs from Hamle 19,1996 not from Meskerem 6,1996.

Generally post dating or antedating an instrument does not affect its negotiability. The code limits the applicability of this rule only to a Bill of exchange (Art 745) without providing any similar provisions for promissory note and cheque. No justifying ground can be given as to why the law fails to provide the effect of postdating and antedating in case of cheque and promissory note. This gap should merely be considered as a drafting mistake, which should be filled by the legislature though amendment.

D. Place of payment

Like the time of payment, indication on the instrument as to the place of payment is necessary to determine Discharge of obligation by the drawee or maker and also to determine whether there is proper presentment for payment or Acceptance (in Bill of exchange) by the rightful holder or owner of the instrument. Articles 735(e) & (g), 823(d) & (f) and Art 827(c) & (d) all similarly require that a bill, a note or a cheque should indicate the place of payment and place of issuance. In the absence of any clear indication as to place of payment and place of issuance the law provides a presumption to such place. Hence a Bill of exchange which does not indicate its place of payment shall be deemed to be payable at the place mentioned beside the name of the drawee and such place shall be simultaneously be considered as the place of domicile of the drawee (Art 736 (b). The same rule applies to a bill which does not mention the place of its issuance. In this case the Bill shall be deemed to be drawn in the place mentioned beside the name of the drawer (736(c). For a promissory note, the law deviates to some extent and makes the place where the instrument is made both as the place of payment and place of domicile of the maker. (Art 824(b)). With regard to cheque the same rule i.e. the place mentioned under the name of the drawee is considered as the place of payment. Since the drawee is always a Banker it means that the Branch indicated under the name of principal Bank is the place of payment. Sometimes several branches may be mentioned under the name
of the drawee. In this case the cheque shall be payable at the first place mentioned. (Art 828 (a)) Deviating to some extent from the rule provided for Bills and promissory notes Art 828(b) regards the place of principal establishment of the drawee as the place of payment in the absence of any place mentioned under the name of the drawee. Neither Art 736 nor Art 824 gives us a hint as to the place of payment if there is no place mentioned besides the name of the drawee or the maker. Then it becomes a question whether a bill or a note which does not mention any place or address of the drawee, drawer or maker, can be categorized as negotiable or not.

According to the uniform commercial code when there is no place of payment indicated on the instrument, it is payable at the address of the drawee or the maker stated in the instrument. Such similar rule is adopted by Art 736(b) and Art 824(b). However unlike the commercial code the UCC does not stop there. If there is no address stated, then it is payable at the drawee’s or maker’s place of business. If the drawee or maker has no place of business, then It is payable at the drawee’s or make’s residence. In deciding the negotiability of a Bill or a note it is recommended that the same position should be taken, when there is no place mentioned besides the name of drawee or maker. In such case, the instrument should be taken as negotiable and either the principal place of business or residence of the drawee or maker be taken as the place of payment. This argument is supported by the general provisions of contract, governing place of payment. The general provisions of contract are applicable to any special contract and obligations even though they do not arise out of contract (Art 1676(1) cum 1677 (1) According to general contract, in the absence of any agreed place, payment shall be effected at the place where the debtor had his normal residence at the time when the contract was made (Art 1755(2). Negotiable instruments being special types of contracts, the rule in Art 1755(2) of the civil code should apply whenever there is no place indicated besides the name of the drawee.

E. Discrepancy in the sum payable
A Negotiable instrument is not considered as non negotiable by the mere fact that there is a difference between the sum stated in figures and words. If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid [Articles 740(1),825(2),837(1)]
Example

A promissory note is written as follows. I promise to pay Abera or order Br 500 (five thousand Birr)” The amount payable in this case is five thousand birr.

Repetition of the sum payable also does not render the instrument non negotiable. If a Bill, note or cheque states the sum payable more than once in words or more than once in figures and there is a discrepancy, the smaller sum shall prevail. [Articles 740(2), 825(2), 837(2)]

Sometimes a discrepancy may be created between words that are type written, printed (forms) or Handwritten. The commercial code does not provided express provisions dealing with such cases. According to the uniform commercial code words that are type written prevail over those that are printed (forms), where as handwritten words prevail over both.

Example

If the cheque in printed form reads “pay to the order of”, and the drawer in hand writing insert in the blank, “Abera Alemu or bearer” the cheque is a bearer instrument. The same approach (of the UCC) should be adopted in interpreting Negotiable instruments under the commercial code when the handwritten words vary with those that are typewritten or printed (forms). The underlying justification for such type of approach is giving effect to the true intention of the drawer or maker. However one danger of such approach should also be underlined. Giving effect to those handwritten words to typewritten or printed may tempt the payee or holder to insert a different statement in handwriting than stated by the drawer or maker in type written or printed (forms.)

Interest

The issue of interest has been discussed briefly in the previous section of this note dealing with negotiability requirements. Generally it can be said that not any justifiable reason could be submitted as to the rules of the code governing interest. First of all, the code has allowed specification of interest on a negotiable instrument provided it is a Bill of exchange, or a
promissory note [Art 739 and 825(2)] The Amharic of version of Art 836 (which is missing from the English version) expressly excludes stipulation of interest on a cheque. Even with regard to Bills and promissory note, stipulation of interest is effective provided they are payable at sight or fixed period after sight (Art 739, 825(2)] A provision of interest on Bills and notes payable at a fixed period and fixed period after date is not valid [Art 739(1),825(1)]. Even on a bill or note payable at sight or fixed period effect sight, interest will be calculated when the rate is specified. [Art 739(2) ,825(1)]

Example

Interest will not be calculated on a bill or note written as “… with interest ” or “with legal interest” This rule is totally different from the one adopted by the Indian law of Negotiable act (of 1881) and the uniform commercial code. It also deviates from the provisions of general contact in the civil code. Both Indian law and UCC provide that when a particular interest rate is intended to be paid but is not specified, such as when the instrument simply states “with interest” the interest rate is the legal interest (the judgment rate of interest provided by law) similarly the general provisions (and also special provisions applicable to contract of loan ) provide that interest shall be paid if the parties have agreed as to payment without specifying the rate. In this case the applicable interest rate will be the legal interest which is nine percent per annum (see Articles 1751 and 2478)

1.4 Transfer by Assignment or Negotiation

There are two modes for the transfer of a negotiable instrument. The first one is through Assignment and the second one is through negotiation.

1.4.1 Transfer by Assignment

Normally, a bilateral contract between two parties produces effect only as between the two parties. However, one of the parties may freely transfer the rights arising out of the contract to another 3rd party, who is an outsider to the contract. Such mode of transferring rights is known as Assignment. Shortly stated assignment is the transfer of rights to a third person. The party
making the assignment is the assignor, where as the party receiving the assignment is the assignee.

Art 1962 of the civil code expressly allows the creditor to assign his right to a third party even without the consent of the debtor. Transfer by Assignment gives the assignee only those rights the assignor possesses. In other words the assignee takes only those rights that the assignor originally had. The fact that no better title is transferred through assignment is what basically distinguishes assignment from negotiation. No transfer of better title also implies that the assignee’s rights are subject to defenses that the debtor had against the assignor (Art 1966)

**Question 17**

Read the provisions of the civil code dealing with Assignment of rights (Art 1962 – 1967) and compare them with the rules applicable to negotiation in the commercial code. Then list down all the differences between the two.

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**1.4.2 Transfer by negotiation**

The commercial code apart from providing the rules of negotiation does not define the term negotiation. According to the uniform commercial code Negotiation is the transfer of an instrument in such form that the transferee (the person to whom the instrument is transferred) becomes a holder. Similarly according to Indian law, when a promissory note, bill of exchange or cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated.

A person is said to be a holder if he is in possession of an instrument (1) that is payable to bearer or (2) that is made payable to an identified person and he is that identified person. For example when Haramaya University gives an employee, Almaz Tilahun, a cheque payable “to
Almaz Tilahun or order”, Almaz is the holder of the cheque because she is in possession of an instrument payable to an identified person (Almaz Tilahun) and she is that person. Almaz may then purchase a TV set from seller, and use the cheque as a mode of payment by endorsing (write on the back of the cheque as “pay to seller X” and sign) and deliver it to the seller X. This means she has negotiated the cheque to seller X. Seller X is now a holder of the cheque, because he is in possession of a cheque payable to an identified person(seller X) and he is that identified person. On the other hand, Almaz while endorsing may simply write her name on the back of the cheque (without indicating the transferee) and deliver it to seller X. still Almaz has negotiated the cheque, and seller X is the holder because he is in possession of a cheque payable to bearer. (A simple signature by the payee converts the instrument from order to Bearer.)

If the cheque was initially issued as Bearer or is converted from order to bearer by endorsement, it could simply be transferred by delivery. Assume Almaz delivers a bearer cheque to Hana, Hana now becomes a holder because she is in possession of an instrument payable to Bearer.

As a principle a transfer by negotiation creates a holder who, at the very least, receives the rights of the previous possessor. Unlike an assignment, a transfer by negotiation can make it possible for a holder to receive more rights in the instrument than the prior possessor had. A holder who receives greater rights is known as a holder in due course.

Generally, there are two know methods of negotiating an instrument so that the receiver becomes a holder. The method used depends on whether the instrument is order instrument or bearer instrument. The special part of the code dealing with commercial instruments provides only these two methods of negotiation. Contrary to this, the general part classifies negotiable instruments as Bearer, order and in a specified name (Art 719). As a result a third method of negotiation is provided for instrument in a specified name. (Art 722 & 723.) For two reasons, it can be concluded that, the method of transfer of “in a specified name instrument” is not applicable to commercial instruments.
Firstly, the law expressly considers Bills of exchange, promissory note and cheque issued in a specified name without the words “or to order” as order instruments. Then it clearly stipulates that such instruments will be negotiated though the same rules of negotiation applicable to any other order instruments (Art 746(2), 825(1)(a),833(1) secondly, The requirement of “registration of instrument” referred to in Art, 723, can not in any way be applicable to commercial instruments, which by their very nature do not need any registration for their transfer. . Art 723 has not been mentioned in the special part dealing with commercial instrument making the general provisions inapplicable to the special provisions. For this reasons the applicability of article 722 & 723 should be limited to only one form of negotiable instruments i.e. transferable securities ( see also article 341 which governs transfer of shares, which is a typical form of transferable securities.)

**Negotiating order instruments**

Only the special provisions of the code dealing with commercial instruments indicate what constitutes an order instrument. Accordingly a commercial instrument becomes an order instrument if it is;

i) payable to a specified person or order

**Example**

Pay Ali Yusuf order

ii) payable to the order of a specified person

**Example**

Pay to the order of Ali Yusuf

iii) payable to a specified person

**Example**

Pay to Ali Yusuf.

The formal requirement for negotiating an order instrument is very simple. An order instrument is negotiated through endorsement followed by delivery by the holder of a the instrument. This rule is summarized in Art 724(1) which reads.

“Instruments to order may be transferred by endorsement followed by delivery of the instrument to the beneficiary under the transfer” The special provisions applicable to Bills
of exchange, promissory note and cheque also restate the rule in Art 724 with out any modifications (Art 746(2),825(1),842(1) respectively.)

**Negotiating Bearer instruments**

A bearer instrument is one that does not specify the payee or is payable to a any person who in possession of the instrument.

Example
An instrument drawn in the following manner is a bearer instrument

“Pay”
“Pay cash”
“Pay Ali Yusuf or bearer”
“pay bearer”

Still the rule of negotiation of a bearer instrument can be easily stated. A bearer instruments is negotiated by delivery of the instrument there of. The same has been stated in Art 721 of the com. Code which reads.

“An instrument to bearer shall be transferred by mere delivery” The special provisions also adopt the same rule of negotiation to Bearer commercial instruments. (Art. 746(1), 825(1). However there is no corresponding provision governing a bearer cheque, which may be attributed to faulty drafting This gap may easily filled by applying the general rule in Art 721 to bearer chaques.

The code dose not endeavors to define delivery or describe what constitutes valid delivery. It can be argued that delivery for the purpose of negotiation should be

i) Voluntary

ii) Physical

iii) With the intention of transferring ownership. A person who obtains a bearer instrument by force or coercion should not be considered a holder. The instrument must also be physically delivered to the transferee. Lastly The intention to transfer the
ownership of the instrument must be present. If an instrument is handed over to another for safe custody or for a special purpose (e.g. to a lawyer for filing a suit) the delivery does not amount to negotiation.

Example

X sells goods worth 5,000 birr to Y. Y then offers him a cheque for the stated amount. X returns without physically taking the cheque telling Y to keep it for him so that he will take it after 2 days. In this case there is no negotiation and x can not be considered as a holder.

Negotiating an instrument “in a specified name”

As stated before, Art 722 and 723 which talk about instruments in a specified name are not applicable to commercial instruments. It can be argued, they are not also applicable to Document of title to goods. These articles could be meaningful if one limits their scope only to transferable securities transferable sublimities.

According to article 723 an instrument in a specified name may be transferred either by the entry of the name of the transferee both in the instrument and in the register held by a person issuing the said instrument or it may be transferred by delivering new instrument to the holder specifying his name on such instrument and in the register. The person in possession of such instrument is deemed to be a holder or rightful owner of the instrument if his name is specified simultaneously in the instrument and the register kept by the person issuing such instrument (Art 722). All this makes sense when one compares provisions of Art 722 and 723 to share certificates which are typical transferable securities. Art 325 of the code after classifying shares into bearer and registered shares provides the rule for the transfer of registered shares in Art 723 Bearer shares which are transferable by delivery (Art 325(1) can 340) still could not be covered by the rules in Art 723.
1.6 Endorsement (Indorsement)

1.6.1 Meaning, form and effects

If an instrument is an order instrument the payee or the holder is required to endorse it for a valid negotiation. Endorsement is the placing of a signature, sometimes with additional notation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge payment. This definition gives a very comprehensive meaning of endorsement. The signature is usually placed on the back of the instrument or an a separate paper firmly attached to it (allonge). It’s object may be transfer of ownership to another person or as indicated in the definition endorsement may also be for the purpose of guarantee or it may be to acknowledge payment, for example in case of endorsement by the holder in favor of the drawee. A simple signature may be sufficient to constitute endorsement; however additional notation like the name of the subsequent holder, date or any other additional valid statements may be included. The person who transfers a negotiable instrument by endorsement is known as endorser. A person whose name is specified by the endorser and who receives right from the instrument is known as endorsee.

Example

The following cheque is issued to Abera Tilahun

<table>
<thead>
<tr>
<th>Dashn Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dire Dawa Branch 1-4-1996</td>
</tr>
<tr>
<td>Pay Abera Tilahun or order Br.600 (six hundred Birr)</td>
</tr>
<tr>
<td>Yirga Fanta</td>
</tr>
<tr>
<td>(signature)</td>
</tr>
</tbody>
</table>

Abera Tilahun has two options to enforce his rights arising out of the cheque. He can present it to Dashen Bank and collect Br 600 in cash. Alternatively he may negotiate it to another person. If he simply puts his signature and delivered it to Almaz Fisseha, (Endorsed it to
Almaz Fisseha), she will be the one entitled to collect payment from the Bank. In this case Abera Tilahun is the endorser and Almaz Fisseha is the endorsee.

One purpose of an endorsement is to effect the negotiation of order instrument. Endorsement transfers all the rights of the endorser to the endorsee, including the right to further negotiation, but the right to further negotiation may be restricted or excluded by express words.

The commercial code without defining the term endorsement provides rules governing forms, types and effects of endorsement in the general part and in the special part. The special rules applicable to endorsement of Bill of exchange, promissory note and cheque are more or less repetition of the general part. Actually, there is no need for providing different categories of rules governing endorsement. All these rules could have been drafted in one section of the commercial code.

Article 725(1),748(1),825(1) & 844(1) all provide the form of a valid endorsement. For a valid endorsement it has to be written on the instrument and signed by the maker. As a principle, the provisions do not impose an obligation on the endorser to place his signature on the back of the instrument, it should simply be on the instrument, meaning it could be on the face or on the back. However in one Exceptional circumstance the rule is modified and the law requires the endorser to put his endorsement on the back of the instrument or on a slip affixed there of. This is when the endorser uses a blank endorsement i.e. puts his signature without specifying the payee. (see Article 748(2) & 825(1)(a),844(2).

In general, endorsement on a Bill of exchange, promissory note or cheque may be either on the face, on the back or on a slip attached to it. But if the type of endorsement used by the endorser is a blank endorsement, he can not put his signature on the face of the instrument. If it is on the back, because the back of the instrument will be clean or indicate only successive endorsements it will be clean or indicate only successive endorsement it will be difficult for the endorsee to deny his signature. Signature on the face of the instrument may belong to the Drawer, making it doubtful to determine whether it belongs to the drawer (maker) payee or
subsequent holder. In practice to avoid such doubtful cases it is usually written on the back of the instrument.

The unconditionality requirement to promise or order for the negotiability of the instrument is similarly applicable to endorsements. An endorsement must be unconditional. But, unconditional endorsement does make neither the instrument nor the endorsement void. Only the condition to which the endorsement is made subject becomes of no effect [(Articles 725(4),747(1),825(1)(a) and 843(1)] An endorsement transfers all the rights arising out of the instrument. The endorser can not endorse for part of the money stated in the instrument. Any partial endorsement is null and void (Articles 725(5),747(2),825(1)(a),843(2)]

One more element regarding the validity of endorsement is related to the party who can stand as an endorser. Generally a party to be bound by a commercial instrument should have a contractual capacity. This means, for instance, a minor can not issue an instrument as a drawer or maker. This is equally applicable to his capacity as an endorser. An endorsement by a minor does not created any obligation against him. However, the instrument still retains its negotiability and will be valid as between the other parties to the instrument.

Example

A bill of exchange is issued in favor of Ketema or order. Then Ketema negotiates it in favor of Ababu who is a minor. This minor in turn endorses and delivers it to Fatuma. Ababu does not have any obligation towards the endorsee or any of the other parties. But the instruments still retains it’s negotiability and is effective as between all the parties save Ababu.

Assuming all the parties have contractual capacity, The maker, drawer, payee or endorsee and if there are several makers, drawers, payees or endorsees, all of them can negotiate an instrument. The maker or drawer, could not normally endorse an instrument at the initial stage of issuance.
Example

Dinku issues a promissory note to Dalcha or order. At this stage any endorsement by Dinku to Dalcha or any other person is of no effect. He has to only deliver the note to the payee i.e. Dalcha. The maker or Drawer may endorse an instrument provided they have received it back through endorsement from the holder. In a bill of exchange and a promissory note endorsement may be validly made to the Drawer or maker [(Articles 746(3),825(1)(a)] there is no corresponding provision which specifically allows endorsement to the drawer of a cheque (again a drafting mistake)

An endorsement to the drawee discharges the obligation arising from the instrument and is considered as a receipt. This is typically the rule with regard to cheques (Art 843(4)]. Exceptionally an endorsement to a drawee bank will be valid as endorsement if endorsement is to Branch other than the paying Branch.

If the instrument is a Bill of exchange there is no limitation upon endorsement to the drawee. The Bill may be endorsed in favor of the drawee whether he has accepted or not[(Art 746(3)]

Question 18

What practical problems do you see in permitting endorsement to the drawee of a Bill of exchange? Unlike Article 746(3) (which is also applicable to promissory note by way of Art 825(1)(a)] which expressly permits endorsement on a bill of exchange to a drawer, Art 843(4)does not give us a hint as to whether endorsement to a drawer is possible on a cheque. Does it mean that holder can not endorse the instrument to the drawer of a cheque? Why?
Question 19

An endorsement that purports to transfer only a part of the amount due on a negotiable instrument is valid. There is one possibility in which a partial endorsement may be valid. In what circumstance does a partial endorsement become valid? (see art. 775 and 859)

Question 20

It has been said that the drawer of a Bill of exchange or cheque cannot endorse it at the initial stage of issuance of the instrument. In one instance the drawer may do so, at the time of drawing the instrument but before delivering to any payee. What is that instance?

Question 21

A Bill of exchange was endorsed as ‘pay to Danacew Atnafu’ and delivered to “Dagnachew Atnafu”. Clearly the name of the endorsee was misspelled by the endorser. Does this constitute a valid endorsement to Dagnachew Atnafu? If yes how should the endorsee write his name, while re-endorsing it to another person?

Question 22

One of the effects of endorsement is transferring all the rights arising out of the instrument. (Articles 726(1),749(1),825(1)(a),845(1)). What are the other effects of endorsement? Explain
Hint:

a) cover (see Article 845(1) and 800) by the way is article 800 applicable to promissory notes? If not is there is any justification?

b) create obligation (see Art 727,750,825(1)(a),846)

Types of Endorsement

Generally, there are four categories of Endorsement blank, special, Qualified and restrictive.

A. Blank endorsement

This type of endorsement is an endorsement that names no specific payee, thus making the instrument payable to the bearer and negotiable by delivery only. It consists of a mere signature

Example

A cheque payable to “Abera Tilahun or order” can be endorsed in blank simply by having Abera’s signature written on the back of the cheque as.

Abera Tilahun

A blank endorsement on an order instrument makes the instrument payable to bearer and negotiable by delivery. In other words a blank endorsement converts an order instrument into a Bear instrument. In the above example Abera Tilahun by putting his signature on the back of the cheque can negotiate it to any person, by simple delivery. The person who received it can in turn negotiate it to subsequent 3rd party by delivery.

Question 23

In the above example Abera Tilahun using blank endorsement, let’s say, has negotiated it to Almaz Fisseha by delivery who is the endorser and who is the endorsees? Again if Almaz Fisseha negotiates the cheque by delivery to Gemechu Alemayhu determine who is the endorser and endorsee?
There are two ways an instrument may be endorsed in blank under the commercial code. The first and typical one is when the endorsement does not contain the name of the endorsee, i.e. mere signature of endorser (Article 725(2), 748(2), 825(1)(a), 844(2)) secondly, by endorsing it “to bearer” followed by signature of the endorser (Article 725(3), 747(3), 825(1)(a), 843(3)).

B. Special endorsement

A special endorsement indicates the identified person to whom the endorser intends to make the instrument payable i.e. it names the endorsee. No special words of negotiation are needed.

Example

A cheque issued to Ali Hussein may be endorsed as

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“Pay to Girum Zenebu
Ali Hussein (signed )
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```
“pay to the order of Girum Zenebe
Ali Hussein (signed)
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C. Qualified endorsement

This can be defined as an endorsement that passes title to the holder of the instrument but limits the endorser’s liability to later holders if the instrument is dishonored. Typically, a qualified endorsement is made by writing the words “with out recourse “or” san recourse” over the signature.
Generally, an endorser, merely by endorsing impliedly promises to pay the holder, or any subsequent endorser, the amount of the instrument in the event that the drawer or maker defaults on the payment.

A qualified endorsement is used by an endorser to disclaim or limit this liability on the instrument.

**Example**

Pay to Geremew Haile
Without recourse
Dawit Zergaw (sinuate)

Qualified endorsements are often used by persons acting in a representative capacity. The “without recourse” endorsement absolves the agent from liability. If the instrument is dishonored, the holder can not obtain recovery from the agent who endorsed “without recourse.”

An instrument bearing a qualified endorsement can be further negotiated. A qualified endorsement is accompanied by either a special or a blank endorsement that determines further negotiation. Accordingly, a special qualified endorsement makes the instrument an order instrument, and it requires an endorsement plus delivery for negotiation. A blank qualified endorsement makes the instrument a bearer instrument, and only delivery is required for negotiation.

**D. Restrictive endorsement**

A restrictive endorsement is one that specifies the purpose of the endorsement or specifies the use to be made of the instrument. A restrictive endorsement does not prohibit further negotiation of an instrument. Among the more common restrictive endorsements are:
1. Endorsement for deposit (Articles 728,753,737(3),867,825(1)(a),851 e.g. “For deposit only” or For deposit to my account at commercial Bank of Ethiopia, Harar Bank”
2. Endorsement for collection(Art 728,753,863,864,825(1)(a),851.”For collection only” “Pay any bank”
3. Endorsement indicating that the endorsement is for the benefit of someone other than the person to whom it is payable.
   e.g. “pay to Almaz, tutor for minor Alemu”

   Generally, the person who takes an instrument with restrictive endorsement must pay or apply any money or other value he gives for the instrument consistently with the endorsement.

1.6.3 Forged, Unauthorized, Misspelled And Multiple Endorsements

The rules in the commercial code govern the correct manner of negotiation through endorsement. The right person who can endorse (there by negotiate the instrument) and the legal effects attached to such valid transfer. By providing the proper rules, it impliedly excludes any mode of transfer from the scope of negotiation. Sometimes, there is a possibility of resort to unlawful means or situations may be created giving rise to practical problems. For some of these deviating circumstances, the code formulates governing the effect of such case, however, failing to provide answer for some of the case such typical problems usually arise with regard to endorsement.

Of course, a significant problem in relation to endorsements occurs when an endorsement is forged or unauthorized. The code does not contain specific provisions regarding such issue. However, there are rules governing unauthorized or forged signature on a bill of exchange, promissory note or cheque. In general irrespective of the fact that forged or unauthorized signature is by endorser, drawer (upon issuance) or drawee (upon acceptance) [Articles 741,742,825(2),838,839]
A/ Forged or unauthorized endorsement

The general rule can be summarized as follows ‘Forged or unauthorized signature does not make the instrument invalid, rather it will have effect only as between the party who placed such forged or unauthorized signature and the remaining parties’. Applying this rule to forged or authorized endorsement, it means that there will be a valid negotiation only as between the one who places a forged or unauthorized endorsement and the other parties.

Example

A cheque to Niggussie Kebede or order was stolen by Firew Fikadu. Firew endorses the cheque as “pay to Zemede Tena.” And signs the forged signature of Niggussie Kebede. The one whose signature is forged does not have any obligation to Zemede, but Zemede, provided he acquires the cheque in good faith and for value may enforce his right against Firew and the drawer. The same rule applies to authorized signature. Assume in the above case that the cheque was validly negotiated from Niggussie to Firew and from Firew to Zemede. Zemede then transfer it through endorsement but writing as “pay to Hana” followed by his own signature with the qualifying phrase “as agent of Ato Biru” Zemede if he is not authorized to do so by Ato Biru the instrument becomes valid only as between Zemede and the other parties. Hana may enforce her right against the drawer and all the previous endorsers. Ato Biru will be relived from liability due to lack of authorization given to Zemede.

In light of the Bank’s liability, payment on a forged or unauthorized endorsement does not make the bank liable towards the drawer. The Bank does not have legal obligation to verify the signature of the endorsers except that of the drawer and the last endorsee. (Art 860)

Question 24
Section 26 of the Indian negotiable act (of 1881) reads.

“A minor may draw, endorse, deliver, and negotiate a negotiable instrument so as to bind all parties except him self’
Identity those articles in the commercial code which have a similar (closer) meaning with this Indian law, then give your reasoned comment as to whether the Ethiopian or Indian law best conveys the idea of the status of a minor as a party to negotiable instrument.

B. Misspelled endorsement

An endorsement should be identical to the name that appears on the instrument. Sometimes the name of the payee or endorsee may be in correctly written by the endorser. The commercial code does not provide rules to determine disputes arising in such situation. The first problem concerns the status of the endorsee (i.e. whether he should be legally considered as a holder) whose name is misspelt by the endorser. Secondly and most importantly considering such endorsee a holder, in what form can he endorse the instrument to another person? The uniform commercial code treats a payee whose name is misspelled as a holder and he can endorse it with the misspelled name, the correct name or both. Hence an instrument endorsed to Tsedale worku as “Sedale Worku” may be re-endorsed as

i. pay X
   Tsedale Worku, or
ii. pay X
    Sedale Wlrku, or
iii. Pay X
    Sedale Worku (Tsedale Worku)

The usual practice in America is to endorse the name as it appears on the instrument and followed by the correct name.

Under Ethiopian law, the gap in the commercial code may be filled by following the same approach as the American. The underlying, basic principle behind the law of negotiable instruments is encouraging the free flow of commerce through practical and reasonable laws. For this reason, provided the true identity of an endorsee whose name is misspelled could be
accurately verified, judges should not regard such type of endorsements as invalid merely due to spelling error.

C. Multiple payees

Still there is no clear provision applicable to multiple payee or endorsees, under the commercial Code. To have a better idea, let’s summarize the approach adopted by the UUC. An instrument payable to two or more person in the alternative (example pay to the order of Assefa or Gemechu) requires the endorsement of only one of the payees. If, however, an instrument is made payable to two or more persons jointly (for example “pay to the order of Assefa and Gemechu “or” pay to the order of Assefa, Gemechu”), all of the payee’s endorsement is necessary for negotiation.

The case of alternative payees doesn’t seem to pose any difficulty in determining endorsement and payment by the drawee, contractual interpretation of the word “or” clearly signifies either of them may endorse the instrument and payment by the drawee to either one of the payees is on effective (valid) payment. When we come to joint payees, still based on the actual meaning of the word and one may safely conclude (for the purpose of endorsement by joint payees under Ethiopian law of negotiable instruments) that the endorsement of both payees is needed. On the other hand in determining as to whom payment should be made by the drawee, the provisions of general provisions of contract should be consulted.

The principle laid down by the civil code regarding joint creditors is presumption against solidarity. (Art 1910 Co.Code). Each creditor may require the debtor to discharge the debt but only half of his share (half of the amount stated) (Art 1910 & 1912 (2) Civ.C) when we relate this principle of law of joint payees on a negotiable instrument, it means each joint payee may require the drawee to pay half of the stated amount on the instrument. A drawee paying the whole amount to either one of the joint creditors will be liable to the unpaid joint payee for half of the amount. Exceptionally, As can be inferred from art 1910 of the civil code the joint payees by an express agreement authorize the drawee to pay the
whole amount to one of the joint creditors. In this case payment of the total sum to one of joint payees is effective as against the other payee. The agreement creates a relationship of agency as between the joint payees. The joint payee receiving payment will now be considered as an agent and there by receiving the amount an behalf of the other joint payee.

**Question 25**

According to the principle of law stated in the previsions of general contract, each joint payee (in the absence of any agreement to the contrary) is entitled to demand his share (half of the amount stated on the instrument)

a) Do the provisions of the commercial code allow partial payment to one of the joint payees?

c) Does the code prohibit (allow) endorsement by one of the joint payees as regard his share (i.e. half of the amount stated on the instrument)?

Support your answers with relevant previsions of the code.

c) From the stand point of convenience is it in a) or b) (above) that obstacle will be created for the easy transferability of negotiable instruments? Why?

**1.6.4 Converting Order Instrument to Bearer and vice versa**

The method used for negotiation depends on the nature of the instrument at the time the negotiation takes place. An instrument payable to the order of a named payee and endorsed in blank becomes a bearer instrument. In other words using a blank endorsement on an order instrument converts the order instrument into bearer instrument. Such instrument may subsequently be negotiated by mere delivery.
Example

A bill of exchange issued to Admasu Tena or order may be endorsed in blank by Admasu in the following way. “Admasu Tena” i.e. mere signature of Admasu on the back of the instrument. Admasu may then negotiate it to another person by mere delivery. The holder of the instrument can now simply transfer it to another subsequent holder by delivery.

The rule of converting an order instrument into bearer by blank endorsement is stated in Article 726(2) (c), 749(2) (6), 825(1) (a) and 845(2) (c) of the commercial code. A holder who receives an order instrument may transfer the instrument to third party without filling up the blank and without endorsing. This holder has two other options to negotiate the instrument endorsed in blank. (726) (2) (a) (b), 749(2)(a) & (b), 825(1) (a) and 845 (a) & (b).

Accordingly the holder may fill up the blank either with his own name or with the name of some other person. In this case he has to do it above the name or (signature) of the endorser. In the above example the bill was endorsed originally as.

“A damasu Tena”

The holder who receives such instrument either may write his name above the endorsement as:

A) “Pay to Juhar mume”

Admasu Tena

Or may write in the blank the name of a third person as

B) “Pay to Tiruneh Ayalew

Admasu Tena”

When the blank in the instrument is filled either with the name of the holder (see A) above), because he has inserted his own name as a specified person, the instrument is again converted from Bearer to order and Juhar can negotiate it only through another 2nd endorsement. However if the instrument is filled with the name of a 3rd person (see B. above), the holder (i.e. Juhar Mume who actually filled the blank) can transfer it to Tirunch Ayalew by delivery.
At that stage the instrument is bearer. The moment it is delivered to Tirunch Ayalew it then is converted into order instrument.

To show this by a diagram.
“Admasu Tena”

The second option available to the holder who receives an instrument through blank endorsement is either re-endorsing it in blank or to some other person. If blank endorsement is followed by another blank endorsement, the instrument is still a bearer instrument. However if the holder endorses it to some other person, it means, he has used a special endorsement and this converts the instrument from bearer back to order instrument.

When we come to conversion of an instrument originally issued as bearer, the code does not clearly tell us whether it could be converted to order instrument. In other words the effect of blank or special endorsement on a bearer instrument is not indicated for all types of instrument. Art 848, which governs such cases as applied to cheque, expressly states that endorsement on a cheque to bearer shall not convert the instrument in to an order cheque, but only makes the endorsee liable to the holder in whose favor the cheque was endorsed.

**Question 26**

Abebe Mola is the holder of a bearer Bill of exchange and also a promissory note. On both instruments he writes as
“pay to Zinabu Tigabu”
Abebe Mola
And then negotiates them to Zinabu Tigabu. Can Zinabu Tigabu negotiate these instruments to another person by mere delivery? Why? Not

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Lastly, the general part under Article 720 provides a rule as to the manner of converting a bearer Negotiable instrument into a specified person and vice versa. One will not get sense from this provision, unless he treats it as applicable only to one type of negotiable instruments i.e. transferable securities. Art 721 classifies a negotiable instrument into three as bearer, order or in a specified name, based on the mode of transfer. The mode of transfer of an instrument (Art 723) and the manner of establishment of right (Art 722) lead us to conclude that the reference in article 722 & 723 is to transferable securities.

Within this limited scope, an instrument in a specified name may be converted to bearer at the request and expense of the holder. There is no “request” or “expense” in converting commercial instruments. A holder of a transferable security e.g. share certificate in a specified name, has to request the company and subsequently pay any necessary fee for such service. In the same way, a bearer negotiable instrument may be converted into an instrument in a specified name (Art 720) (a)

Generally, there is no doubt that Art 720 is applicable only to transferable securities typically share certificate. This can be easily inferred from Art 325(3) of the code which has a similar meaning with Art 720.

1.7. Holder and Holder in due course

By negotiation, the instrument is transferred in such a form that the transferee becomes a holder. The holder, at the very least, receives the rights of the previous possessor. Unlike assignment, a transfer by negotiation can make it possible for a holder to receive more rights in the instrument than the prior possessor had. This holder who receives greater rights in known as a holder in due course.

We will see, first, how a person becomes a holder and then examine the qualifying requirements to give him a holder in due course status.

1.7.1 Holder

Generally, a person becomes a holder of a negotiable instrument if he acquires it through the rules of negotiation. A person is said to be a holder of a bearer instrument if he is in
possession of that instrument. The criterion to be a holder of a bearer instrument as indicated in Art 725(2) is “Sole fact of presentment.” Possession and fact of presentment each convey the message that a person will be able to present an instrument to the drawee or maker provided he is in possession of that instrument.

If the type of instrument is order instrument it can be said that a person becomes holder of that instrument provided he had it under his possession and his name is specified on it either as a payee or an endorsee.

**Example**

i) Gebeyehu will be a holder of a bill issued as “pay to Gebeyehu Mola or order” because his name is specified and he is that specified person.

ii) Gebeyehu endorses the above instrument as

   “pay to Fatuma or order”
   Gebeyehu Mola (signed)

If Fatuma is in possession of such instrument she is the holder because her name is specified as endorsee and she is that specified person.

The commercial code in determining holder of an order instrument does not expressly employ the test of “possession” plus “specified name.” Article 724(2), which is a general provision and similar with Art 751 and Art 847 makes a person holder of an order instrument if his right could be established through “uninterrupted series of Endorsement.”

Possession as an additional requirement is not mentioned in the code. However one should take it as an implied requirement because no one becomes holder of either bearer or order instrument without actually possessing it.

Series of endorsements imply the previous history of negotiation and it should be uninterrupted. when one of the endorsement is forged or unauthorized the series of endorsement should be taken as interrupted.
Example

i. A bill of exchange issued as “pay X or order” was endorsed on the back in the following sequence.
1. ----------- X (signed)
2. ----------- [ Pay to Kelemua or order
Tariku (signed)
3. ----------- [ Pay to Kebebush or order
Kelemua (signed)

ii. A provisions note issued payable to X or order was endorsed on the in the following sequence.
1. ------------ [ Pay Tilahun or order
X (signed)
2. ------------ [ pay Tefaye or order
Tilahun (signed)
Pay Fitun or order
Zinabu (signed)

In the above two examples there is no series of interruption in the first case, hence the last endorsee i.e. w/o Kebebush if she is in possession of the instrument will become the holder. In the second example there is interruption on the last endorsement. It has been endorsed by Zinabu to Fitun, Zinabu is an outsider. There is no way he could negotiate it by endorsement. The last person to endorse it is Tesfaye. For this reason Fitun, even though he is in possession of that promissory note could not qualify as a holder. However, if the last endorsement was in blank. (Article 724(2), 751,847), the last possessor be it Fitun or any other person becomes a holder. Blank endorsement converts the order instrument into bearer and it could now be negotiated only through delivery. For the purpose of determining liability a person who acquires an instrument lastly endorsed in blank will be presumed to acquire it through blank endorsement.

Example

A cheque was issued payable to Tibebu or order. Tibebu negotiates it using special endorsement to Tewodros. Tewodros again using the same special endorsement endorses it to
Ayelu. Ayelu, then using blank endorsement negotiates it Hana. Now the order instrument is converted to bearer. Let’s say Hana by delivering it to Thomas has negotiated it to him. Thomas got the cheque through delivery only. Since the last endorsement is in blank he will be presumed to have acquired it through the last blank endorsement from Ayelu. This legal presumption creates a legal relationship between Ayelu and Thomas, hence making her liable to him as an endorser.

**Holder in due course**

A holder in due course is a special type of holder. A person who qualifies as a holder in due course of a negotiable instrument gets special rights. The advantage lies in the fact that while acquiring the instrument, he takes it free of personal defenses and claims to the instrument.

In order to qualify as a holder in due course a person must meet some legal requirements. The provisions of the commercial code which talk about a holder in due course do not expressly enumerate legal requirements for such status. Art 718 generally requires that the person should get the instrument in due course and in accordance with the rules applying to negotiation. There is also the requirement of good faith or knowledge in Art 717(3), 752 and 849. Actually this later provisions refer to the advantages to being a holder in due course rather than determining such status.

**Requirements for holder in due course status**

Due to lack of clarity in the commercial code it is very essential to have a brief overview of requirements for a holder in due course under the uniform commercial code. Accordingly a person to become a holder in due course, he must be a holder, and take the instrument for value, in good faith and with out notice. The meaning of holder has already been explained. A holder in due course is a special type of holder. So, A person should first become a holder before qualifying as a holder in due course.

**A. Value**
To qualify as a holder in due course of a negotiable instrument a person must give value for it. A person who receives an instrument as a gift or who inherits it has not met the requirement of value. The concept of value here is not identical with consideration in the law of contracts. For instance negotiation of an instrument for a promise to give value in the future does not fulfill the requirement of taking it for value. For instance a cheque payable to X or order was endorsed to Z by X. Z while taking or acquiring the instrument promised to pay x the value of the cheque after 5 days or let’s assume he has promised to give him a golden watch. In this case until the promise is actually performed, there is no value given to the instrument and the holder can not qualify as a holder in due course. In addition to performance of promise, value will be presumed to be given when the holder takes an instrument by acquiring a security interest, by taking it in payment of an antecedent debt (a preexisting claim) by taking a negotiable instrument as a payment for a certain transaction, by giving a negotiable instrument as payment etc.

D. Good faith

To qualify as a holder in due course of a negotiable instrument, a person must take it in good faith which means that the person should obtain it in the observance of reasonable commercial standards of fair dealing. Acquiring an instrument by trickery or with knowledge that it has been stolen does not give the status of Holder in due course to that person. There is no good faith acquisition. The good faith requirement applies only to the holder. It is immaterial whether the transferor acted in good faith. Thus a person who in good faith takes a negotiable instrument from a thief may become a Holder in due course.

E. Taking without notice

Notice is one of the basic requirements for a holder in due course status. A person will not be afforded HDC protection if he or she acquires the instrument knowing, or having reason to know, that it is defective. Notice of a defective instrument is given whenever the holder has (1) actual knowledge of the defect; (2) received notice about a defect, or (3) reason to know that a defect exists. Such defect may exist in any one of the following ways.
Overdue instruments

A negotiable instrument has its own maturity date. Expiry of the due date or time of payment renders such instrument overdue, with regard to cheques and instruments payable at sight or on demand, they become overdue if the time of presentment for payment elapses. A person who acquires overdue instruments could not qualify as Holder in due course.

Dishonored instruments

To be a holder in due course a person not only must take it before he has notice that it is overdue but also must take it before it has been dishonored. A negotiable instrument has been dishonored when the holder has presented it for acceptance or payment and such acceptance or payment has been refused. Thus, a person who takes a check clearly stamped “in sufficient funds” is put on notice.

Defenses against or claims to an instrument

A holder can not become an HDC if he or she has notice of any claim to the instrument or defenence against it. For instance if the instrument is incomplete on its face to call into question its authenticity or if the holder knows it was completed contrary to the instruction given by the maker or drawer, he could not qualify as HDC. Similar any irregularity on the face of the instrument that calls in to question its validity or terms of ownership or creates an ambiguity as to the party to pay will bar HDC status. Notice of voidable obligations is also another reason a holder may not get a HDC status. A purchaser who knows that a party to an instrument has a defense that entitles that party to avoid the obligation can not qualify as an HDC. At the very least, good faith requires honesty in fact and the observance of reasonable commercial standards of the purchaser in a transaction.
Chapter two

Presentment and payment

Introduction

Dear student welcome to the second chapter of this module. This chapter is a continuation of the first chapter. In the first chapter you studied about the basic concept and principles of negotiable instruments which are really basis for the study of this chapter that mainly deals with presentment and payment of negotiable instruments.

The holder of a negotiable instrument has a right to the entitlement as expressed in the instrument. In other words, the holder of negotiable instrument can claim payment from the debtors of the instrument and exercise his right in the instrument. Claim for payment presupposes the fulfilment of certain criteria or act by the holder. Among others, a holder has to present the instrument either on certain date before he claim payment or/ and when he claims for his/ her right; depending on the nature of the instrument.

In this chapter you will learn about presentment and acceptance of negotiable instrument in general and presentment and acceptance of check, bill of exchange and promissory note in particular.

2.1 Presentment In General

What is presentment?
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Black’s law dictionary, seventh edition, defined presentment as a formal production of a negotiable instrument for acceptance or payment. This definition clarifies the act of presentment and its purposes. According to the definition presenting negotiable instrument means producing a document for the purpose of payment or getting acceptance of an instrument.

Presentment for acceptance is production of an instrument to the drawee, acceptor, or maker for acceptance before the maturity date of the bill whereas presentment for payment is production of an instrument to the drawee, acceptor, or maker for payment when or after the instrument is matured.

Though both presentment for payment and presentment for acceptance are acts of production of the document by the holder of the instrument to the debtor of the same, the purpose that the holder achieves by presenting the instrument for acceptance is different from the purpose he/she achieves by presenting the instrument for payment.

Holders of negotiable instrument present a negotiable instrument for acceptance in order to get assurance that he/she will be paid when the instrument matures; whereas holders present an instrument for payment at or after maturity in order to actually receive their money; in other words in order to get paid. In both cases holders have to present the instrument properly to achieve their purpose.

What constitutes proper presentment?
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Basically, a proper presentment is presentment that is timely made by a holder to the proper person in a proper manner. The party to whom the instrument must be presented and the time of and manner for presentment depends on the type of instrument involved.
2.2 Presentment For Acceptance

Presentment for Acceptance of Bill Of Exchange

To recall our discussion in chapter two, a bill of exchange contains an order of payment, which is directed to the drawee. However the mere order which is given by the drawer to the drawee in the bill does not impose any liability on the drawee. Unless and otherwise the latter expressed his/her willingness to obey or respect the order given by the drawer, the drawee will not have liability on the bill. Meaning the holder of an instrument can not sue the drawee if the latter refuse to pay the bill in whole or in part.

As per Sub article 764 of the Commercial Code, it is the drawee who accepts the bill of exchange who undertakes to pay it. In other words if the drawee of the instrument does not accept bill then he is not liable to pay.

Article 764(1): Effect of acceptance

(1) By accepting the drawee undertakes to pay the bill of exchange at its maturity.

Some times holders may demand to have the promise or undertaking of the drawee and will be eager to know, in advance, weather or not the drawee will pay the bill up on maturity. As per Article 757 of the Commercial Code, those holders who want to have the promise or the undertaking of the drawee may present the bill of exchange to the drawee for acceptance. Such holders present bill for acceptance for their own advantage; since it may enable them to add one more person who is liable to pay the bill, if the drawee accepted the presented bill. In other words, holders may present a bill for acceptance up on their own will and wish and for their own benefit in the absence of law or contractual obligation to present for acceptance.

Article 757: presentment for acceptance

Until maturity, a bill of exchange may be presented to the drawee for acceptance at his domicile, either by the holder or a person who is merely in possession of the bill.
As can be ascertained from the cumulative reading of Articles 758 and 759 of the Commercial Code, the freedom of holders to present or not to present a bill for acceptance is not absolute. Some times holders may be legally obliged to present the bill for acceptance or in the bill the drawer may make stipulation for the presentment or non presentment of the bill for acceptance.

Article 758: order or prohibition as to presentment

(1) In any bill of exchange the drawer may stipulate that it be presented for acceptance with or without fixing a limit of time for presentment

(2) Except in the case of a bill payable at the address of a third party or in a locality other than that of the domicile of the drawee or of a bill drawn payable at a fixed after sight, the drawer may prohibit presentment for acceptance.

(3) He may also stipulate that presentment for acceptance shall not take place before a fixed date

(4) Unless the drawer has prohibited acceptance every endorser may stipulate that the bill shall be presented for acceptance with or without fixing in limit of time for presentment.

Article 759: Obligation to present for acceptance bill of exchange payable at a fixed period after sight

(1) Bill of exchange at a fixed period after sight shall be presented for acceptance with in one year of their date

(2) The drawer may shorten or extend this period

(3) These periods may be shorten by endorsers

As per the above two Articles, situations where presentment of acceptance is must are:

A) Where the Drawer Orders Presentment for Acceptance: A drawer of a bill of exchange has a right to either order any holder of the bill to present it for acceptance or to
prohibit presentment for acceptance. Article 758 rules that in any bill of exchange the drawer may stipulate that it be presented for presentment.

In case where the drawer orders presentment, the holder should present the bill for acceptance. Failure to present the bill for acceptance will preclude the holder from proceeding against the drawer and endorsers. The holders recover the sum fixed in the bill without first presenting the bill to the drawee for acceptance.

B) Where the type of maturity date of payment of the bill requires presentment for acceptance. As will be discussed later on, the maturity date (date of payment) of a bill of exchange may be determined by the drawer and the payee. In the bill of exchange there are four types of maturity and one of them is fixed period after sight.

Where the bill of exchange is drawn payable at a fixed period after sight, the holder should first present the bill for acceptance. This is because it is impossible to determine the date of payment of the bill unless the bill is presented for acceptance. The exact date of payment of bill is determined by counting the date fixed on the bill starting from the date of presentment for acceptance. For example if the drawer writes as “pay to Mr.A birr 1000( one thousand birr) two mothers after sight…”, the bill of exchange matures or becomes due two months after it is presented to the drawee. We can not determine the maturity date with out presenting the bill to the drawee.

C) Where the Endorser Orders for Presentment. Endorsers like the drawer, have a right to order the holder of a bill of exchange to present the bill to the drawee for acceptance. Whoever endorsers can not order for presentment if the drawee prohibited the holder from presenting the bill of exchange to the drawee for acceptance.

Except in the cases mentioned above the holder is not under obligation to present the bill of exchange to the drawee for acceptance. He may or may not present it to the drawers.

The drawer of a bill may prohibit the holder from presenting the bill to the drawee for acceptance. If stipulation for such purpose is made by the drawer of the instrument, the holder
may not present the instrument to the drawee for acceptance even if he/she want to. However the right of the drawer to prevent the holder from presenting the bill for acceptance is subject to limitation. He /she may not prohibit presentment for acceptance if:

a. the bill is payable at the address of third party,

b. the bill is payable in a locality other than the domicile of the drawee or

c. the bill is payable at a fixed period after sight.

**Time and Place of Presentment of Bill of Exchange for Acceptance**

From the reading of Articles 757 and 759 of the Commercial Code above, one can easily learn the time and place for presentment of acceptance. As we discussed under the general part of this chapter above, a bill shall be presented for acceptance properly. In other words it should be presented to the proper person at the right time and in the correct manner. Failure to present on time is the most prevalent reason for improper presentment.

Where the holder wish to present the bill of exchange for acceptance, or where the drawer or endorser orders him/her to do so, or where the nature of the bill requires him/ her to do to present, the holder should present the instrument within a certain period of time fixed in the bill of exchange for presentment or if the bill is payable on certain date after sight, the holder has to present it with in one year from the date the bill is issued.

Where the drawer or endorser fixed a time limit with in which the bill should be presented for acceptance, the holder should comply with this requirement and present the bill with in the limited period of time. Where there is no time limit, fixed in the bill of exchange, the holder may, according to Article 757 of the Commercial Code, present the bill until maturity. But this rule (Article 757) applies only to bill of exchange, which mature at fixed time and fixed time after date.

Where the bill of exchange is drawn payable at fixed date after sight and no time is fixed for presentment, the holder should present it for acceptance with in one year of its date. As we discussed before the exact date of payment of a bill payable at fixed time after sight may be determined only when it is presented to the drawee for acceptance. The question here is
within what time the holder should present the bill for acceptance. The answer for this question depends on whether or not the time for presentation is fixed in the bill. If the drawer or endorser fixed a time limit in the bill, the holder should present it within that limit. If no time is fixed, the holder should present it for acceptance within one year from the date of issuance of the bill.

The one year period of time fixed by the law for presentment of bill of exchange payable on certain time after sight may be shorten or extended by the drawer of the bill. The period may also be shortened by endorsers.

How should the drawer extend or shorten the time for presentment of acceptance of a bill payable on certain time after sight?

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The provision of the Commercial Code that empowers the drawer to extend or shorten the period within which the holder of a bill payable on certain date after sight present the instrument for acceptance, does not say any thing about the time when and the manner in which drawers may extend or shorten the period. Is it possible for a drawer to extend or shorten the time after he issued and transferred the bill to the payee? Can he/she extend or shorten the period orally or by expressing his intention for such purpose on separate document?

Where should the holder present the instrument for acceptance?

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According to article 757 of the Commercial Code, the holder of a bill must present the instrument to the drawee for acceptance at the domicile of the drawee. The domicile of a person, in our example, the drawee, is the true, principal and permanent home of a person.

**Presentment For Visa of Promissory Note**

As you can remember from the discussion in chapter one of this module, a promissory note is a promise in writing by a person to pay a sum of money to a specified person or his/her order. In promissory note, there are only two parties, the promissory or the maker and the payee to whom the promise is made. Hence there is no such thing as acceptance proper as we have discussed in a bill of exchange. The person who issues the promissory note is liable to pay the note without the prerequisite of acceptance since he is the one who issued and signed the note.

The obligation of maker of promissory note is similar with the obligation of acceptor of bill of exchange.

**Article 826**

(1) *The maker of promissory note shall be bound in the same manner as an acceptor of a bill of exchange*

There is one exception on this regard. The holder of promissory note payable at a certain time after sight shall be presented to the maker within the limit of time fixed by Article 759 for visa. The limited time is one year from the date of the promissory note. The purpose of presentment however is different from presentment for acceptance of bill of exchange. The Commercial Code ordered for presentment of promissory note payable on certain date after sight for the purpose of visa. In other words the holder has to present the instrument for the purpose of determining the maturity date of the note. The pertinent provision in this respect is Article 826(2).

**Article 826(2)**

(2) *Promissory note payable at a certain time after sight shall be presented for the visa of maker within the limit of time fixed by Article 759. The limit of time shall run from the date of the visa signed by the maker on the note. The refusal
of the maker to give his visa with the date thereon shall be authenticated by the protest (Art 761), the date of which marks the beginning of the period of time after sight.

To conclude, there is no need to present promissory note for acceptance since all the parties to the instrument have signature liability. Signature liability relates to signature on instrument. Those who sign promissory note are potentially liable for payment of the amount stated on the instrument. Hence presenting promissory note for acceptance is of no value. However a promissory note payable at certain period after sight may be presented for visa for the purpose of determining the maturity date of the note.

**Presentment for acceptance of check**

Check may not be accepted. The holder of a check is not required to present the check for acceptance. Any statement on the check that ordered the presentment of the check for acceptance shall not have any effect and shall be disregarded. Unlike bill of exchange and promissory note, check is payable only at sight or demand. In other words, check always mature immediately after its issuance unlike bill of exchange and promissory note hence the holder can ascertain whether or not the drawee bank will pay him/her by presenting the instrument for payment.

Here it is very important to discuss about certification of check.

What is certification of check?

Certification of check is a confirmation given by the drawee bank that the drawer has funds in his account to the extent of the sum specified in the check. You must note here that a certification by the bank may only be given when the drawer request the drawee bank to do so. Without the request of the drawer the drawee bank may not certify a check. For example the drawee bank may not certify the check up on the request of the holder. Hence certification is not the same with acceptance
Presentment for Acceptance When Excused

Presentment of acceptance in due time is necessary and a crucial element for the holder to continue with the next step in his process of exercising the right vested to him through the bill. However, if the holder is prevented to present the bill out of his control the law excuses. Art.797 is about the excuse for some time or for all when the holder is prevented by force majeure from presenting the bill in due time. The provision is provided below and you should understand its application well as it is sighted now and then through out the module in connection with time aspect.

Art.797- force majeure

1) Where the presentment of the bill of exchange or the drawing up of the protest within the prescribed time is absolutely prevented (legal prohibition by any state or other cases of force majeure), these limits of time shall be extended.

2) The holder shall give notice without delay of the case of force majeure to his endorser and specify this notice, which he shall date and sign, on the bill or an alloge, in other respects the provisions of Art.788 shall apply.

3) Where force majeure has terminated, the holder shall without delay present the bill for acceptance or payment and, where necessary, draw up the protest.

4) Where force majeure continues to operate beyond thirty days after maturity, recourse may be exercised, and neither presentment nor the drawing up protest shall be necessary.

5) In the case of bills of exchange drawn at sight or at fixed period after sight, the time limit thirty days shall run from the data on which the holder, even before the expiration of the time for presentment, has given notice of force majeure to his endorser. In the case of bills of exchange drawn at a certain time after sight, the above time -limit of thirty days shall be added to the period after sight, specified in the bill of exchange.

6) Facts which are purely personal to the holder or to the person entrusted with the presentment of the bill or drawing up of the protest shall not be deemed to constitute cases of force majeure.

Based on the provision when and for what period of time the holder is excused for presenting the bill for acceptance?
In situations which can be taken as a force majeure the holder is excused to present the instrument until the time the situation is gone. However he was the duty of giving notice to the endorsers about the situation, which may be by telephone or post but which he can prove, and shall date and sign on the bill. As soon as the force majeure situation ends he should also with out reasonable delay present the bill for acceptance. Where, however, the situation had continued for thirty days after the maturity for payment time of the bill the holder's obligation to present to present the bill for acceptance extinguishes at all that he can exercise his right on the bill and the non-presentment can not be raised as a non-compliance against him by parties liable on the bill to refuse payment.

The following cases are also where presentment is excused and the bill may be treated as dishonored in most legal systems.

1. Where the drawee is fictions person or one incapable of contracting.
2. Where the drawee can not after reasonable search, be found
3. Where the drawee is dead or insolvent, the instrument may be presented for acceptance to the legal representatives or to the official assignee of the insolvent.

Art.784 (1) (b) states that a protest shall contain whether the drawee has been unsuccessfully summoned, or he can not be found called. Protest is evidence that shows presentment of the bill has been made but not accepted or paid by the drawee. The provision indicates that protest may be produced with out presentment if the drawee is not found or can not be reached; therefore the case is an excuse to presentment. Although the Ethiopia law is silent about such other cases it is illogical to taken them as excuses. Even if presentment for acceptance may be necessary the holder can not be found. The third case is obvious that when the drawee is absent due to death or bankruptcy the bill shall be presented for the legal representatives

### 2.3 Acceptance for Honor

The negotiable instrument law contains, among other, a provision relative to acceptance for honor. As a general rule, a stranger can not accept the bill. In case a bill is dishonored by non-acceptance then the holder may allow it to be accepted by a stranger for the honor of drawer
or any other party. Thus, payment in whole or in part, can be guaranteed by any person other than the drawee. This is called acceptance for honor as the provision in article 766 is entitled and the person who accept it for the honor of some other party is called "acceptor for honor".

Art. 766- Acceptor honor.

(1) Payment of a bill of exchange may be guaranteed by an acceptance for honor as to the whole or part of its amount.

(2) This guarantee may be given by a third person or even by a person who has signed as a party to the bill.

The acceptor for honor is bound in the same way as the person for whom he has become guarantor. The rules relating to acceptance for honor provided under article 767 to 768 shall also apply to promissory notes and check as are crossed referred to in article 825(3) and 853.

**Effects/Right and obligation of Acceptor for Honor**

What is the effect of acceptance for honor of the acceptor?

Art.767.-Forms of acceptance for honor

(1) The acceptance for honor shall be giving either on the bill itself or on an allonge, or by separate act showing the place where it is made.

(2) It shall be, or by the words "good as acceptance for honor" or any other similar words followed by the signature of the acceptor for honor.

(3) It shall be effective on the signature of the acceptor for honour placed as provided in sub-art (2).

(4) An acceptance for honor shall specified for whose account it is given in default of this, it shall be deemed to be given for the drawer.

Art. 768:- Effects of acceptance for honor.

(1) The acceptor for honour shall be bound in the same manner as the person for whom he has become guarantor.
(2) 

His understanding shall be valid even when the liability which he has guaranteed is in operative for any reason other than defect of form

3) Where he pays a bill of exchange. He may exercise the rights arising out of the bill of exchange against the person guaranteed and against those who are liable to the latter on the bill of exchange.

Acceptance for honor gives a type of guarantee for the payment of a bill on the date of maturity. At the maturity date the holder in due course hold the acceptor for honor liable to make the payment, alonge other people.

The position of the acceptor for honor, on the other hand, would be the same as that of the party for whose honor he accepts it. Thus, he shall be liable to all the parties to the bill who are subsequent endorsees of the party for whose honor he has accepted the bill if for e.g., some one accepts the honor of the drawer the holder at the time of maturity of the bill can sue or claim payment from all other persons who are liable to make payment under the bill. These parties are endorsers before the holder, if any, and the acceptor for honor. Here the drawer can not be sued by the holder as his liability is taken over by the acceptor for honor shall be liable only when the bill was presented to the drawee for payment on maturity and it has been dishonored.

After payment however he has the right of recourse against the person he guaranteed and those who are liable to the latter on the bill of exchange (Art.768(1). In the above example thus after payment the acceptor for honor for is entitles to be indemnified by the drawer. He can recover all sums he paid from the drawer.

2.4 Acceptance by intervention for Honor

Acceptance by intervention is another similar case to acceptance for honor where some other person may accept the bill in case of need for the honor of a party to the bill. Here the acceptor in case of need is specified by the drawer or endorsers on the bill and the drawer if he needs may present the bill for the acceptance of this person. The acceptor in case of need may be among the parties on the bill, the drawee or a third party.
In case of acceptance by intervention, the acceptor is already specified in the bill. The holder may only present the bill for the drawee’s acceptance and go to legal recourse if the bill is not accepted, or he may still present the bill to the acceptor in case of need. If the acceptor in case of need accepted the bill, the person who specified the acceptor in case of need will no longer be liable to the holder. The holder should also wait until maturity date for payment to claim payment or legal recourse against the acceptor in case of need. Thus, the choice is with the holder. If he thinks that rather than exercising legal recourse against parties liable on the non acceptance of the bill by the drawee it would be better to exercise his other chance, he may still present the bill to the acceptor case of nees. It would be of course an advantage for him if him if the acceptor in case of need accepts and pays.

Other effects and obligations and rights of the acceptor in case of need are similar to that of acceptor.

The risk and the peril of the drawee would be that he will still be required to effect payment to the drawer against if drawee had made payment to the wrong person before maturity. Even if at maturity if the fraud, the rightful holder of the bill the drwee shall still be liable to the holder. The drawee is also liable for undue payment by fault .His fault may be in case of verification of regularity of the endorsements.
Example: Payment of the money to a wrong person without verifying that the bill was not ordered to be paid so that person.

2.5 Presentment for payment

The second type of presentment of negotiable instrument is presentment for payment. The time when and the person to whom the holder present the instrument depend on the maturity date of the instrument and the type of the instrument. Since the purpose of presenting or producing the instrument for payment is to receive payment, no instrument may be presented for payment before maturity. Hence, the time of presentment of a negotiable instrument is always dependent on maturity date. The term maturity refers to the date at which a negotiable
instrument fails due. We will see the maturity date, time of presentment for payment or time of payment and payment in due course.

**Presentment for payment of bill of exchange**

**Maturity and Time of payment of bill of exchange**

A holder of a bill of exchange may demand payment only when the bill is due. When payment becomes due we say the bill is matured. As has been discussed in chapter one, a bill of exchange should contain the date at which it matures; if not, the bill is deemed payable at sight.

Dates of payment (maturity) may be of four types, i.e. a bill of exchange may be drawn payable:

a. At sight;
b. At a fixed period after sight;
c. At a fixed period after date; and
d. At fixed date.

These are the only maturity dates of bill of exchange. The drawer may fix no other maturity date. He may not, for example, drew a bill whose amount is payable by installment, like, two hundred day today, five hundred next week, and the remaining amount one month from today. This kind of maturity is not acceptable and the bill shall be null and void (for your better understanding read the following article)

Article 769: Categories of maturity

I) A bill of exchange may be drawn payable:

(a) at sight

(b) at a fixed period after sight

(c) at a fixed period after date

(d) at a fixed date
(2) Bill of exchange at other maturities or payable by installments shall be null and void.

a. Bill of exchange payable at sight: - This kind of bill is payable on demand. It matures the moment it is demanded. The holder of this bill may present the bill for payment beginning from the day it is issued.

When is the last date for presentment of bill of exchange payable at sight?

As per article 770 of the Commercial Code of Ethiopia a bill of exchange at sight shall be presented for payment within a year of its date unless the period is extended or shorten by the drawer. The period may also be shortened by the endorser.

Article 770: bill of exchange at sight

(3) A bill of exchange at sight is payable of the presentment. It shall be presented for payment with in a year of its date. The drawer may shorten or extend this period. Thus periods may be shortened by the endorsers

(4) The drawer may stipulate that a bill of exchange payable at sight shall not be presented for a fixed date. In this case the period for presentment shall run from the said date.

The law has given to the drawer a power to either extend or shorten this one – year period. The drawer may, for example, fix the date of payment of the bill in the following manner

“Pay at sight _ _ _ but it should be presented within six month of its date or within two years of its date … “in this case, the holder shoulder should present the bill within the time stipulated by the drawer.
Also, the endorsers of a bill payable at sight (on demand) have also been given a right to shorten the one-year period provided by law. They may not, however, extend the one-year period (Article 770 sub-article 1).

Again, the drawer may prohibit the holder from presenting the bill which is payable at sight for payment before a fixed date. For instance, the drawer may stipulate in the bill as “pay” “x” 100 birr at sight but the bill should not be presented for payment before ten days elapse. In this case the holder may not present the bill within ten days starting from its date. He can only present it after the ten days have elapsed. When such kind of limitation (prohibition) is stipulated in the bill of exchange, the one-year period that we discussed in the above paragraph starts to run, nor from the date of issue of the bill. But from the day the fixed period elapse. (sub-article 2 of Article 770).

**b.** Bills of exchange payable at a fixed period after sight: - We have seen earlier (subsection 2.2.3.) that a bill of exchange payable at a fixed period after sight should, as of necessity, be presented to the drawee for acceptance. One of the reasons for presenting the bill for acceptance is to determine the exact date of payment. The maturity date or the date on which this kind of instrument is payable is determined by referring the date when the instrument is accepted.

Once the date on which the instrument is payable is determined, it would be an easy task to ascertain the date of payment of such instrument. As per the pertinent provision of the Commercial Code, Article 774, the holder of a bill of exchange payable on a fixed day after sight shall present the instrument for payment either on the day on which it is payable or on one of the two business days which follow.

What if one or both of the two days that follow the date of payment of the bill of exchange is/are holidays?

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In such cases the holder can present the bill for payment on the days that follow the holidays. For example if the bill is payable on Friday, the two days that follow Friday are not business days. Hence the holder can present the instrument for payment until Tuesday.

How can we determine the date of payment if the drawee refuses to accept the bill

Article 771 sub-articles 1 says that the date of payment shall be determined by referring to the date of protest. In other words, where the drawee refuses to accept the bill, the holder should draw a protest (an official dated declaration that the drawee refused to accept the bill)

Sometimes, even though the drawee accepts the bill, he/she may not write the date of acceptance. In such a case, the law presumes a date of acceptance. Sub-article 2 article 771 says that an undated acceptance shall be deemed so far regards the acceptor, to have been given on the last date of the limit of time for presentment for acceptance. What the last day is, have been discussed when we were discussing acceptance. This kind of bill of should be presented for acceptance within the time limit stipulated by the drawer or endorsers, and in the absence of such stipulation it should be presented within one year of its date.

c. Bill of exchange drawn at a fixed period after date: - The maturity date of this kind of bill is determined by reference to the date of issuance of the bill of exchange. The date of payment of the bill is calculated starting from the date written on the bill. For example if the drawer order the payment saying pay X…two Months after date one can easily ascertain the exact date on which the instrument is payable by counting 60 days from the date of issuance of the instrument.

The date of payment of an instrument payable at a fixed period after sight is the same with that of the date of payment of a bill payable at certain period after sight.

d. Bill of exchange drawn payable at a fixed date:-This Kind of bill contain a definite or fixed date of payment. The rule applicable to govern the date of presentment for payment of bill payable at certain date after date or after sight is applicable to
determine the date of presentment of bill of exchange payable at a fixed date. (Article 774(1))

The drawee’s obligation to pay (Article 775-776):- We said that a drawee accepted the bill is primary party liable on the bill. So, when the bill of exchange is presented to him for payment in the manner discussed above, he shall pay the sum specified in the bill, if of course he has accepted the whole amount.

However, he can pay the sum in the bill only where the holder presents and surrenders the bill. Article 775 sub- article 1 rules that the drawee that pays a bill of exchange may require the holder:

- To give him a receipt ; and
- Surrender the bill to him

Sometimes the drawee may be willing to pay only part of the sum mentioned in the bill In this case, the holder should not refuse partial payment ( sub_- article 2 of Article 775). He should take the sum offered by the drawee and claim from the drawer and other parties liable for the unpaid sum of money. In case of partial payment, the holder is not required to surrender the bill to the drawee . This is because the holder needs the bill for the unpaid sum of money. He may collect the unpaid sum from other parties liable only by presenting the bill to them. He is however, required to give receipt to the drawee as to the paid sum. The drawee may also require that mention of partial payment be made on the bill (look at sub- article 3).

Where the drawee pays only part of the sum written in the bill the holder shall draw a protest for the unpaid sum. That is, he should have an official declaration that the drawee has only paid partially and that he refuse to pay the remaining sum (sub- article 5 of 775).

Payment before maturity: - A drawee who has accepted a bill should pay the sum specified in the bill at maturity. A question may arise however, as to whether a holder of bill of exchange can require payment before maturity and as to whether payment made by the drawee before maturity is valid or not. Article 776 sub- article 2 indicates that the drawee is
not at least required to pay the bill before its maturity. It, on the contrary, suggests strongly that the drawee should not pay the bill before its maturity. A drawee who pays, before maturity will be liable for any kind of risk which may ensue from the bill. In other words, payment before maturity does not discharge the drawee from liability, from this it follows that a holder of a bill of exchange may not be compelled to receive payment before maturity (sub-article 776). In deed, the holder’s right of refusing payment is in the nature of the bill of exchange; that is, compelling him to cash the bill means preventing him from further negotiating with the bill and hampering the circulation of the bill unit its maturity.

Therefore, the holder cannot require the drawee to pay the bill before its maturity and neither can the drawee or any other person compel the holder to receive payment before maturity.

On the other hand, a drawee that pays at maturity is validly discharge from his liability. Meaning, in so far as the drawee pays on the due date to the holder who appears to be a lawful possessor will not be responsible for any risk that may arise from the bill of exchange. The drawee, thus, needs to make sure that he pays at maturity to a rightful possessor. He does this by verifying the regularity of the series of endorsements (see Article 776 sub-article 3).

Currency of payment in bill of exchanges: When we were discussing law of contracts in general we have seen that a debtor who owes money debt expressed in foreign currency has an potion to pay it in a currency which is a legal tender of the place of payment. When we come to debts owed on a bill of exchange the same rule applies. Article 777 of the commercial code

**Mode of Payment of bill of exchange**

A bill presented for payment may be paid by the drawee in full or in partial of the amount it order to be paid. Depending on the amount of payment the drawee who paid may claim the bill or a receipt. The currency on which the payment should be settled may be as ordered by the drawer or otherwise as provided by the law, when a foreign element is involved in relation to the payment of the bill.
Art. 775 provides as to right and duties of the holder and drawee on the delivery of the instrument and the remaining amount to be paid depending on the amount paid.

Art. 775 Receipts

1. The drawee who pays a bill of exchange may require that it be surrendered to him receipted by the holder.

2. The holder may not refuse partial payment.

3. In case of partial payment, the drawee may require that mention of this payment be made on the bill and the receipt therefore be given to him.

4. Payment made on account on the sum expresses in a bill of shall discharge the drawer and the endorser.

5. The holder shall protest the bill exchange for the remainder.

The right of the drawee who pays in full is that he may require the delivery of the bill to him with the attestation of the holder that the payment is settled to him. This is made in case of full payment of the amount of the bill. The drawee can use the delivered bill to him as an evidence of payment and that he discharged his obligation in relation to the bill in case another claimant comes, as far as he paid in accordance with art.776.

In case of acceptance drawee may agree on payment of the partial amount of the bill here the holder may not refuse the partial payment saying that he requires payment in full. The remedy of the holder is having the protest of the drawee on the bill for the remaining amount.

A protest is a dated declaration of nonpayment written on the bill itself or separate deed. Thus, for the remainder the holder can bring a legal recourse against the parties liable on the instrument. The drawee has also aright to get a receipt of the partial payment from the holder. Whether payment is made in full or in partial, to the extent of the sum paid not only the drawee but also the drawer and endorsers are discharged from liability to the holder.

The right provided for the drawee to ask for the delivery of the bill at time of payment, in return gives him another complementary right that he may refuse payment in case the bill is not presented to him. The provision also stipulates that payment may be refused where the holder is bankrupt. This is because in case of bankruptcy the payment of the bankrupt should
be made to trustees in case of bankruptcy. Thus, art. 779 below contains these ground for which the drawee may refuse to make payment.

Art 779- Opposition to payment

Payment may only be opposed in the case of loss of the bill of exchange the bankruptcy of the holder.

The other thing that should be raised in relation to payment is the currency on which the bill is paid. Art.777 discusses the issue.

Art.777. payment in a foreign currency

(1) When a bill exchange is drawn payable in a currency which is not that of the place of payment, the sum payable may be paid in the currency of the place of payment, according to its value on the date of maturity. If the debtor is in default, the holder may at his option demand that amount of the bill be paid in the currency of the place of payment according to the rate on the day maturity or the day of payment.
(2) The drawer may specify that sum payable shall calculated according to a rate expresses in the bill.
(3) The foregoing rules shall not apply to the case in which the drawer has stipulated that payment shall be made in a certain specified currency( provision for payment in foreign currency).
(4) If the amount of the bill of exchange is specified in a currency having the same denomination, but a different value in the country of issue and the country of payment, reference shall be deemed to be made to the currency of the place of payment.

From the above provision identify the cases where payment of a bill in a foreign currency arises and how the issue is resolved. The issue comes in to question when the bill is drawn in a place having a different currency than that of the place the bill is to be paid.

In case like this, the sum payable is calculated according to its equivalent value on the date of maturity. For eg if the bill is drawn in US and it is for the amount of USD 32,000 to be paid in
Ethiopia and at the time of maturity the US Dollar – Birr exchange rate is 1 Dollar to 8.98 Birr the payment is effected by paying Birr ……… to the holder.

If, on the hand, the debtor was in default of payment at the maturity date, which is when the drawee for not good reason didn’t pay when bill is presented for payment the holder will have two options. They are to demand the amount expressed in foreign currency to be paid to him in the currency of the place of payment.

However this applies so far as it was not a specified in the bill that the sum payable should be calculated according to a rate expresses in the bill, like for instance `pay at the rate 1:8.00` the payment will in any case be calculated at this rate.

The above cases do not apply where stipulation for payment in a specified foreign currency has been provided in the bill. In such predetermined cases the amount would paid in the specified currency. If it is stipulated payment to be made in `birr` or in `Dollar` payment would be effected in `birr` or in `Dollar` in the place of payment.

However still, if the specified currency has same denomination, same, in the country of issue of the bill and in the country of payment of the bill, but the value of that currency is different in the two countries the currency specified shall be taken to refer to that of the currency of the place of payment. For instance, a bill issued in Canada but to be paid in the USA which specified the payment to be effected in ‘Dollar’, the currency name used by both countries but which has different rates in the two countries, the payment would be effected with the USA dollar.

Read Articles 806-810 of Commercial. Code and discuss the conditions of payment by intervention, and rights and obligations of the holder of the bill and the person intervening to pay.

Payment by intervention is made where the right of recourse of the holder on the bill matures. It may be at the date of maturity or before the supposed date of maturity, which is where the
bill was not accepted by the drawee. The bill may be presented for the persons who accepted it by intervention and those mentioned as to pay by intervention.

The holder is not, compelled to present and receives payment from the intervention payer. However, when he refuses the payment he shall lose his right of recourse against the person who would have been discharged by such payment. This is because as payment is not effected not for the refusal of the payer to pay but due to the refusal of the holder to receive payment; and as had the holder received the payment the party’s liability would have been discharged, the party should not now be held liable for the holder’s mere refusal.

On the other hand if holder has presented the bill but payment is not made, the holder still should produce protest of non-payment to make liable or to exercise right of recourse against the party who mentioned the payer in case of need and the subsequent endorsers.

If payment is made, the payment should be full. Such payment should be indicated in receipt that mentions the person for whose honor payment is made. If the honored party is no mentioned the payment is deemed as made honoring the liability of the drawer. The bill and the protest shall be delivered to the person paying by intervention.

Having the bill and the protest under his possession helps the intervening payer to exercise the rights transferred to him. His rights would be those rights of the person for whose honor he paid. He can thus exercise right of recourse against the others who would be liable to the party he paid. However, as the payment is made at or after maturity date he can not re-endorse the bill.

A holder of a bill of exchange may demand payment only when the bill is due. When payment becomes due we say the bill is matured. As has been discussed in chapter one, a bill of exchange should contain the date at which it matures; if not, the bill is deemed payable at sight.

Dates of payment (maturity) may be of four types, i.e. a bill of exchange may be drawn payable:
a. At sight ;
b. At a fixed period after sight ;
c. At a fixed period after date ; and
d. At fixed date.

These are the only maturity dates of bill of exchange. The drawer may fix no other maturity date. He may not, for example, drew a bill whose amount is payable by installment, like, two hundred day today, five hundred next week, and the remaining amount one month from today. This kind of maturity is not acceptable and the bill shall be null and void (for your better understanding read the following article)

Article 769: Categories of maturity

(3) A bill of exchange may be drawn payable:
   (a) at sight
   (b) at a fixed period after sight
   (c) at a fixed period after date
   (d) at a fixed date

(4) Bill of exchange at other maturities or payable by installments shall be null and void.

e. Bill of exchange payable at sight: - This kind of bill is payable on demand. It matures the moment it is demanded. The holder of this bill may present the bill for payment beginning from the day it is issued.

When is the last date for presentment of bill of exchange payable at sight?

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As per article 770 of the Commercial Code of Ethiopia a bill of exchange at sight shall be presented for payment within a year of its date unless the period is extended or shorten by the drawer. The period may also be shortened by the endorser.
Article 770: bill of exchange at sight

(5) A bill of exchange at sight is payable of the presentment. It shall be presented for payment with in a year of its date. The drawer may shorten or extend this period. Thus periods may be shortened by the endorsers

(6) The drawer may stipulate that a bill of exchange payable at sight shall not be presented for a fixed date. In this case the period for presentment shall run from the said date.

The law has given to the drawer a power to either extend or shorten this one – year period. The drawer may, for example, fix the date of payment of the bill in the following manner

“Pay at sight _ _ _ but it should be presented within six month of its date or within two years of its date … “in this case, the holder should present the bill within the time stipulated by the drawer.

Also, the endorsers of a bill payable at sight (on demand) have also been given a right to shorten the one- year period provided by law. They may not, however, extend the one- year period (Article 770 sub- article 1)

Again, the drawer may prohibit the holder from presenting the bill which is payable at sight for payment before a fixed date. For instance, the drawer may stipulate in the bill as “pay” “x” 100 birr _ _ _ at sight _ _ _ _ _ _ but the bill should not be presented for payment before ten days elapse _ _ _ ” In this case the holder may not present the bill within ten days starting from its date. He can only present it after the ten days have elapsed. When such kind of limitation (prohibition) is stipulated in the bill of exchange, the one- year period that we discussed in the above paragraph starts to run, nor from the date of issue of the bill. But from the day the fixed period elapse. (sub- article 2 of Article 770).

f. Bills of exchange payable at a fixed period after sight: - We have seen earlier that a bill of exchange payable at a fixed period after sight should, as of necessity, be presented to the drawee for acceptance. One of the reasons for presenting the bill for
acceptance is to determine the exact date of payment. The maturity date or the date on which this kind of instrument is payable is determined by referring the date when the instrument is accepted.

Once the date on which the instrument is payable is determined, it would be an easy task to ascertain the date of payment of such instrument. As per the pertinent provision of the Commercial Code, Article 774, the holder of a bill of exchange payable on a fixed day after sight shall present the instrument for payment either on the day on which it is payable or on one of the two business days which follow.

What if one or both of the two days that follow the date of payment of the bill of exchange is/are holidays?

In such cases the holder can present the bill for payment on the days that follow the holidays. For example if the bill is payable on Friday, the two days that follow Friday are not business days. Hence the holder can present the instrument for payment until Tuesday.

How can we determine the date of payment if the drawee refuses to accept the bill?

Article 771 sub-articles 1 says that the date of payment shall be determined by referring to the date of protest. In other words, where the drawee refuses to accept the bill, the holder should draw a protest (an official dated declaration that the drawee refused to accept the bill)

Sometimes, even though the drawee accepts the bill, he/she may not write the date of acceptance. In such a case, the law presumes a date of acceptance. Sub-article 2 article 771 says that an undated acceptance shall be deemed so far regards the acceptor, to have been given on the last date of the limit of time for presentment for acceptance. What the last day is, have been discussed when we were discussing acceptance. This kind of bill of should be
presented for acceptance within the time limit stipulated by the drawer or endorsers, and in the absence of such stipulation it should be presented within one year of its date.

g. Bill of exchange drawn at a fixed period after date: - The maturity date of this kind of bill is determined by reference to the date of issuance of the bill of exchange. The date of payment of the bill is calculated starting from the date written on the bill. For example if the drawer order the payment saying pay X…two Months after date one can easily ascertain the exact date on which the instrument is payable by counting 60 days from the date of issuance of the instrument.
The date of payment of an instrument payable at a fixed period after sight is the same with that of the date of payment of a bill payable at certain period after sight.

h. Bill of exchange drawn payable at a fixed date:-This Kind of bill contain a definite or fixed date of payment. The rule applicable to govern the date of presentment for payment of bill payable at certain date after date or after sight is applicable to determine the date of presentment of bill of exchange payable at a fixed date. (Article 774(1)

The drawee’s obligation to pay (Article 775-776):- We said that a drawee accepted the bill is primary party liable on the bill. So, when the bill of exchange is presented to him for payment in the manner discussed above, he shall pay the sum specified in the bill, if of course he has accepted the whole amount.

However, he can pay the sum in the bill only where the holder presents and surrenders the bill. Article 775 sub- article 1 rules that the drawee that pays a bill of exchange may require the holder:

❖ To give him a receipt ; and
❖ Surrender the bill to him

Sometimes the drawee may be willing to pay only part of the sum mentioned in the bill In this case, the holder should not refuse partial payment ( sub_- article 2 of Article 775). He should take the sum offerd by the drawee and claim from the drawer and other parties liable for the
unpaid sum of money. In case of partial payment, the holder is not required to surrender the bill to the drawee. This is because the holder needs the bill for the unpaid sum of money. He may collect the unpaid sum from other parties liable only by presenting the bill to them. He is however, required to give receipt to the drawee as to the paid sum. The drawee may also require that mention of partial payment be made on the bill (look at sub- article 3).

Where the drawee pays only part of the sum written in the bill the holder shall draw a protest for the unpaid sum. That is, he should have an official declaration that the drawee has only paid partially and that he refuse to pay the remaining sum (sub- article 5 of 775).

Payment before maturity: - A drawee who has accepted a bill should pay the sum specified in the bill at maturity. A question may arise however, as to whether a holder of bill of exchange can require payment before maturity and as to whether payment made by the drawee before maturity is valid or not. Article 776 sub- article 2 indicates that the drawee is not at least required to pay the bill before its maturity. It, on the contrary, suggests strongly that the drawee should not pay the bill before its maturity. A drawee who pays, before maturity will be liable for any kind of risk which may ensue from the bill. In other words, payment before maturity does not discharge the drawee from liability, from this it follows that a holder of a bill of exchange may not be compelled to receive payment before maturity (sub- article 776). In deed, the holder’s right of refusing payment is in the nature of the bill of exchange; that is, compelling him to cash the bill means preventing him from further negotiating with the bill and hampering the circulation of the bill unit its maturity.

Therefore, the holder cannot require the drawee to pay the bill before its maturity and neither can the drawee or any other person compel the holder to receive payment before maturity.

On the other hand, a drawee that pays at maturity is validly discharge from his liability. Meaning, in so far as the drawee pays on the due date to the holder who appears to be a lawful possessor will not be responsible for any risk that may arise from the bill of exchange. The drawee, thus, needs to make sure that he pays at maturity to a rightful possessor. He does this by verifying the regularity of the series of endorsements (see Article 776 sub- article 3)
Currency of payment in bill of exchanges: When we were discussing law of contracts in general we have seen that a debtor who owes money debt expressed in foreign currency has an option to pay it in a currency which is a legal tender of the place of payment. When we come to debts owed on a bill of exchange the same rule applies. Article 777 of the commercial code.

**Presentment of a check for payment**

The presentment of a check is an important step that has to be taken as it is up on the presentment of the check that the holder can avail himself of the right to the entitlement. He can exercise his right of recourse against the parties liable to him where the check is dishonored. Making a presentment for payment of a check would only be rendered unnecessary where force majeure continues to operate beyond fifteen days after the date on which the holder has given notice of force majuere. It would seem that once a presentment for payment becomes unnecessary, it becomes unnecessary once and for all and the duty to make presentment that would make presentment for payment possible.

Facts which do constitute a force majeure can be referred from arts. 1792 and 1793 of the civil code. However, facts which are purely personal to the holder or to the person entrusted with the presentment of the check do not constitute force majeure. E.g. illness, private calamity etc will not constitute force majere.

**Place of presentment**

As to where the presentment of a check should be made, it would be logical to make the place where the payment a check is effected also the place presentment. Otherwise it would create inconvenience for both the party who is seeking payment and the party required to pay, more so to the latter. Art. 828 states that the place of payment would be the first place mentioned under the name of the drawee, if it is not expressly provided; or if no place is mentioned at the principal establishment of the drawer. Thus these places will be where the check would also be presented for payment. Checks usually indicate the name of a branch of the bank where the account of the drawer is maintained. Accordingly, a check should be presented for payment at the bank or a branch where the account of the depositor is maintained.
Modes and Effects of Payment of a Check

With respect to payment of check Arts.859-862 discuss the modes of payment, the discharge of the drawee and payment of a check issued in foreign currency. These cases are similar to the cases discussed in relation to bills in connection with arts. 775-777. Thus, no further detailed discussion is made here but you are highly recommended to the law provisions and the discussion made in connection with bills.

The point raised by arts. 857 and 858 should, however, be in addition noted about the payment of checks.

What do you think is the justification behind the rules of the provisions?

Art. 857 states about the case where payment of a check may be suspended or refused and art 858 is where payment should not be suspended or refused. As the drawee bank pays to the order of the drawer, the drawee shall refuse payment when the drawer orders not to pay. This is one reason among others on the ground of which the drawee can refuse payment. On the other hand, as a check is at sight instrument the payment to the holder of the check had matured from the day the check was drawn. Check works replacing money as a media of payment. The money is deemed to have been paid when the cheque is issued to the holder. Thus the holder like unpaid creditors does not need to claim payment from the liquidators of estates or trustees of the drawer in the case of incapacity like bankruptcy of the drawer. The death of the drawer or his incapacity taking place after the issue of the check shall not be a ground for the payee drawee to refuse payment. The drawee has to effect payment of the check even if the said state of affairs has come to its knowledge.
Chapter Three

RIGHT OF RECOERCSE ON NEGOTABLE INSTRUMENTS

INTRODUCTION

Right of recourse is the right of the holder of the instrument to institute a legal action or sue the parties liable for payment of the instrument. The right arises when an instrument is dishonored. An instrument is said to be dishonored if the drawee or maker refuses to accept or pay when the instrument is duly presented to him for such effects. Specifically speaking an instrument is said to be dishonored by non acceptance when the drawee makes default in acceptance upon duly required to accept it. On the other hand, a negotiable instrument is said to be dishonored by non payment when the maker of a note, acceptor of a bill or drawee of a check makes default in payment upon being duly required to pay the same.

The effect of dishonor of an instrument will give to the holder of the instrument the right to take a legal action. This legal recourse can be taken against all other parties liable to make payment with respect to the instrument. This unit mainly discusses about dishonor of bill of exchange and the requisite elements and formalities to take legal recourse upon dishonoring.

3.1 Dishonor of a negotiable instrument

Dishonor refers to either non- acceptance or non- payment of the instrument. Dishonor by non- acceptance is limited to Bills of exchange since a cheque and a promissory note do not require presentment for acceptance hence they could be dishonored by non- payment only.

The effect of dishonor is that it allows the holder to bring an action against parties liable on the instrument for the recovery of the amount. Art 780 (2) (a) of the commercial code states that the holder may exercise his right of recourse on a bill of exchange even before maturity provided there is total or partial non- acceptance. Partial non- acceptance here refers to a qualified acceptance by the drawee as indicated in Article 762 (1) of the code. so at maturity,
there will be dishonor by non-payment of the bill, hence entitling holder to pursue his action provided payment has not be made [780 (1)]

As stated above only a bill of exchange could be dishonored by non-acceptance [780 (2) (a)]. However regarding promissory notes Art 825 (1) (c) makes a reference to Art 780, creating an impression that the provision is applicable to promissory notes. Clearly Art 780 (2) (a) which talks about dishonor by non-acceptance is not applicable to promissory notes. It should be noted that according to Art 825 provisions regarding bills of exchange are similarly applicable to promissory notes so far as they are not inconsistent which the nature of promissory notes. This means that due to the nature of a promissory note, which is a non-acceptable note, Art 780 (2) (a) is not applicable.

This being the case it should be underlined that the law should attain maximum clarity, as far as possible, and not create any condition leading to further disputes. It is incidentally recommended that the commercial code provisions dealing with negotiable instruments be redrafted in a comprehensive way so that every provision is applicable to every commercial instrument with regard to common matters and special provisions should be inserted by way of exception to the general rule. There is no need for separate provisions for bills, notes and cheques. That is also the approach adopted by the Indian Negotiable instruments act and the uniform commercial code.

As regards dishonor for non-payment of a promissory note it is similarly governed by Art 780(1) due to the reference in Article 825(1). A cheque is considered as dishonored by non-payment if it is presented in due time and not paid or there is refusal of payment by the drawee (Art 868)

Once we conclude that a commercial instrument is considered as dishonored either by non-acceptance or non-payment it is proper to investigate what constitutes non-acceptance or non-payment. The commercial code states only instance constituting non-acceptance or non-payment. Which is refusal to accept or refusal to pay by the drawee. However it should be noted that other cases may also give rise to non-acceptance or non-payment
3.1.2 Dishonor by non-acceptance

Generally a bill of exchange may be considered as dishonored in the following cases.

a) When after due presentation, the bill is not accepted by the drawee. This refers to refusal of the drawer to put his signature or the bill and be bound by it. When there are several drawees (who are not partners) refusal by any one of the drawees will amount to dishonor.

b) Where the drawee is incompetent to be bound by contractual obligations (Art 733), the bill may be treated as dishonored.

c) If the acceptance is restrictive or qualified (Art 760(2)) the bill may be considered as dishonored.

d) If the instrument not being payable at any specified place, the drawee can not be found after due search, or if the instrument being payable out some other specified place, neither drawee nor any other person authorized to pay it attends at such place during the usual business honors, or if the instrument being payable at Drawee’s place of business, he closes such place or business day during the usual business honors, in all the above cases the bill may be considered as dishonored.

e) Where a drawee in case of need is named in a bill, or in any endorsement thereon, the bill is not dishonored until it has been dishonored by such drawee.

3.1.2 Dishonor by non-payment

A promissory note, bill of exchange or cheque is dishonored by non-payment when the maker of the note or the acceptor of the bill of exchange or drawee of the cheque makes default in payment upon being duly required to pay the same. When there is partial payment, the instrument is considered to be dishonored for the remaining amount. The holder can not refuse partial payment and treat it as dishonored for the total amount.
3.2 Effect of dishonor

When an instrument is dishonored either for non-acceptance or non-payment it gives the holder a go-ahead to bring an action on all parties liable on the instrument and recover the amount due from such parties. In other words dishonor is a pre-requisite for the holder to exercise his right of recourse on the instrument. Bringing an action before dishonor entitles parties liable on it to raise the defense of lack of the necessary conditions to bring a proceeding (Art 717(2)). Such defense relieves such parties from liability.

Conditions necessary to exercise right of recourse

Dishonor is not the only condition, rather it is the first condition to exercise right of recourse by the holder. There are other conditions including a) drawing up a protest and b) giving notice. Hence a holder whose instrument is dishonored should take the necessary steps in drawing up a protest and giving notice to the parties.

Noting and Protest

When an instrument is dishonored for non-acceptance or non-payment the fact of non-acceptance or non-payment has to be sufficiently proved. Noting and protest refer to the act of causing dishonor recorded or evidenced by a public notary. Both of them serve to establish the fact of non-acceptance or non-payment by the act of the public notary.

The difference between the two is that while noting is merely a record of the fact of dishonor on the instrument. Protest refers to a certificate issued by a public notary stating the particulars regarding the dishonor.

Noting

When a promissory note or bill of exchange has been dishonored by non-payment or non-acceptance, the holder may cause such dishonor to be noted or recorded by a public notary upon the instrument. Noting on a promissory note or bill of exchange is defined as “a dated declaration written or the note or bill” (Art 781(2) & 825(1) (d)] by a public notary such
procedure of noting by a public notary is applicable only to promissory note and a bill of exchange. A cheque also may be noted but it is the drawee bank or a financial institution who records the fact of non-payment on the cheque [Art 868(b)(c)] noting in general replaces a formal protest, hence relieving holder from drawing up a protest. However such right (of noting) is conditional when it comes to promissory note and bill of exchange. According to Article 781(2) and also 825(1)(d) the drawee or maker of the instrument may insist and stipulated for a formal protest rather than a simple noting. In this case the holder to exercise his right has to draw a formal protest.

The advantage of Noting is that it is a convenient method of regarding the fact of dishonor. The procedure is time searching, less expensive and easy compared to protest.

**Protest**

A holder, if he does not prove the fact of dishonor by noting or if the drawee of a bill or maker of a note stipulate for a protest, has to establish the fact of non-acceptance or non-payment by a formal protest drawn by a chiefly authorized public officer or public notary. In this case drawing a protest is not discretionary rather it is mandatory for the holder [Art 781 (1), 825 (1) (d), 868 (a).] Holder can not bring a valid action before drawing a protest. A protest is simply a certificate issued by a public notary evidencing non-acceptance or non-payment. It may be drawn not only in case of refusal (default) of acceptance or payment, but may also be drawn before maturity upon the occurrence of events affecting the financial capacity of the drawee or the drawer see Article 780 (2) (b) (c) and Article 780 (6) (7) can Article 825 (1) (d)) Hence the holder may draw a protest before maturity.

   a) Bankruptcy of drawer
   b) Exaction on the goods of drawer becomes conduces full
   c) Stoppage of payment
   d) Bankruptcy of a drawer of a non-acceptable bill.

The event in i.e. unsuccessful exam from on the property of the drawer seriously affects the financial capacity of the drawer. In such case malting until the time of maturity may seriously
affect the intercity of the holder. For this reason the law protects him by permitting to exercise
his right of recourse and pursuer his remedy immediately by drawing a protest. This doesn't
mean that he is relieved from presenting the instrument for payment [Art 781 (6)]. Before
drawing protest he has to demand payment or present it for payment to the drawer. The
protection need not present the bill for acceptance even though, it is an acceptance bill i.e.
where presentment for acceptance is mandatory 2) holder need not wait until the maturity date
of the bill or the note to present it for payment. Normally a bill or a promissory note may be
regarded as dishonored if it is only presented at maturity and payment is refused however
useful exertion on the goods of the drawer or maker.

Stoppage of payment, (mentioned above in c) an order given by the drawer against the drawer
not to pay any holder an instrument (779). If such order is given, holder may draw a protest
without presenting it for payment to the drawer. Once the drawer is an stmeted not to pay,
there is no reason why the holder should request payment from the drawer.

Lastly Bankruptcy of a drawer or Drawer of a non-acceptable bill enables holder to exercise
his right of recourse without presenting it for payment and with out a protest The declaration
of bankruptcy is clearly a sufficient evidence of lake of found to make payment. That is why
the law equates it as a protest 781 (7)

“Sans Protest” 789, 825 (1) (D), 871

Generally, drawing up a protest is a mandatory requirement imposed on the holder. He can
not exercise his right of recourse without complying with such procedure. This general duty
of drawing up a protest may be excepted by a stipulation made in the instrument either by the
drawer or endorsers by a provision “reform sans fraise “ “Sans protest” or any other similar
words written and signed on the instrument relieve the holder from the duty of drawing up a
protest.

The provision “Sans protest” (without protest) relieves the holder only from drawing up a
protest. He is still bound or required to present protest. He is still bound or required to present
the bill for payment at its maturity and to give notice of non-payment. The effect of the
provision “Sans protest” differs depending on the identity of the party who stipulated such provision, “San protest” by a drawer is effective against all persons who have signed the bill in this case the holder has a right to proceed against all persons who have signed the bill without drawing up a protest.

Where the provision “Sans protest” is written by an endorser or acceptor for honor, it shall be effective against such endorser or acceptor for honor. Still he has to draw a protest as against the other parties, who haven’t written the provision “Sans protest”

The holder even though, is relieved from drawing up a protest either by the drawer or acceptor for honor or any of the endorser, may still insert on drawing up a protest. Disregard or “San protest “Provision by the holder, relieves such party who work such provision from the liability of drawing of drawing up a protest in other words holder bean the expenses of drawing up a protest when he draws a protest contrary to the “Sans protest ” provision . Drawing up a protest involves some expenses. Normally refunding the instrument. Disregarding “Sans protest” Provision relieves the party from such duty and holder will year his own Costs.

Form and content of protest [784, 785, 825,(1)(D) 868]

A protest is a certificate issued by a public notary, which serves as an evidence of the fact of non – acceptance or non – payment. As a certificate it indicates that it is a separate document. This is what distinguishes. Protest form noting. The Letter is a record of non-acceptance or non – payment on the instrument.

The commercial code clearly requires that protest on bill and a note be drawn on a separate document, which should subsequently be attached to instrument (Art 785, 825,(1)(d)] when we compare the formality of drawing up a protest, Article 868 (a) refers to protest as a formal instrument , impliedly indicating that it is also a separate document issued by the public prosecutor. However the practice in Ethiopia shows that there is no such thing as formal protest with respect to chigoes [Art 868(a)]
Practically there is only noting i.e. declaration by the drawee bank dated and written on the cheque (art 868(b)). Usually the bank also makes such declaration on a separate paper in addition to the one on the cheque.

A protest in addition to the fact of non-acceptance or non-payment should contain the following particulars.

a) The name of payee, maker and drawee
b) Statement that maker or drawee have been unsuccessfully summoned to satisfy the entitlement and sing out of the bill or the note, or that they can not be found.
c) The place and day on which summons was made or unsuccessfully presented.
d) The signature of the person who has drawn up the protest.
e) Partial payment, if any

The code is silent when it comes to content of a protest drawn up or a cheque. However, one can apply the alive particulars by analogy to cheque. Practically this doesn’t create a problem since in practice we have only noting by a drawee Bank but not a protest by a public notary.

Time of drawing a protest[781,(3)(4),825(1)(d)869]

It is true that a holder is not entitled an unlimited time to present in instrument either for acceptance or payment. He has of present it with in a limited period of time similarly, holder does not enjoy unlimited time to draw up a protest. He has to act promptly and within the period of time specified by the law and draws a protest, delay results in loss of right of recourse. According the Commercial code protest for non-acceptance or non-payment should be made in the following time limit.

A. The time limit for drawing a protest for nm – acceptance is the time limit fixed for presentment for acceptance. A bill payable fixed period after sign has to be presented within one year of its date (759(1)), shave shortening or extending by the drawer or
shortening by the endorsers [759(2)(3)]. Therefore the protest for non-acceptance has to be drawn within this one year period. is reduced or extended by the drawer or shortened by the endorsers, protest should be drawn with such time.

For other types of bills, they need not be presented for non-acceptance; holder will only draw a protest for non-payment. This may not be true if this is an order of the drawer for presentment in accordance with Art 757(1). Order of a drawer for presentment for acceptance is binding on the holder to present the bill before demanding payment. Drawer’s order of presentment for acceptance may be made with or without fixing a limit of time for presentment.

If the order orders presentment within a certain specified period or time, the holder has to draw a protest with such time for example the bill is payable 2 months after date and the drawer orders its presentment for a acceptance within 12 days of its date. This means the drawer has to present it within stating from the date of the bill and if there is refusal, has to draw a protest within these, 12 days. On the other hand, when the drawer orders presentment for acceptance without specifying a time limit, the bill has to be presented for acceptance within the period of time for its payment and the protest has also be drawn within such time for payment for instance, when drawer orders presentment for acceptance on a bill payable 2 months after date, without specifying any time the holder should present it within these tow months, including on the day on which it becomes payable and on one of the two business days which follow. [Art 774,(1)]. Similarity, these tow months including the day the bill becomes payable and the next tow business days are the time fixed for drawing up a protest.

B. Protest for non payment of a bill or a promissory note payable or a fixed day, fixed period after sight or fixed period after date, must be drawn on one of the two working days following the day or which the bill is payable. (Art 781(4), 825(1) (a)] in others words, grace period for payment i.e. the next tow working days the instrument becomes payable Art 774(1) is the time limit for drawing up a protest, for instance a promissory note payable or January 1, 1985 is payable on such day. If there is default
by the drawee the has to draw a protest within the next two working days i.e. January 2 and 3, provided they are working days.

C. Protest for non-payment on a bill of exchange is a promissory note and cheque must be drawn within the period of time fixed for presentment for payment. A bill or a note payable at right should be presented for payment within a year of its date. (Art 770(1), 821(1)(b)) therefore protest for non-payment on a bill or a note payable at right has to be drawn within this one year period (Art 784(3)(4), Art 825(1)(d)). A cheque which is always payable at right must be presented for payment within six months of its date (Art 855) Hence protest for non-payment on a cheque must be drawn within this six months period [(869(1)]. If the cheque is presented or the list day of the six months period protest for non-payment must be drawn on the following working day [Art 869(2)]

**Right of Recourse Relating to Bills of Exchange**

How a bill is brought for acceptance or payment are discussed in the previous unit. This unit is concerned about when instruments are not accepted or not paid. The payment may have been refused in the second presentment after the bill has been accepted or when directly presented for payment in case of non-acceptable bills. In the case of non-acceptance in the first place the holder need not present the bill for payment. In those all cases, the remedy of the holder to have the bill paid would be to institute a legal action against the parties liable. There are formalities and requirements for the holder to comply with.

**When Rights Of Recourse Rises?**

It is said generally that is when after a bill of exchange presented for acceptance and/or payment and refused, dishonored, the holder exercises the right or recourse. Article 780 provides by specific listing the cases that would give rise for the right of recourse of the holder.
Art.780.- Recourse of the holder

*The holder may exercise his right of recourse against the endorsers, the drawer and other parties liable:*

1) at maturity, where payment has not been made; or
2) before maturity:
   a. If there has been total or partial refusal to accept; or
   b. in the event or bankruptcy of the drawee, whether he has accepted or not, or in the event of a stoppage of payment on his part even when not declared by a judgment, or where execution has been levied on his goods without result; or
   c. On the event of bankruptcy of the drawer of a non-acceptable bill.

The case differs when the dishonoring is as to acceptance or payment. In case of non acceptable bills, i.e. bills which need not be presented for acceptance, the holder can exercise his recourse at maturity time for payment. In case of dishonoring by non-acceptance, the recourse arise arises even before maturity of the payment day. This is because as the drawee is deemed to have refused to make future payment by not accepting the bill. Thus, there is no need to present the bill for payment again but rather the holder can directly go for the legal recourse.

Besides non-acceptance and non-payment of the instrument which are before and after maturity, the holder can proceed a recourse against a bankrupt drawee even without presentment for acceptance. The bankruptcy may be in law or in fact. It is enough that the drawee stopped payment of his debts or where he has no cash money to pay so that his goods are encumbered for execution. This is because a debtor in such positions is proved to be unable to pay his debts. Thus, it could be taken for granted from factual circumstances that the debtor is actually and totally bankrupt even if judgment to that effect is not yet given. Recourse can also be taken on the event of bankruptcy of drawer of a non-acceptable bill. A non-acceptable bill is that drawn payable at sight or at a fixed date.
Extent of Rights of the Holder

The amount the holder may ask from the parties liable is indicated under art. 791.

Why does the law permit additional payments to the holder? Explain Art 791 of com. Code with respect to the total respect to the total sum the holder can claim.

As the holder is not paid at the due date he has the right to ask for damages he incurred due to the delay of payment. The law provides damage can be claimed based on the legal interest rate, which is 9% pursuant to art. 1851 of civil code if a different rate is not provided. In addition, however, he can also claim protest and notice expenses as he would not have incurred such losses had the payment has been effected as presentment of the bill upon maturity. Thirdly a commission of up to 1/3% may be awarded for the holder.

Sub (2) deals about some discounts on the amount of the bill if recourse is exercised before maturity. Recourse is exercised before maturity when the bill had been presented for acceptance and it was dishonored. In such a case recourse may be started even before time the bill would be presented for payment had the bill been accepted. Thus for such period of time between recourse and the maturity date the amount of the bill may be discounted by a certain rate. This is because the holder has got payment before maturity where the dishonor is a blessing in disguise for him. The discount would be according to the discount rate officially declared, but as there is no such directive, the provision is not much applied.

The above provisions are about the persons liable for the holder and the extent of his right of recourse. Among the parties listed liable if any one pays the amount ordered by the bill that party will have the same right or status as that of the holder. So that by way of subrogation he can claim reimbursement from the other parties the haler could claim from other parties who paid. He shall also have same right till the obligation rests on the primarily liable party, the drawee.
Unlike the above discussed way of exercising once right of course, the party may exercise his right by way of a fresh bill redrafted to him. The fresh bill may be drawn by one of the parties liable to the holder, or for the party who pays a holder if any. The bill should be at sight bill so that the holder can ask the drawee anytime without presentment for acceptance. The bill also should contain the name of the person who can recover by way of a legal recourse, as provided under Arts. Read 791 and 792. For your better understanding read the following.

Art. 795. – Redraft.

(1) Any person having the right of recourse may. In the absence of agreement to the contrary, reimburse himself by a fresh bill (redraft) to be drawn at sight on one of the parties liable to him and payable at the domicile of that party.

(2) The redraft shall include, in addition to the sums mentioned in Art. 791 and 792 brokerage and stamp duty to be paid on the redraft.

(3) If the redraft is drawn by the holder, the sum payable shall be fixed according to the rate for a sight bill drawn at the place where the drawer of the redraft is domiciled up on the place or domicile of the party liable.

3.4 Loss of Right of Recourse

Right of recourse may be lost for non compliance of presentment for acceptance or for payment and drawing up of protest in due time, and due to period of limitations of such actions.

A, Non Compliance With Time of Presentment and Drawing Up of Protest

Considering Art. 796 of com. Code and referring to previous discussions as to presentment of bills for acceptance, payment and drawing up of protest, discuss when the holder is going to lose his right of recourse.
The holder loses his right of recourse for non presentment of the bill against the drawer and endorsers only, not against the drawee. If the bill is ‘at sight’ bill art. 776 prescribe a one year period from its date for its presentment for payment. Art. 759 also states that a bill ‘at a fixed period after sight’ should be presented for acceptance within one year of their date. Thus if the holder didn’t present such types of bills for payment or acceptance in the time provided respectively the holder shall loss his right of recourse.

Here the effect as to non presentment of the other types of bills is not mentioned. Express mention of the above types of bills seems the exclusion of the other type of instruments. Thus, it may be said that non presentment of ‘at a fixed period after date’ and ‘at a fixed date’ instruments according to time provided under article 774 may not be set up against the holder by the other parties of the bill as a defence.

In addition to the compliance of time for presentment, the holder should also comply with time for drawing up of protest or for presentment for payment in case of “san proter” provisioned bills. In case of non acceptance and non payment of bills the protest should be drawn up in accordance with the time provided under art. 781 (3) and (4). Even if protest is not necessary to be drawn for “san proter” provisioned bills, the bill should still be presented for acceptance and payment in due time.

The other main point is that non compliance of the time of presentment, or drawing up of protest cannot be raised by the acceptor against the holder. This means that the holder can still present the bill for acceptance and payment for the acceptor out of time, and if the acceptor accepts he will be liable for non-payment of bill presented to him upon time or out of time. Thus, it can be said that the time provided for the presentment and for the drawing up of the bill as far as the acceptor is concerned works only for the issue of damage. The acceptor, drawee, sued by the holder can argue that he is not liable for damages as presentment is not made in due time.

The case of force majeure provided under art. 797 should also be taken into consideration here. As discussed under the section dealing presentment of bills for acceptance, cases of force majeure also extend the time limit for presentment and drawing up of the protest. So that
if delay of the holder is due to force majeure he may take the situation for his avail if upon the termination of the situation he complied accordingly. Or if the force majeure continues to operate beyond thirty days drawing up of protest shall not be necessary that holder may directly start to exercise his right of recourse.

Limitation of Actions

The other reason the holder or a party who takes up and pay a bill may lose his right of recourse is when the time to exercise his right of recourse is barred by limitation. Art. 817 is all about when the action of the holder and endorsers against the parties is barred, and art. 818 discusses the cases when the prescribe period is interrupted.

Considering Art. 817 and 818, discuss the time limitation for the holder and the other parties to exercise right of recourse.

The holder is given the right to institute legal action against the drawer and endorsers within one year of date of protest or date of maturity. On the other hand an endorser’s right against the same parties is limited by six months. In the latter case the time starts from the day the endorser pays taking up the bill or the day the endorser is sued. When an endorser is sued he should apply for other liable parties to join the suit, pursuant to civil pro. Cod. Art. 43, in case the proceeding lasts more than six months.

With respect to the acceptor the time shall bar after three years. The law seems to have given time for the parties against whom the right has been exercised or who takes up and pays the bill relatively longer period. If a longer time is not provided they may lose the right they acquired later against the person who accepted the liability to pay and up on who finally the duty rests.

The limitation time is for instituting a legal action, once the action is taken and judgment is given by the court, the limitation shall not apply that the execution may be applied any time, but within the 10 years time a judgment should be excited.

The limitation period shall be interrupted by institution of a legal action. Thus, is by any some the action is interrupted, otherwise than payment and leave of suit with out permission of court, the time limit shall start to run from the day the action is interrupted. If one endorser
is sued a notice given to the other liable parties shall interrupt the time for the endorser against
the others. In case of bankruptcy of a party the holder’s action of claim in the bankruptcy
proceeding also interrupts the time limit. However, the interruption of a period of limitation is
only effective with respect to the person who was involved in the case. If the period is
interrupted by a legal action instituted against one endorser, the time against another endorser
or drawer will not be interrupted so that the plaintiff should still hurry to exercise his rights
against those other persons in case the suit or execution become unsuccessful.

**Causal Relations between the Parties**

Loss of legal recourse against the parties liable under a bill extinguishes the right of the holder
to claim a special right for the fulfillment of the duty of the debtor by way of proving the
cause the debtor issued the bill to him. For example, if the drawer had issued the bill to the
holder as repayment of a loan the drawer had browed from the holder, but if the holder lost his
legal recourse right against the drawer due to one of the reasons discussed above, the holder
can still sue drawer debtor for the repayment of the loan under the loan contract, which is the
cause on which the bill is drawn and issued. Here the creditor can only use the bill as one
evidence to prove the loan and that it is not paid. For other requirement for causal relation
consider the provisions of art. 800.

**Right of Recourse Relating to Checks**

The dishonoring of a check immediately confers on the holder of the check the legal remedy
of a right of recourse against the drawer and endorsers. This is a result of the legal duty of
guaranteeing the payment of a check, imposed upon these parties. According to the terms of
the instrument and the provisions of the law

The mere fact that a bank dishonors a check does not entitle the holder to exercise his right of
recourse against the parties liable. There are certain conditions precedents which have to be
fulfilled in order that the right of recourse may be exercised. Non – compliance with these
conditions will deprive the holder of his right of recourse. Theses requirements are some how
similar to cases discussed in section one with respect to bills of exchange. A large proportion
of checks are paid when they are presented for payment to the drawee. Payments are also
refused by the drawee more often than not for various cases, which is worth discussing. The section thus begins with the main and usual reasons for dishonoring.

Dishonoring of a Check

The essential characteristic of a check is that it is an order addressed to a banker to pay a sum certain in money on demand. From this emanates the obligation of a banker to honour checks drawn upon him by his customer. When the bank refuses to pay a check presented it said that it is dishonored. A banker may dishonour a check or in banking parlance ‘return a check unpaid’ for various reason. In module two we have seen some real and personal defenses for non payment of negotiable instruments. They are mostly cases raised between the drawer and the holder. However, as checks are payable by banks the reasons are not those which can be raised between the drawer and the holder. Banks are seen dishonoring checks for cases between the banker and the drawer apart from the real defenses.

What reasons do you know or you presume to be given by banks for dishonoring a check?

...............…………………………………………………………………………………………………………………………………………………………………………………..

The Banks in Ethiopia dishonor checks usually for reasons listed below.

1. Endorsement missing.
2. Payee’s endorsement required.
3. Payee’s endorsement irregular
4. Payee’s endorsement requires clearing Bank’s verification
5. Drawer’s signature differs.
6. Alteration in……….. requires draer’s full signature
7. Check is post dated.
8. Check is out of date.
9. amount in words and figures differ
10. Payment stopped by the drawer
11. Deposit items not cleared.
12. Exceeds arrangements.
13. Refer to drawer.
14. Check is mutilated.
15. No arrangement is made to overdraw the account.
16. Signature required.
17. Ten cents stamp required.
18. Account transferred to branch.
19. Account transferred to branch.
20. Insufficient fund.

The main reasons for dishonoring of checks by the bank may be discussed under the following headings.

A) Termination of the contractual relationship between a bank and a customer

When a person deposits his money in a bank, a banker-customer relationship of contractual nature comes into existence where by the bank may dispose of the deposited funds in respect of its professional activity subject to their repayment under the conditions agreed between the two parties.

One of the modes by which a customer deposits funds in a bank is a current account. From the banker’s duty to repay funds deposited with it, first there derives the customer’s implied right to draw checks up to the amount of any credit balance on his account or within the limit of the agreed overdraft. This imposes on the banker implied duty to honour any checks drawn upon it by its customer.

Like any other type of contract, the contractual relationship between a banker and a customer may be terminated. The contract may be terminated by mutual agreement, although in practice it is one of the parties, usually the customer, who initiates the termination of the relationship. Sometimes, however, the banker-customer relationship may be terminated without either party taking the initiative. This may occur where the deposit in a customer’s account is reduced to nil balance due the customer with drawing the money or where a customer’s account is closed by court order.
When a current account is closed the banker has no further relationship with the customer in respect of that account. Any money owed by one party to the other has been paid or is treated by the party closing the account as no longer recoverable. It is when such Customers hand a check to the holder that the dishonoring of a check due the termination of the banker-customer relationship comes into picture.

B. Stopping of payment of a check

The drawing and issuing of a check creates a duty on the drawee to pay the sum specified to the holder. The duty created by the voluntary act of the drawer may be destructed by his act. Payment of a check, therefore, may be stopped by the drawer’s act of countermanding the payment.

The provision of the Commercial Code that deals with the stopping of payment of a check, Art 857, states that the drawee bank is authorized to refuse to pay a check if he is so ordered by the drawer. The usual reason why a drawer wishes to stop payment of a check is because the check has been either lost or stolen. A drawer may also stop the payment of a check if he believes that the payee is unwilling or unable to fulfill the contract in respect of which the drawer issued the check.

Even though no requirement is set out by Art 857 about the form in which a drawer can stop the payment of a check, it is customary for banks to require their customers who wish to stop the payment of a check to do so by giving a written and signed instruction. The reasons why banks require their customers to stop the payment of a check by a written order are first to minimize the risk that an oral order countermanding or stopping the payment of a check well not be acted upon though it has been received in ample time and second to incorporate stipulations which exempt them from liability if through inadvertence they pay a check whose payment has been stopped. For this purpose they prepare a ‘stop payment request’ or other similar forms in which the customer fills in the full description of the check the payment of
which he wishes to be stopped (number, date, amount, payee’s name) and the reason why he wishes the payment of the check to be stopped.

The right to countermand the payment of a check, as envisaged by Art 857, is a right that can only be exercised by the drawer. Thus, if a banker is informed by a holder that he has lost a check, the bank cannot stop the payment of the check but will request the holder to communicate at once to the darer, and obtain the latter’s written instruction to have the payment of the check stopped.

C) Insufficiency of funds in account
A banker’s duty to repay funds deposited with him by way of a customer’s drawing a check up on him is dependent, inter alia, upon the existence of cover and upon whether the check is issued in accordance with an express or implied agreement under which the drawer has the right to dispose of deposited funds by checks. This is whether the amount stated is within the agreed overdraft by which a customer is permitted to draw a check beyond the amount that he has in his account. If the account of a customer does not have sufficient funds to meet a check drawn by him or if the customer issues a check beyond the limits of the agreed overdraft a banker can dishonor such a check when the check is presented to him for repayment.

If these precautions are taken, the “wrongful” dishonor of a check may be avoided. After taking the precautions if it is ensured that the check has no cover, the check will be returned unpaid to the holder for reason of ‘insufficient funds’

D) Attachment of balance under court order
As it has been said before, a banker’s main obligation when funds are deposited with it is to repay the sum standing to a customer’s credit. The banker can disregard any claims of third parties who allege that the whole or part of the customer’s balance belong to them. If, however, such third parties obtain an order from a court by which the amount of a judgment debt, or if he is restrained from withdrawing funds from the account, pending the final determination of the court case, the bank can refuse to pay a check drawn on such an account.

E) Check in improper form
A check has to be in a proper form before a banker is obliged to pay it upon presentment. If any one of the following points are not in order a banker will dishonor the check.

**Drawer’s Signature**

One of the requirements that a check should fulfill and in the absence of which will render a check invalid, as we saw in chapter one is the signature of the drawer. Thus if a check on which the drawer’s signature is missing is presented for payment, a bank will return it for the reason of invalid check for the drawer’s signature is missing.

A bank always requires each customer, on opening a current account, to supply sample (specimen) signature so that the bank may verify the customer’s signature on checks drawn by him. This is a precautionary measure banks have established in order to protect themselves against payment of a check. Besides we have seen that the drawee bank should confirm the series of endorsements and the signature of the drawer. If upon examination it turns out that the signature on the check does not conform to that found on the sample (specimen) signature card, the bank will refuse to pay the check and returns it for the reason that the drawer’s signature is different.

**Date of the check**

A bank in practice unusually dishonor a check which is presented for payment if it is undated, post or ante-dated or out–dated.

Is this action of dishonoring a check by the bank based on a valid ground?

The issue is better to be seen from the types of the check with respect to the dating separately as follows.

**Check Undated**

Art. 827(d) provides that a check should mention the date on which it was drawn and Art. 828 state that in the absence of the date on which the check was drawn the instrument will not be valid as a check. Hence, if a check on which the date it is drawn
is not mentioned is presented to a bank for payment, the bank will return it unpaid. Although a check may have been issued undated by the drawer, the holder of the check has the right to date it prior to its presentment and thus is entitled to payment of the amount stated therein.

Check Post-dated

A check is said to be post-dated if it is dated later than the date of issue. Thus if a check is issued on November 1, 2000 but is dated January 1, 2001 it is said to be post-dated. If a post-dated check is presented for payment before the date written on the check, a bank will return the check unpaid for the reason check is post-dated.

The practice of banks in dishonoring a check for the reason that it is post-dated does not seem to be legally supportable since Art. 854 provides that a check is payable at sight. As a ‘sight’ instrument a check has to be paid by a bank once it gets sight of it upon presentment for payment in so far as the check fulfills the requirements set out by Art. 827 cum Art. 828.

Using a check as a pledge to secure a debt is a practice that does not accorded with what the law provides. This is because its applicability will be inconsistent with one of the essential characteristics of a check, namely that it is payable at sight.

How is that giving a check as a pledge be inconsistent with its characteristics or applicability?

A check by is t sight instrument means that the holder can demand payment of the check the moment the he presented it to the drawer, even if the date on which the check is issued is issued is earlier than the date written on the check. Payment on the instrument is unconditional and the holder to exercise the right upon the instrument what he needs is is unconditional and the holder to exercise the right upon the
instrument what he needs is to be a lawful holder. Thus a check cannot be issued as a pledge being drawn postdated as the post dating will not have effect.

This proposition can be supported by numerous court decisions among which is Civil Case No. 977/86 can be sighted. The plaintiff sued the defendant because the check given to him by the defendant was dishonored due to insufficient funds. The defendant advanced as one of his defenses that the check which he issued was intended as a pledge for the payment of money which he owned to the plaintiff and hence should not be held liable on the check before the date on which the check becomes due. In rejecting the defense put forward by the defendant the court said, “Giving a check as a pledge is contrary to Art. 854 which provides that a check is payable at sight. This is so because the said provision shows that a check by its nature cannot be given as pledge.”

Check Out-dated

It was seen in the previous unit that pursuant to Art.855 “A check has to be presented for payment within six months of the date thereof regardless of when the check was issued”. If a holder thus presents a check for payment after the expiration of this period, then, unless the delay in the presentment of the check is excused a bank will return the check unpaid for the reason that the check is ‘out-dated’

Check ante Dated

Although a holder may present an ante-dated check for payment, a bank will not dishonor such a check for reason that it is out-dated unless the date written on the check is six months prior to the date on which it is presented. If the check is in such a way that at the time it is presented the six months period from the date of

Though the Commercial Code does not furnish a meaning of the word alteration it can be defined as any change or addition which alters the effect of the instrument in any respect.
There are many circumstances the occurrence of which might warrant the assertion that a check has been altered. Some of them are changes in the date, sum payable, place of payment, the number of parties to the check, the relations of the parties, the medium or currency in which payment is to be made and the addition of a place of payment where no place of payment is specified.

5) Absence and Irregularity of endorsement payable to self drawer endorses payable to the order of payee only to endorses by payee not to order

Banks require the holder of a check to endorse the check before they pay the sum. Thus if a check is drawn payable to self the drawer himself has to endorse the check. If it is drawn payable to the payee or to the order of a payee the payee of the last person to whom the check was endorsed has to endorse the check. This made if the check is not drawn payable to the payee and is accompanied by the words (only) or (not to order) or any similar words. In such a case the payee should be the person to whom, the check is ordered to be paid thus any other endorsement there after is irregular.

Ascertaining the regularity of the endorsement of an endorsee is one of the duties imposed upon a banker. Art 860 in this respect provides that, "The drawee who pays an endorsable check.....must verify the signature of the drawer and the last endorsee." It should be noted, however, that it is not practicable to require a banker to verify the signature of the last endorsee since it does not have a sample signature of the last endorsee against which he can compare the signature of such a person affixed on the check.

Indorsing a crossed check to whom who cannot claim under a crossed check is also an irregularity of endorsement. Thus, presentment of a crossed check for payment by someone other than a banker or a customer of the banker is additional reasons that cause the dishonoring of a check.

The rights of recourse issues with respect to checks are similar to that of bills discussed in section one. In this sub section we only focus on the features differently provided for checks. However, the student is strongly advised to take a look at those issues discussed under bills by
cross referring to the provisions dealing about dishonoring and right or recourse of holder of a check

The rights of recourse issues with respect to checks are similar to that of bills discussed above. In this sub section we only focus on the features differently provided for checks. However, the student is strongly advised to take a look at those issues discussed under bills by cross referring to the provisions dealing about dishonoring and right of recourse of holder of a check.

Art. 868.-Rights of the holder

The holder may exercise his right of recourse against the endorsers, the drawer and the other parties liable where the check on presentment in due time is not paid and the refusal to pay is evidenced:

a) by a formal instrument (protest); or
b) by a declaration by the drawee dated and written on the check and specifying the day of presentment; or

c) by a dated declaration made by a financial institution approved by the Government stating that check has been presented in due time and has not been paid.

The protest can be a dated declaration of the drawee written on the check, or same declaration made by a financial institute which may be made on a separate act.

Preconditions to be observed in Exercising Right of Recourse

The act of presenting a check for payment in due time is not sufficient by itself to subject the drawer, endorsers and the other parties liable to the holder's right of recourse. It has to be accompanied by the taking or certain legally required steps. These are drawing up the check.

What is discussed about protest in case of bills is also some how applied here that art. 869 provides that dishonor of a check should be evidenced by protest and similar to that of bills drawing up of a protest is provided to be unnecessary in checks with provisions "sans protest"
under art.871. However, as checks are presented for payment to banks and as there is no presentment for acceptance, there is no protest of non-acceptance and protest of non-payment is drawn by banks, not public officer. Drawing up of protest is seen in the earlier section here we begin with the requirement of notice.

**Notice of Dishonor**

An essential measure which a holder has usually to take if he wishes to exercise his right of recourse against the drawer, endorser and the other parties liable of a dishonoured check is to give due notice of dishonor to these parties.

In this connection Art.870 (1) provides that a holder has to give notice of non-payment to his endorser and to the drawer. Unlike other conditions which have to be fulfilled in order to exercise right or recourse the non-compliance with the duty to give a notice of dishonor will not extinguish the right or recourse or the person who failed to give notice within the prescribed limit of time against the endorser, drawer and the other parties liable on the check. However, he will be liable for any damage he causes by his negligence to an amount not exceeding the amount of the check.

If the refusal of the drawee to pay the check on presentment is evidenced by a formal protest, the public officer who has drawn up the protest is required to inform in writing without delay the persons bound by the check whose addresses are specified on the check or to the persons whom he knows are bound by the check about the drawee's refusal to pay the check.

The following guidelines regarding the giving of a notice of dishonor are provided by Art.870.

A) Form of Notice

There is no requirement that a notice of dishonor must be given in a certain form. Thus it may be given in any form, be it in writing or by verbal communication. The return of a dishonored check to the holder, endorser or drawer also constitutes giving a notice of dishonor.
B) time Of Giving Notice of Dishonor

The holder has to give notice of dishonor to his endorser and to the drawer within the four working days following the day on which the protest is drawn up. Every endorser must, within the two working days following the day on which he receives notice, inform his endorser and acceptor for honor if any of the notice which he has received. In the case of a provision 'retour sans frais', the time reference for notice is the day of presentment. For a notice has been posted within the above time.

In connection with time what should be noted is that giving a notice of dishonour is a corollary of the presentment and drawing up of a protest. Thus the circumstances which excuse or delay or render unnecessary the presentment of a check and the drawing up of a protest, stated under art.876, also operates to have the same effect in the case of giving of a notice of dishonor.

C) Where notice would be unnecessary

There are nevertheless some instances which dispense with the giving of a notice of dishonor may be mentioned here. These are:

Art.835 (3) states that a check may be drawn by a banker on himself. If all the conditions necessary to exercise the right of recourse are fulfilled, it will be the drawer who will ultimately pay the check. Hence, if a check is drawn by a banker upon himself and if he is required to give a notice of dishonor, he will be giving the notice to himself. Therefore, it will be unnecessary to give a notice of dishonor in this case.

Extent of the Right of the Holder

The extent of the rights of the holder and the party who look up and paid the check are provided under articles 873-875 they are similar to the cases discussed with respect to the extent or rights against parties liable under a bill, under arts. 791-794, thus further discussion is not made here.
Loss of Right of Recourse due to Limitation of Time

As is the case with other types of rights, the right to exercise a right of recourse in cases where a negotiable instrument is dishonored is not granted to the holder for an indefinite period of time. The right will be barred if it is not exercised within the limit of time set by the law. With respect to this it is necessary to consider the provisions of Art.881

Art 881.-Periods of time

1) Actions of recourse by the holder against the endorsers, the drawer and the other parties liable shall be barred after six months from the expiration of the limit of time from presentment.

2) Actions of recourse by the different parties liable for the payment of a check against other such parties shall be barred after six months from the day on which the party liable has paid the check or the day on which he was sued thereon.

3) Actions by the holder of the check against the drawee shall be barred after three years from the expiry of the time limit for presentment.

4) Limitation shall run, in the case of legal proceedings, from the date of the conclusion of the last proceedings.

5) Limitation shall not apply where judgment has been pronounced or the debt has been acknowledged by separate act.

Discuss the time of limitations for the holder and other parties to exercise right of recourse from the date of the check.

As previously discussed, the limit of time for presentment expires after six months of the date written on the check by virtue of art.855. The cumulative operation of Art.881 (1) and Art.855 thus has the effect of barring the exercise of right recourse after the lapse of one year of the date written on the check.

Art.881 (3), on the other hand, bars action by the holder against the drawee if it is not brought within three years from the expiry off the limit of time for presentment. Again, as this sub-
article is to be interpreted in conjunction with Art.855, an action by the holder against the
drawee will be barred if it is not brought within three years and six months from the date
appearing on the check.

Pursuant to Art.881 (2), actions of recourse by the different parties liable for the payment of a
check against other such parties will be barred after six months from the day on which the
party liable has paid the check or the day he was sued thereon.

One major point which should be raised with the issue of period of limitation is the fact that
the period of limitation of an action has lapsed does not by itself bar the bringing of an action.
A court cannot also, on its own motion, dismiss a case by applying provisions concerning
limitation of action unless limitation is pleaded by the party who seeks to set it up as a
defense, as art. 1856(2) civil code prohibits such actions. The action can be brought and may
also be decided in favor of the plaintiff if the party who can set up the limitation against the
party who brings the action waives the time limitation defiance after it has become effective.
The right to invoke limitation of action as a defense is waived where the party who can invoke
it does not raise it at the earliest time as preliminary objection. It is enough that the defendant
raised objection of period of limitation the fact that the does not sight a provision of the law or
does not supported his objection be provisions will not make his objection in vain.

The law also provides certain circumstances where actions or recourse will not be barred even
if they are not brought within the limits of time set by Art 881(1), 881(2) and 881(3). In this
regard Art.881 (5) provides that limitation of actions of recourse will not apply where
judgment has been pronounced or the debt has been acknowledged by a separate act. In other
words, if the action has been brought in respect of a check on which a decision has been given
or if the party liable on the check admits by a separate act that he is indebted to the party who
is holding him liable, there will be no limitation of action that runs in favor of a person who is
liable to pay the check.

Interruption

The period of limitation regarding action of recourse can be interrupted for various reasons
also discussed with respect to bills Art. 882(1) lists these cases.
Art.882- Interruption

1) The period of limitation shall be interrupted by bringing of an action, by notice being given of third party action or by lodging a claim in bankruptcy.

2) Interruption of the period of limitation shall be effective against the person in respect of whom the act interrupting such period was performed.

3) Where the period of limitation is interrupted, a further period of the same duration shall begin to run.

Discuss the reasons for which period of limitation is interrupted listing the specific cases the law provides.

The provision of the law lists reasons for interruption of period of limitation. The reasons are:
1. Bringing of an action of recourse;
2. Being given notice of a third party action;
3. Lodging a claim in bankruptcy

If the period of limitation is interrupted due to the reasons stated above, this interruption will, according to Art.882 (2), be effective against the person in respect of whom the act interrupting the period of limitation was performed. The limitation will not be interrupted against the other person liable on the check. For example if the holder only sues one of the endorsers the period of limitation is only interrupted with respect to the sued endorser only. With respect to the drawer and other endorsers the time is still running to count from the last day of presentment time.

Causal Proceedings

Art. 886 provide that reservation of causal proceedings discussed under art.800 for bills of exchange also apply to checks. Thus, if the holder loses his right of action on the check he may still have a claim against the person who gave the check to him as a consideration for a certain transaction based on the cause of their relation. What the holder needs to do is to prove that he is the creditor based on the transaction and the other person who had issued the check is still a debtor as the obligation of the debtor which was supposed to be paid by the check is not fulfilled as the holder could not exercise the right on the check. The plaintiff, which was
holder, can now use the unpaid check alonge evidence of proof of the transaction and the indebtedness of the defendant. However, his claim would not be now unconditional, as what would be on the check, and he uses the normal procedure than summary procedure.
Chapter four
Liabilit, Discharge and defense

Those who issue and/or transfer negotiable instrument and those who guarantee the payment of the instrument are parties who are liable to holders. These parties have either primary or secondary duty to satisfy the claim of the holder, if the latter claimed his/her right satisfying the preconditions. Certain defenses can bar the right of holders to demand payment from persons who would otherwise be primarily or secondarily liable on the instrument and have the effect of discharging debtors from their obligation. This unit is mainly aimed to discuss the parties liable to commercial instrument, the time when and the situation in which the liability of the parties arise and the defenses that may be raised by the persons who would otherwise be liable against the holder.

For the sake of convenience, the parties liable to a bill of exchange and their liability are dealt under the unit separately from the parties liable in check.

4.1 Liability of parties
4.1.1 Parties liable for a dishonored bill

The parties liable for payment of a bill are provided under art.790.

Art.790. - Joint and several guarantees of persons bound by bill.

1) All drawers, acceptor, endorsers or acceptors for honor of a bill of exchange shall be jointly and severally liable to the holder.

2) The holder may claim against all these persons individually or collectively without being required to observe the order in which they have become liable.

3) Any person signing the bill who has taken it up and paid it has the same right.

4) Proceedings against one of the parties liable shall not bar proceedings against the others, even though they may be subsequent to the party first proceeded against.
From the above article who do you think is/are the party or parties liable to the instrument?

The acceptor of a bill of exchange is the party who is primarily liable to the holder of the instrument. The liability of the other parties including the drawer, endorser and acceptor for honor arise in case when the drawee of the instrument refuses to accept the instrument. The liability of parties who are secondary liable may also arise when the drawee who accept the instrument failed to effect payment when the holder present the instrument for payment.

As indicated above, endorsers and acceptor for honor are secondarily liable for the payment because their liability arises if the drawee who accepts does not pay upon presentment for payment. The holder can sue them all together with the acceptor, or he can sue only one or some of them from whom he thinks can get payment. The fact that holder did not include the remaining some people who could be sued together would not set them free. He can still institute a legal proceeding against the remaining some if the suit against the former is unsuccessful.

It is the right of any party who would be liable under the bill to make payment. The bill may be fully dishonored or partially paid and partially dishonored. In payment to the holder the party will have the right to demand from the holder that the bill and the protest be surrendered to him, with a receipt. This helps the party as an evidence of payment and to exercise right of recourse against the other parties. The party may also cancel his and his subsequent endorser’s endorsements. Thus, if in case the bill is entrusted to some other’s possession he will made a party liable for payment as cancelled endorsements are as good as no endorsement.

The party who pays can ask the party liable to him, the drawer and the endorsers, before him. The endorsers subsequent or after him are not liable to him as it is him who gave the bill as consideration for fulfillment of his obligations towards them. Thus, they are creditors not debtors of him. The extent of the right of this paying party against others liable to him is to the extent of the sum he paid with legal interest.
Assume, for e.g., the drawer is Abebe and Belay, Chala and Debebe are endorsers of the bill respectively where Eskedar is the last endorsee and Fikadu is the drawee, and the bill has been accepted dishonored for payment by Fikadu. IF Chala pays the bills amount, say Br. 3500, to the holder or last endorsee Eskedar, Chala’s right against the holder, Eskedar, is requiring the delivery of the bill with the Protest and receipt. Chala then can institute legal recourse against Abebe, Belay and Fikadu, the drawer, an endorser before him and the drawee, but not against Debebe as this is a subsequent endorser Chala cannot hold liable. The extent of Chala’s right is the amount he paid, the 3500 Birr and legal interest 9% per annum of Br. 10000 calculated from the day Chala paid the sum to Eskedar up to he is paid back and other expenses if any.

**4.1.2 Parties Liable to a Dishonored Check**

Art. 872, states how the holder may exercise his right against the party liable under the check.

*Art.872-Joint guarantee of persons bound by a check*

1) **All the persons liable on a check shall be jointly and severally liable to the holder.**

2) **The holder may sue all these persons individually or collectively without being compelled to observe the order in which they have become bound.**

3) **Any person signing the check who has taken it up and paid it has the same right.**

4) **Proceedings against one of the parties liable shall be no bar to proceedings against the others, notwithstanding that such other parties may be subsequent to the party first proceeded against.**

It is impossible to know the parties who are liable to the holder from the reading of the provision. The provision simply says all the parties liable to check are jointly and severally liable. Who are these parties who are liable on check? ....

To answer the above question let us reconsider who the parties to a check are. The original parties to a check are the person who draws the check (the drawer), the person on whom the check is drawn or who is required to pay the check (the drawee) and the person to whom the check is drawn payable (payee or bearer). Other persons can come into the picture and become parties to a check after it is issued. One of such parties is the endorser and endorsee
who transfer a check by signing on it and to whom the check is transferred by endorsement respectively. The other person who is a party to a check is the acceptor for honor.

In other words, in order for a party to a check to be held liable on it, the basic requisite of liability has to be fulfilled. That is the party that is sought to be liable on the check by the holder is one who have assented to be bound. His assent is signified by his signing on the check as drawer, endorser or acceptor for honor. If his signature is not contained in the check or an allonge affixed there to he will not be held liable. Thus, the drawer, endorser and acceptor for honor are legally obliged to guarantee that a check will be paid upon presentment for payment. In the event of the dishonoring of the check the holder can exercise his right or recourse against them.

As you well know, the drawee of check is always the bank. The bank has an obligation to pay to the holder of a check when it is presented to it. The bank will not be liable to the holder unless it accept check. The bank is also liable if it certify the check.

**Liability of an Agent value in collection for collection by attorney**

A person can personally sign a check as drawer, endorser or acceptor for honor or have the check signed to cause the same effect by an agent on his behalf.

What is the liability of a person who signs on a check by agent capacity?

An agent who signs a check on behalf of his principal will not be held personally liable on the check in so far as he acts within the scope of his power since the check is deemed to have been signed by his principal. Thus, if the holder comes into possession of a check endorsed in such a way as to imply agency, such as "value in collection", "for collection", "by attorney" etc and he endorses the check only in his capacity as agent, he is considered to have acted within the limits of his authority. If, however, a check is signed by a person who claims to be an agent of a person but who has authorization or if the act of signing a check by an agent
exceeds his power, such person will bind himself as a party to the check and consequently will be held liable to the holder as any other liable party on the check.

**Distinction between Liability of Drawer and Endorser**

An important distinction can be drawn between the liability of the drawer and the liability of the endorser. The endorser can limit his liability to the holder of a check by prohibiting any further endorsement of the check if in spite of the prohibition the check is subsequently endorsed. So the other endorsee can not held liable the endorser who had prohibited endorsement. However, the drawer of a check can not escape liability to the holder of the check for any reason whatsoever because any provision by which he releases himself from his obligation to guarantee payment will be of no effect by virtue of Art 840.

**Liability of Transferor of a Bearer Check**

A holder of a bearer check can transfer the check by delivery alone. Strictly speaking a person who negotiates a check in such a manner is not a party to the check since he has not signed his consent to incur liability on the check by signing it. But a holder of a bearer check can also transfer the check by endorsing it. In this case his endorsement would make him liable in accordance with the provisions regarding the right or recourse of subsequent holders.

**Liability of a Drawee**

Is a drawee of a check liable to the holder? If yes, when does he become liable?

It was seen previously that one of the differences between a check and bills of exchange is that while the drawee of a check cannot accept it (Art 831), the drawee of a bill of exchange can do so. By accepting the drawee of a bill of exchange undertakes to pay the bill at its maturity. The acceptor of a bill of exchange is bound in the same manner as a maker of a promissory note to pay the instrument at maturity. However, as the drawee of a check is legally prohibited from accepting a check, he cannot undertake to pay the check at maturity and hence cannot become liable on the check.
It was seen in the previous module that one of the differences between a check and bills of exchange was that while the drawee of a check cannot accept it (Art 831), the drawee of a bill of exchange can do so. By accepting the drawee of a bill of exchange undertakes to pay the bill at its maturity. The acceptor of a bill of exchange is bound in the same manner as a maker of a promissory note to pay the instrument at maturity. However, as the drawee of a check is legally prohibited from accepting a check, he cannot undertake to pay the check at maturity and hence cannot become liable on the check.

When a bank dishonors a check he is liable only to wards the drawer but not to wards the payee or holder as there is no privity of contract between the holder and bank. A binding contractual agreement between the drawee and the payee or holder does not exist to the effect that the drawee will honour a check presented for payment by the holder. Moreover, as it is only a person who signs on a check that will be held liable on the check and the drawee does not sign the check, it will not be held liable on the check for failing to pay the amount to the holder.

Is the drawee who certifies a check liable to wards the holder?

The question can be answered in the affirmative since by virtue of Art 832(3) "Certification is effected by the signature of the drawee on the face of the check," and as was seen earlier signing an instrument makes the person who signed the instrument liable to wards the holder.

When a bank, at the request of the holder, certifies a check, it blocks the cover in respect of which the cover was certified in a separate account for the benefit of the holder. By blocking the cover the bank guarantees that the money to meet the check is available for payment when the check is presented. The certifying bank, however, guarantees payment of a certified check up to the expiration of the six months from the date on which the check was drawn because Art 832(2) provides the "The cover in respect of a certified check shall remain blocked in a separated account for the benefit of the holder until the expiry of the period of time for presentment provided in Art 855."

In short, the certification of a check operates to make the drawee that certified the check liable towards the holder and allow the holder to exercise his right or recourse against the drawee.
Liability in case of Alteration of a Check

The effects of the alteration of a check on the liabilities of the parties to a check need to be considered here. Arts 879 and 880 provide what the consequences of alteration of a check are. Art 879 deals with the effect of the alteration of the text of a check while Art 880 Specifically deals with the alteration of a crossing on check.

Art. 879: Extent of the obligations of signatories

In case of alteration of the text of a check, parties who have signed subsequent to the alteration shall be bound according to the terms of the altered text; parties who have signed before the alteration shall be bound according to the terms of the original text.

Art. 880: Alteration of crossed check.

1) In the case of a crossed check, any alteration of the crossing made without authorizations shall invalidate the check except as regards any person who has himself made or consented to the alteration, and towards later endorsers.

2) Where the alteration is not apparent, the lawful holder may rely on the check as if it had not been altered and require payment as originally provided.

The important factor to be considered in Art 879 is the time when a signature was placed on the check relative to the occurring of the alteration. Thus parties who have signed subsequent to the alteration will be bound according to the terms of the altered text while parties who have signed prior to the alteration are bound according to the terms of the original text.

Illustration

Suppose that X draws a check for birr 100,000 before endorsing it to Z, who in turn endorses it to L, and L finally endorses it to K. If K sues all the endorsers on the check, L will be held liable to wards K for birr 110,000 as he have signed on the check after it was endorsed by X and Y while X and Y will be liable to wards K for birr 100,000 since they signed on the check before it was altered.
With respect to a crossed check Art 880 (1) provides that any alteration of the crossing made without authorization will invalidate the check as regards any person who has himself made or consented to the alteration and to wards subsequent endorsers. Assuming that the check in the above example is crossed, the it will be invalidated as regards B and C (if they have not consented to the alteration) but it will be valid as regards D, E and F. The non-apparentness of the alteration of the crossing will result in a different consequence than that provided by Art 880 (1). Accordingly Art 880(2) lays down, "where the alteration is not apparent, the lawful holder may relay on the check as if it had not been altered and require payment as originally provided

4.3 Defense

Certain defenses can bar the right of holders to demand payment from persons who would otherwise be primarily or secondarily liable on the instrument. The governing law of the land which is relevant to the above issue is Article 717 of the Commercial Code of Ethiopia.

Article 717

1. The debtor may only set up against the holder of the instrument defenses based on their personal relations defenses of form, and those based on the text of the instrument.

2. He may set up defenses based on falsification of signature lack of capacity or power of representation at the time of issue of the instrument, or on the absence of the necessary conditions for bringing the proceedings.

3. The debtor may set up against the holder of the instrument defense based on his personal relations with preceding holders unless the holder in acquiring the instrument has knowingly acted to the detriment of hr debtor.

The article mentions all the available defenses the debtor may raise. These defenses are:-

a. Defenses based on the personal relations between the debtor and the holder;
b. Defenses of form and those based on the text of the instrument;
c. Defenses based on falsification of signature;
d. Defenses based on lack of capacity;
e. Defenses based on lack of representation at the time of issue of the instrument; and
f. Defenses based on the absence of the necessary conditions for bringing the proceedings.

Depending on whether a holder who makes the demand for payment is holder in due course or ordinary holder, the defenses are divided into two general categories i.e. Universal defense and Personal defenses.

**Universal defense**

Universal defenses, which are also known as real defenses, are defenses which are valid against all holders and include defense of form and those based on text of the instrument, defense based on falsification of signature, defense based on lack of capacity and authority to represent, and those based on absence of necessary conditions for bringing the proceeding.

Defenses based on form and text of the instrument:

These are defenses, which the debtor can raise in relation to the formality requirement of negotiable instrument. We may look at article 735, 823/24, and 827/28 of the Commercial Code as examples. If these requirements are not fulfilled the debtor may raise defenses based on non fulfillment of such requirements. Again defenses based on text of instruments refer to situation where the contents of the instrument are altered or cancelled etc. In this case, the debtor may raise the alteration or cancellation as a defense.

**Example**
The holder of the instrument which is payable to bear altered the amount of money fixed in a Bill of exchange from 2000 to 20,000 by adding one zero and delivered it to a holder in due course. In this case the drawer of the instrument have a valid defense against the payment of 18,000 thousand birr.
Falsification of signature:

Signature of the parties involved in a negotiable instrument is a necessary requirement to hold them liable under the instrument. It may happen that the signature of the debtor who is required to pay is falsified or forged. In such a case, the debtor has a right to raise defense based on such ground and refuse payment.

Lack of representation (authority)

Where a person signs on a negotiable instrument on behalf of another person without having authority, the person on whose behalf the instruments signed can not be held liable for the obligations incorporated in the instrument,

Example

Ms. “A”, who is the secretary of Mr. “B”, signed on B’s check representing B without actually having proper authority and gave it to Mr. C. Mr. C later on transferred the check to Mr. D. Mr. D, claimed payment of the check from Mr. B, the employer of Ms A. Mr.B can raise defense based on absence or lack of representation against D, or C.

Lack of capacity

Incapacity is also among the ground of defenses that bar the right of holders to demand payment from the parties who are otherwise liable to payment. Incapacity may relate with the age or mental state of a person. If one of the parties liable to the holder signed the instrument while he was bellow eighteen years old or while he was adjudicated mentally incompetent by court proceeding, he or those people who represent him can defend payment on the ground of his age or mental problem.
Personal defense

Personal defenses are used to avoid payment to an ordinary holder of a negotiable instrument. Such defense can not be raised against holder in due course. The term personal relation between the debtor and the holder is so broad that it almost includes every prior relation the two persons have had. It may, for example, refer to contractual relations between the debtor and the holder including the one based on which the negotiable instrument is issued or transferred to the holder. When the there is a breach of the underlying contract for which the negotiable instrument was issued the maker of a note can refuse to pay it or the drawer of a check stop payment.

Example

Ato Ababa and Ato Kebede entered in to contract for the sale of 2 laptop computers. According to the contract, Ato Kebede agreed to deliver the computers two months after Ato Abebe pay the price of the laptop. Though Ato Abebe paid the total price of the laptop immediately after the contract, Ato Kebede did not deliver the laptops until two weeks after the expiry of the two months period. Eighteen days after the expiry of the two months period, Ato kebede present the bill of exchange for payment. In such case Ato Abebe can raise personal defense against Ato kebede on the ground of breach of contract.

In the above case what would happen had Ato Kebede transferred the instrument to Ato Lema who acquired the instrument in good faith with out knowing the defense available against Ato Kebede?

In such case Ato Abebe can not raise against Ato Lemesa, the holder in due course, the defense he could have raised against Ato Kebede; since personal defenses are defenses that can only be raised against ordinary holders not against holder in due courses.
Part two
Check and the Banking Transaction
Chapter One

CHEQUE

Recall from chapter one that a negotiable instrument to be qualified as such must meet some requirements. These requirements are what make a certain instrument negotiable. Those factors that make an instrument valid or negotiable are discussed in chapter one in general terms. In this chapter we will examine specific requirements applicable to cheque, its characteristics and distinguishing features including other provisions of the code which are particularly applicable to cheques.

Validity requirements

In chapter one we have said that every commercial instrument should fulfill the following requirements to be property called as negotiable. Hence an instrument to be considered as negotiable or valid it must.

A. Be in writing
B. Be signed by the maker or the drawer
C. Contain a fixed sum of money
D. Be payable to a specified person, to order or bearer
E. Contain an unconditional order to promise to make payment
F. Be payable on demand or at a definite period of time

When we come to cheque Art 827 of the commercial code enumerates the following specific requirements of a cheque. Thus a cheque shall contain.

a) An unconditional order to pay a sum certain in money.
b) The name of the person who is to pay (drqwee)
c) The place of payment
d) The date when and the place where the cheque is drawn
e) The signature of the person who draws the cheque (drawer)

**Question**
From the above reading of art 827, which requirements do you think are mandatory?

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**Question**
Compare art 827 with those general requirements applicable to every type of negotiable instrument. One mandatory requirement is missing from the article identify the missing requirement and indicate which other provisions of the code fills the gap.

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**Question**
A cheque was issued by the drawer as “pay Zumra” is this a cheque assuming other requirements are fulfilled, why or why not?

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**6.2.1 Characteristics of a cheque**

Even though the commercial code does not give a formal definition of a cheque it could be defined as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise on demand: This means

- A cheque is a bill of exchange
It is always drawn up on a bank, (Art 829)
It is always payable on demand Art 854

A cheque is a bill of exchange because in both case the drawer gives a signed, unconditional order to the drawee to pay a certain sum of money to a certain person or to the order of that person or to the bearer of the instrument. Although every cheque is a bill of exchange, every bill of exchange is not a cheque. The points of difference between a cheque and a bill of exchange may be summarized as under:-

A. A cheque is always drawn on a bank whereas a bill of exchange can be drawn any other person.

**Question**
Can a bill of exchange be drawn or a bank if yes how?

B. A cheque is always payable on demand, whereas a bill of exchange may be payable on demand or at a defined period of time.
C. A cheque can be crossed, but a bill of exchange cannot be crossed.

**6.2.2 Definition & types of a cheque**

A--Dry cheque Art 830 (also termed bad cheque, cold cheque, false cheque, not cheque)

Dry cheque is a cheque that is not honored because the account either contains insufficient fund or does not exist. Normally a person acts as a drawer and issues a cheque he has opened a current deposit account and sufficient fund with the drawee bank. A bank honors a cheque based on express or implied agreement with the account holder (Art 830) contrary to this a person may issue a cheque with out having sufficient fund in his account or even without having any current deposit account in the drawee bank. A cheque issued in such cases is called a Dry cheque. According to Art 830 the fact that there is insufficient fund or no account all does not affect the validity of the cheque. Hence, the
holder of a dry cheque may still exercise his right of recourse against the drawer and endorsers.

B --Blank cheque – Art 841

It is a cheque signed by the drawee but left blank as to the payee or the amount, date or all. A cheque if it does not specify the payee, amount or date is not a valid cheque the holder does not set any right from such cheque. However the holder may fill up the blank and make it valid and negotiable. For instance, a cheque which is blank as to amount is non-negotiable. When the amount is written by the holder, now it becomes valid. (Art 841) you should not that if there is an express agreement between drawer and payee as to the content of the statement to be written on the blank space, the payee has to strictly comply with such agreement.

Example
A drawer issued the following blank cheque to Abera.
“pay abera or order Br ………………………..” The drawer then instructs Abera to write br 400 on the blank space but he wrote br 800 contrary to drawer’s instruction in this case Abera is entitled to no more than br 400.

However, if Ato Abera after writing br 800 negotiates the cheque to senait, who receives it in due course and according to the rules of negotiation, senait as a holder in due course is entitled to get br 800 (Art 841).

C---Certified cheque – Art 832

A certified cheque could be defined as a depositors cheque drawn on a bank that guarantees the availability of funds for the cheque. Normally a drawee bank is not obligated to certify a cheque. When a drawee bank does certify a cheque, it substitutes its undertaking (promise) to pay the cheque for the drawer’s undertaking and becomes obligated to pay the cheque. At the time the bank certifies a cheque, the bank usually debits the customer’s account for the amount of the certified cheque and shifts the money to a special account (blocked account) at
the bank. It also adds its signature to the cheque to show that it has accepted primary liability for paying it. The bank’s signature must appear on the cheque.

According to Art 832(1) a cheque is certified by the drawee bank at the request of the drawer. The bank certifies the cheque by signing on the face of the cheque in this case the bank has to keep the cover (the money) of the certified cheque in a separate blocked account (Art 832(2)] until the expiry of the six months for presentment for payment (Art 832(2) cum Art 855).

Even the code is silent as to the liability of a bank who certifies a cheque, one can discern from art 832 that certification is an undertaking to pay, meaning the bank assumes primary liability to pay the holder on the certified cheque.

**D---Traveler’s cheque – Art 887 – 890**

A traveler’s cheque is a cheque that (1) is payable on demand (2) is drawn on or payable at or through a bank, (3) is designed by the term “traveler’s cheque” or by a substantial similar term and (4) requires, as a condition to payment, a counter signature by a person who specimen signature appears on the instrument.

**Question**

Compare this definition with Art 887 and Art 888 of the code enumerate the difference and the similarity between the two.

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There are some distinguishing features which makes a traveler’s cheque different from other ordinary cheques. As indicated in Art 887 a traveler’s cheque is issued by a banker to his client, meaning the drawer, not only the drawee, is also a banker. The signature of the holder of such cheque appears on it and the paying bank has to make payment against verification of
specimen signature of the holder. That is not the case or ordinary cheque. There is no specimen of holder’s signature on the face of a cheque, if is not a traveler’s cheque.

A traveler’s cheque may be payable on the branch of the issuing bank or at a different bank (Art 887 (1)] for instance Distiches Bank may issue a traveler’s cheque to Petros payable at the branch of Detached bank or at commercial bank of Ethiopia. Usually, a traveler’s cheque as the name indicates is issued to tourists traveling from one place to another place or country.

6.2.3 Crossed cheques and cheques payable in account.

Crossing of cheques

The cheque system has now become one of the wheels in the machinery of business. But, at times an open cheque payable across a bank's counter lends itself to fraud and forgery by unscrupulous persons causing loss either to the bank or to the customer. With a view to avoiding such risk and protecting the owner of the cheque, the system of crossing of cheques has been introduced where by the holder of an open cheque directs the paying bank to carryout his mandate in particular way.

Thus, a crossed cheque is one on the face of which two transverse parallel lines have been drawn with or without certain words in them (Look at Art, 863 sub article 2).

Classification of crossings:- Crossings are of two types:

- General crossing. And
- Special crossing.

General crossing:- It is a crossing. Which consists of two transverse parallel lines across the face of the cheque. In between the line certain additional words like "banker" or some equivalent term may be written or it may be left without any additional word. (Look at sub article 3 of art 863)
These are examples of general crossing.

Special crossing: when inside the two transverse parallel lines across the face of a cheque, the name of a particular bank is written, it is known as special crossing.

Effects of Crossing: The effect of crossing of cheque is that the payment of this cheque can be made by the drawee banker to some other banker as agent of the holder or to the customer of the drawee bank, and the payee or the holder there of cannot obtain case from the drawee bank. When a cheque is crossed, no one can case it at the counter of the drawee bank, except a customer of the drawee bank or another bank. The amount can be either deposited with the drawee bank for the credit of his customer's account, or have the drawee bank pay its proceeds to another bank for the credit of his account which the holder has with such other bank through the local clearing house.

Article 864 deals with the effects of generally and specially crossed cheques. The effect of general crossing is that payment of such a cheque can be obtained through a bank only or the customer of a drawee bank, and the payee or the holder cannot get payment in cash at the counter of the drawee bank. (Look at sub-article 1, 864). If the payee or holder of a generally crossed cheque is not a customer of the drawee bank or does not have a bank account in any
bank, he must hand it over to a friend or relation who has a bank account will be credited with the amount of the cheque.

The effect of a special crossing, on the other hand, is that the cheque can be paid by the drawee bank only to the named banker or, where the latter (the named bank) is the drawee, to a customer of the drawee. The holder cannot get payment through any and every bank, but only through the bank whose name is mentioned in the crossing or where the named banker is the drawee, through the customer of the drawee bank. Thus, for purpose of receiving payment in such a cheque, the holder either must have an account with the named bank, or must negotiate it to some one who already has such an account. (Look at sub-article 2, Art 864)

A cheque can be crossed by the drawer or by any subsequent (sub-article 1 of art. 863). No restriction is imposed here. Again, a general crossing can be turned into a special crossing, but a special crossing may not be converted into a general crossing (sub-art-4, Art. 863).

Purpose of crossing of cheques:- Crossing is mainly used to safeguard the cheque against theft, fraud and other tampering. Naturally, a crossed cheque becomes much safer than an open or uncrossed cheque. It can be easily traced into whose hands the money has been paid. Even if it is lost by the payee, he dose not stand to lose anything because the finger can not collect the amount at the counter unless he has an account in the drawee bank that was named in the special crossing.

Article 865 introduces an additional purpose of crossing. The drawer or holder of a cheque may prohibit negotiability of the cheque by inserting in between the line words "not negotiable". The effect of inserting such word is that the holder may not negotiate the cheque. Where a person takes a crossed cheque which bears on it words "not negotiable" he shall not have and shall not be capable of giving a better title to another person than that which the whom he took it had (Sub art 2,Art. 865)
Obligation of the bank to honor a cheque

Liability of the banker (Art. 866):- A banker who pays a cheque crossed generally otherwise than to a banker or the drawee bank, or a cheque crossed specially otherwise than to the banker whose name is mentioned, or to the customer of the drawee bank, (where the drawee bank is the named bank) shall be liable for the resulting damage up to the amount of the cheque.

Cheque payable in account (Art.867)

The drawer or the holder of a cheque may prohibit its payment in cash by writing transversally across the face of the cheque the words "payable in account" or any similar words. The effect is that the payee or holder of such kind of cheque cannot get cash from the drawee.

Presentment and Payment of a cheque

Generally, a person to be entitled payment on a negotiable instrument has to fulfill two conditions in accordance with Art 716(1)

i) Establish that he is the lawful possessor (holder) of the instrument

ii) Present and deliver the instrument to the debtor (i.e maker or drawee)

When this rule is applied to cheque it means that the person should primarily show that he is under possession of a bearer cheque (721(2) or if the cheque is to order that he is in possession of the order cheque which contains an uninterrupted series of endorsement (724(2) Cum 847) and his name is indicated as a payee or as an endorsee.

A person if he qualifies as a holder, he is entitled payment as stated in the cheque, by presenting it to the drawee bank at its maturity. A cheque is a demand instrument by operation of law (854). The holder can present it for payment within six months from its Date. (Art 855) Date here refers to the date appearing on the cheque, not the cheque of issuance i.e. the date the cheque was actually delivered to the holder.
Example
A cheque Dated 27-1-2000 may be actually delivered to the payee on 27-3-2000 in this case the 6 months time runs from 27-1-2000.

When a cheque is presented for payment to the drawee bank, holder has an obligation to physical deliver or surrender it to the bank (Art 716(2) cum Art 859). The Bank may also require the holder to give him a receipt.

Sometimes it may happens that the drawer does not have sufficient cover (money) in his account. In practice, when the amount in the drawer’s account is less than the amount stated on the cheque, Banks dishonor (refuse payment) for in sufficient cover. However, the law (Art 859 (2) & (3)] clears provides that holder has the right to request payment up to the cover and he could not also refuse partial payment. When partial payment is effected, It will be stated on the cheque and holder has to give a receipt to the drawee. Partial and endorsers, but only up to the amount paid (Art 859(5). The holder has protest and pursue his right of recourse for the remaining amount. Although not clearly stated in Art 859 it could also be said that Refusal of partial payment (Art 859(2)] releases the drawer and the endorsers up to the amount refused. This is because to draw a protest there has to be refusal to pay by the drawee bank.

6.2.6 Payment of a cheque

A drawee bank who receives cheques issued by a drawer will make payament to the holder provided the cheque is valid and the drawer has sufficient fund (cover) in the bank one of the main functions of a banker is to make payament of cheques issued by his customer as and when they are presented to him. A bank does not have any duty to the holder to make payment, rather his duty is towards the drawer. When a bank receives a properly drawn and payable cheque on a person’s account and there are sufficient funds to cover the cheque, the bank is under contractual duty to pay if. In other jurisdictions the banker has also a statutory duty. According to Ethiopian law, there is no mandatory provision which imposes an obligation on the drawer bank to pay a properly drawn and presented cheque. The source of obligation is only contractual. According to article 830 the arrangement to honor cheque is based on express or implied agreement between the drawer and the bank.
When a bank dishonors (refuses to pay) a cheque without any valid legal ground he is not liable to the holder. He becomes liable towards the drawee because by dishonoring a valid cheque, he has failed to be bound by the agreement. In such case the drawer may claim compensation for the damage caused by the bank on the drawer’s prestige and Economic loss, if any.

6.2.7 Limitation of banker’s duty to honor a cheque

Banker’s liability towards a drawer is limited to case where the cheque is valid and there is no other ground to refuse payment. Hence the duty may be limited in the following cases.

A. Stop payment order – Art 857

A stop payment order is a request made by a customer of a drawee bank (i.e. by the drawer) instructing not to pay a cheque. Any person authorized to draw a cheque may stop payment of it. For instance an agent of the drawer, if he valid power to draw his drawer’s cheque may give stop payment order to the bank. A drawee bank must strictly comply with stop payment order given by the drawer and should refuse payment. The stop payment order must be given in time. i.e. before the bank has actually made payment on the cheque. The stop payment order must also describe the cheque with “reasonable certainty” so as to provide the bank’s employee the ability to recognize it as the cheque corresponding to the stop payment order.

If there is a stop payment order it is sufficient authority for a bank to refuse payment (Art 857). The code does not provide any formality of the stop payment order. In the absence of any specific provision one can conclude that stop payment order may be given orally or in writing. In practice, stop payment order given orally, creates a problem on the bank, as it may lack sufficient evidence whether it is actually given by the drawer or not. To be on the safe side, it is advisable that it be given in writing. According to the uniform commercial code stop payment order, but it has to subsequently be approved in writing within 14 days.
Antedated and post dated cheque

It is self evidence that a bank can not refuse an antedated cheque so far the six months period of presentment for payment has not expired, with respect to post dated cheque, there is provision (similar to Art 845- bill of exchange) governing its effects, but it could be strongly argued that a post dated cheque is still a valid cheque. One of th requirements of a cheque in Art 827 (d) is that it should indicate the date the cheque could e taken as date of drawing, whether it is antedated or post dated.

A posted cheque may be refused to be paid by the bank until the date on the cheque, but a bank should not pay the postdated cheque before the date on the cheque, there is perhaps some reason why the drawere postdated the cheque. Until the date in the cheque he may change his mind and issue a stop payment order, hence to give effect to the intention of the drawer a bank should not pay a postdated cheque until the date on the instrument.

Example

On February 1, 2006 Alemu darws a cheque writing the date as February 27, 2006 and issues it to Abera. This is a postdated cheque which is valid and negotiable. In this case.

i. The darwee bank may validly refuse payment if its is presented for payment before February 27, 2006.

ii. The drawee bank has an obligation to honor the cheque and make payment to Abera, if it is presented for payment on or after February 27, 2006.

iii. The drawee bank if he pays the holder of such cheque before February 27, 2006, it will be liable to the drawer, for any subsequent damage. By making payment before February 27, 2006 the bank has deprived drawer to cheque his mind until that date for instance he could have given stop payment order until February 26, 2006. That’s why the bank should be liable for payment before the date on the cheque.
Death or in capacity of drawer Art 857

When a bank pays a cheque issued by the drawer he is in principle acting as his agent. Under the general principles of agency law, the death or in capacity of the principal terminates the agent’s authority to act for the principal. However, a totally different rule is apply to the authority of a bank to pay cheques out of the account of a deceased or incapable person. Art 857 of the code clearly states that neither the death of the drawer or his in capacity taking place after the issuance of the cheque shall have any effect as regards the cheque. This provision authorizes a bank to pay a cheque even through it is aware of the death or incapacity of the drawer. The rule is slightly different under the uniform commercial code. Accordingly the bank has the authority to pay until it has notice or incapacity of the drawer. Once the bank learns of this fact, it coses its authority to pay that person’s cheques – because the depositor is not complete to issue instructions to pay. Similarity a bank is authorized to pay the cheque of deceased drawer until it has notice of his death. Even if a bank knows of the drawer’s death, for a period of 10 days after his death. However, the deceased person’s heirs or other persons claiming an interest in the account can order the bank to stop payment.

Other grounds

In addition to the above typical cases in which payment is refused, there will also dishonor by the bank on the following grounds.

a) When the cheque contains material alternations

not authenticated by the drawer. Alteration does not affect the validity or the negotiability of the cheque. But the drawer’s liability is limited to the extent before alteration. (Art 879) Hence a bank should not pay an altered cheque, as it is not the clear instruction of the drawer. Where the alteration is related to the crossing made the instrument, it results in the invalidity of the cheque (Art 880). Similarly a bank also should not make payment when there is alteration of crossing.
b) When the signature of the drawer, payee or any endorser

Bank should pay only upon authorized signature its depositor. So, if the bank could detect that the signature bears a forged signature of the drawer, it should refuse payment, as there is no actual instruction to pay by the true drawer. Similarly, when a bank is aware of any forgery with respect to the signature of the payee or any endorser, it must refuse payment to the person who presents it. This is because that person is not legally entitled payment for he does not qualify as a holder or holder in due course. Forged endorsement interrupts the series of the endorsement and any subsequent person who acquires the cheque does not qualify either as holder or holder in due course (Art 847).

Difference of the amount stated in words and figures

Normally, discrepancy in the sum payable does not make the cheque invalid. In case of discrepancy the amount stated in words shall be paid (837(1)]. When the amount is written more than once the smaller sum shall be paid. In practice such discrepancy creates a suspicion that it may not be made by the express declaration of the drawer. Legally speaking, a bank which pays a cheque which contains a discrepancy in the sum payable is not liable towards the drawer, but to avoid any potential liability (for instance discrepancy may due to alternation by the payee or one of the endorsers) a bank in practice does not pay such type pf cheques. A Bank also does not have any contractual liability for dishonoring a cheque containing a discrepancy in the sum payable, since it has a legitimate ground to refuse payment. It has the right to avoid any subsequent doubt and is not contractual obligated to assume risks.

Payment in due course (Art 716(3), 861)

We have said that in some cases a bank has a legal and valid authority to refuse payment. Sometimes refusal to pay is mandatory and payment in contrary results in the liability of the bank. In few cases a bank has discretion to pay or not to pay (e.g. Discrepancy in the sum payable). As far as the bank is exercising its discretion payment or refusal of payment does not entail any liability forwards the drawer, as far as the bank does not violate the express or implied terms of its agreement with the drawer.
One of the key issues in Banker – Customer relationship mainly with respect to payment of cheque as the nature and extent of bank’s liability towards the drawer, when if pays, in cases it should have paid. For instance is a bank liable to the drawer it pays a cheque bearing forged signature of the drawer? Is it still liable even though it does not have any actual or presumed knowledge of forgery? What further implications will it have for a business transaction through negotiable instrument specifically through cheques, if the burden of (assuming liability) is allocated either to the drawer or the bank.

On the one hand it may be argued that a cheque containing forged signature of the drawer is void abolition as regards the drawer, any person who becomes a holder of such cheque is not legally entitled to get payment from drawer’s account. The bank also should refund the amount if in any way makes payment on such cheque. The agreement between the drawer and the bank is to pay a cheque provided it is issued by the drawer. Similarity a cheque containing any alteration does not express the intention and instruction of the drawer. Making the bank liable is also supported by the fact that it has a duty to verify and detect the true signature of the drawer. It is the bank’s duty to implement proper mechanisms of detecting signature. We may also add that the bank is in a stable and sound financial position compared to the drawer, hence even through it commits no fault while paying a forged or altered cheque, it should bear the burden. This encourages dealing through negotiable instruments which is vital for business transactions, by guaranteeing Drawers( depositions) that their money is safe, and not pay taken away suddenly by forgery.

It is also possible to provide a strong and sound argument from the bank’s point view, most of the times the existence of forged cheques is attributable to the fault of the drawer. He is the one who has to take due care in keeping his cheque book safe. The drawer is in a better position to avoid forgery than the bank. A bank even though it takes the utmost due care in detecting forgery, there are case beyond the skills of any reasonable employee of the bank to detect forgery. However, if the drawer takes reasonable care in keeping his cheques safe, it could almost totally avoid any access by third parties though theft or any other illegal methods. Hence there is a fall usable condition to the drawer to protect before it materializes.
In other words, the bank is in a less favorable condition to detect and protect forgery once it has materialized. (Once the cheque is stolen or taken unlawfully by a 3rd person who forger it)

Based on either of the above arguments most jurisdictions employ different rules governing the effect of payment on forged or altered cheques. For distance the uniform commercial code, holds the bank liable if it pays a forged cheque. The bank may be relived if it is established that there is negligence of the drawer contributing to forgery with respect altered cheques, is not liable so far it has exercised ordinary care in the processing of the cheque. The UCC also contains specific rules governing particular cases. Hence the risk for fraudulent endorsement by employees falls on the employer rather than on the drawer, the drawer also can not hold the bank liable in a situation in which the same wrongdoer makes a series of unauthorized drawer’s signature or alterations after the statement of account that contained the first unauthorized drawer’s signature or an alteration was available to the customer for a reasonable period.

Now let’s examine how the issue of liability is treated under the commercial code. The code provides a general rule applicable to any type of negotiable instruments. According to article 716(3) a debtor (drawee) who pays in the absence of fraud or gross negligence pays on the instrument to a person who does not acquire from the instrument is relieved from liability. Specifically Art 861 of the code governs payment on a cheque. According the drawee bank as far as he makes payment in good faith and in accordance with normal business practice he is discharged from his liability towards the drawer.

**Question**

Compare Article 716(3) and 861, which article is more favorable to the bank? What is the difference between payment in good faith and payment in the absence of fraud or gross negligence? If a bank pays a forged cheque negligently can it validly defend itself by arguing that it didn’t commit gross negligence according to article 716(3)? Why or why not?
Art 716(3) is a generally rule applicable to every type of negotiable instruments, whereas Art 861 is specifically applicable to cheques. Hence by the rule of interpretation which says a special provision prevails over the general, the liability of the bank should be determined based on Art 861. The rule of interpretation is necessary in this case because the test in Art 716(3) is totally different from that of Art 861. The former makes the debtor liable provided there is no fraud or gross negligence. However according Article 861, the absence of fraud or gross negligence is a defense. The bank has to establish that it make payment in due course or in good faith.

Compared to the UCC, the Ethiopian law gives more protection to the bank than to the drawer. Remember according to the UCC a bank who pays on a forged signature of the drawer has to refund the amount. It could escape liability provided there is negligence of the drawer contributing to wards the forgery. Acting in good faith is not a sufficient ground to avoid liability.

However according to Article 861 the bank is protected so far as it payee in good faith. So far as payment is in good faith the absence of negligence of the drawer doesn’t shift liability to the bank. While the criteria in the UCC is negligence of drawer where as faith is the test in Art 861.

Payment in due course – continued according to Ethiopian law, a drawee bank to be discharged from liability for paying a forged or altered cheque the following conditions should be fulfilled.

Payment should be in accordance fulfilled payment should be in accordance apparent ten or of the cheque. Since payment on a chque is based on Express or implied agreement between the drawer and banker, the lather has strictly following the instructions of the drawer as stated on the cheque. A bank who pays contrary to drawer’s order breaches his contractual duty. Payment effected in this manner (i.e. contrary to drawer’s order) is considered as payment to a person (holder) not entitled or the chque. Holder’s rights in Art 716(1) is limited only “as expressed in the instrument”.
Example

A drawee bank who pays a postdated cheque before the date written on the cheque didn’t pay according to the apparent ten or of the cheque. Similarly if drawers order is to pay br 257, bank should only pay that same amount. If the cheque is issued to Fetence it could not be paid to Fetiyha, Fitun or any other person.

- Payment to the person in possession of the instrument (holder)
This requirement has been mentioned earlier. A bank has to pay to the one who presents a bearer cheque to it. If the cheque is order, it should be either to the payee or to the endorsee who establishes his right by uninterrupted series of endorsement.

- Payment in the absence of stop payment order
A bank should never make payment when there is stop ayment order given by the drawer or any other person having valid authority. Payment in disregard of a stop payment order constitutes fault entailing liability on the bank.

- Payment in good faith
A banker most makes payment of the cheque in good faith, i.e. honestly and fraudulently good faith requires exercising reasonable care while processing the cheque. If the employee of the bank processing the cheque has actual knowledge of forgery or alteration, the bank incurs liability to refund the amount. Similarly, a cheque on its face may give rise to reasonable suspicion of forgery or alteration payment in such case is not payment in good faith.

Verification of signature

The moment every bank ensures protection of drawer’s interest and detects any forgery is through verification of signature. The law (Art 860) clearly requires the bank to verify the signature of the last endorsee and the drawer. Normally, it could not verify the signature of the previous endorsers as it does not have any specimen.
Verification of signature of the last endorser is made against the true signature appearing or his identification card or any other relevant documents. Practically what is being verified here is rather the identity of the endorser. The bank should write the name, address and any other relevant particulars of the endorsee either on the cheque or a separate document. Usually, he is required to submit a copy of his identification card. This helps to pursue him if he later turns out to be an unlawful owner of the cheque.

Signature verification is very difficult when it comes to drawer’s signature. In Ethiopia such verification is done manually by the employees of the bank who usually do not have any special skill other than experience. There are cases where the signature is carefully and skillfully forged that it becomes hardly possible to detect any forgery. The maximum any bank can do is carefully compare the signature appearing on the cheque with the three specimen signatures given by the drawer at the time of opening a current deposit account. Comparing the signatures and simply raving a decision does not of course, relive the bank from liability. If after comparison, it pays a cheque bearing a signature, totally different from that of the drawer’s specimen it could not escape liability.

6.2.6 Payment in accordance with normal business practice

The term normal business practice refers to the actual banking practice in general or specifically with the drawee bank in paying cheque. A bank, for instance should pay only within the normal working hours. If seeking oral approval of the drawer (though phone) beyond a certain amount is the practice in a certain bank, it has to be complied to escape liability.
Chapter Sven
Banking Transactions

The Bank Customer Relationship

The fundamental relationship of a banker and customer is based on a contract of deposit. It emanates from a contract made between the banker and customer involving obligations on both sides. As bankers perform different services for their customers, the nature of the relationship between the parties may vary from transaction to transaction. Thus, when the banker accepts the custody of documents of goods he acts as bailee and when he agrees to hold money on trust he becomes a trustee. The relationship of banker and customer, however, is established, as has been shown, by the opening of an account. When a banker opens an account for the customer the relationship established is one of debtor and creditor. When the account is in credit, the customer is the creditor and the banker is the debtor. The rights and duties of the bank and the customer are contractual and depend upon the nature of the transaction they undergo.

An agency relationship underlines the check collection process. However, it has to be noted that a check does not operate as an immediate legal assignment of funds between the drawer and the payee. That is to say, the money in the bank represented by that check does not immediately move from the drawers account to the payee’s account, nor is any underlying debt discharged until the drawer bank honors and makes final payment contract.

To put it in a nutshell, examining the nexus between customer and banker calls for the discussion of the rights and duties between them. Now, it is high time to see the bird’s eye view of the rights and duties of the two stakeholders of banking transaction. This may emeante from either the alw or the contract they undertake together.
Duties of the Bank

1. The Bank has the duty to honor its customer’s orders made by check for withdrawal of money and this is deemed as the paramount duty of the banker.
2. The bank has the duty not to make payment after the drawer has made a stop payment order and he receives the order before it effects payment.
3. The bank has to be vigilant enough in effecting payment be check and the customer should not be liable for the former's negligence.
4. The bank may not effect payment for a check drawn after it was notified of the drawers insanity or incapacity.
5. The bank has the duty not to reveal its customers account to third parties as there exist a fiduciary relationship between them, which is based on mutual trust and confidence of the parties.

Rights of the Customer

1. The customer can order withdrawal of his money deposited by check either his order to a specified person or to the bearer for the whole amount or for the part of the amount provided he has the mandate to do that.
2. The customer has the right to stop payment. Even if, the bank is deemed as the owner of the money deposited and may dispose it for professional activities, the customer will have the right to order payment or stop payment from his account.

Requisites to engage in banking business

In order to be able to undertake banking business in Ethiopia, a person must meet the following conditions:

- It should be a share company, whose share capital is fully prescribed;
- The total par value of the shares should be paid up and deposited in a bank;
- Its directors and officers should have the requisite qualifications as the national Bank of Ethiopia confirms;
- It should be issued with a license by the national Bank of Ethiopia;
In addition to these general requirements the proclamation has set other requirements which are worth consideration. These requirements have to do with the minimum capital requirement and nationality.

a) **Minimum capital requirement**: The minimum initial capital required to carry on banking business is determined by the National Bank of Ethiopia. The nature of banking business needs huge investment as compared to other share companies, whose minimum initial capital is 50,000 Birr. Again the total amount of the capital of a banking company must be paid up. This is not the case with other ordinary share companies in which the total amount of capital of the company must be subscribed, of which at least 25% is to be paid up and deposited in a bank at formation.

b) **Nationality test**: According to proclamation No 84/94, banking business may be undertaken only by Ethiopian Nationals. Foreigners are not allowed to engage in banking business.

**Continuing duties of banks**

**A. Financial Soundness**

A bank must always be financially sound as to discharge what it owes to depositors. Thus, the law requires it to have sufficient funds by observing the following duties.

**Reserve level**

Every banking company is required to maintain certain percentage of its deposit liabilities in the National Bank of Ethiopia. The basic reason for requiring level is to protect the interest of depositors. In other words, it serves as a strong guaranty for depositors in case a bank is in trouble.

The amount of reserve level a bank must maintain is determined by the National Bank of Ethiopia. It can in no way exceed 20% of the total deposit liabilities of a bank. The deposit
liabilities mean securities and/or money deposited by individuals or organizations. The National Bank can prescribe different percentages for saving, time or demand deposits.

**Maintaining Minimum Liquid Assets**

Liquidity is the term used to describe banks' ability to satisfy demand for case. Liquid assets are cash, readily convertible assets expressed and payable in foreign currency, other deposits and assets that the National Bank declares acceptable.

Consumer who deposited money in bank have a right to demand upon notice or otherwise the money from the bank. In order to satisfy the demand of its customer the bank should have liquid assets in its hands. It should be able to show that its liquidity enables it meet the demands of its depositors. That is why maintaining a minimum liquid asset is imposed as a continuing duty on banks.

The amount of the liquid asset to be the bank is determined by the National Bank of Ethiopia. However, it may not exceed 35% of the deposit liabilities of a bank.

**Legal Reserve Account**

A bank is required to create a legal reserve account and to transfer to such account before any dividend is declared, a sum of not less than 25% of its net-profit, as disclosed in the profit and loss account. This amount has to be reserved until it equals 100% of the capital of the bank.

According the proclamation, the legal reserve account, can neither be reduced nor attached. However, the reduction of the account may be allowed only for the purpose of increasing the capital of the banking company. Besides, it may be attached it is the only means of preventing a reduction or attachment of the paid up capital, provided an agreement has been reached between the National Bank and the Bank on the period within which the deficiency has to be made good.
Submission of Reports and Examination

While grant or denial of a license is the means of enforcing the requirement of the law, continuous enforcement of it is sought by examination and requirement of reports. Accordingly, every bank is required to submit statements on its financial affairs. It may also be inspected by the National Bank of Ethiopia.

Based on the reports and its findings, the National Bank will be able to identify banks that are in trouble and accordingly take any measure it deems appropriate.

Revocation of license and winding up of a bank

The grounds for revocation of a license are stipulated in the proclamation. The National Bank may revoke a license if any of the following conditions provided by law occurs.

- If a bank fails comply with statutory minimum capital, it result in the revocation of a license.
- A license may also be cancelled if a bank does not commence operations within one year following the grant of license.
- Amalgamation with another bank without prior written authorization of the National Bank of Ethiopia also results in revocation of license.

Finally, the legal existence of a bank comes to an end on the initiative of the National Bank, based either on the result of its inspection or examination of the affairs of the bank, or on the agreement of shareholders and creditors or when the bank is declared bankrupt.

7.1.1 Bank deposits

A primary characteristics of Banking involves accepting deposit from the public and ceding or Borrowing money back to the public. Deposit by a customer is contractual in its nature which subsequently a corresponding obligation on the accepting bank. The term Bank deposit is used here generally so as to refer to deposit of funds and deposit of securities. The former an
theorizes the bank to dispose money deposited by customer for lawful purpose in way it deems necessary. Deposit of securities involves receiving documents in cooperating rights such as commercial instruments transferable securities or other non-transferable instruments. In this case the bank mainly acts as a bailer and agent of the customer and may perform some activities for the interest of the depositing customer.

**A. Deposit of funds (Article 896-902)**

It is a contract where by a bank accepts funds from the customer, with the intention of owning and disposing as its own; subject to its repayment on demand or under conditions in the contract. Two important elements may be identified from the definition.

1. Ownership of the funds:- Once a customer deposits his money in a bank, he is no more the owner. Ownership right over the funds passes to the depository bank. Being the owner the bank has a right to dispose of the funds in whatever manner it deems appropriate. Note, however, that the bank may not acquire title to nor the right to dispose of coins or other monetary token if there is an express agreement that these coins or monetary token shall be refunded in kind.

2. The right of depositor to require repayment:- although the ownership right of the fund deposited passes to the bank, the customer has a right demand repayment of the fund. Being creditor of the bank the customer is always entitled to his money; the holder of account (the depositor ) may require repayment of the whole or part of the deposit at any time. This right may, however, be subject to notice or where there is agreement the right may only be exercised at the expiry of a fixed period of time.

i. Time when the contract is formed.

The contract of deposit shall be deemed to be completed where opens an account in a bank in which the latter enters by way of credit and all transactions carried out with the depositor or on his behalf with third parties.
An "account" is a statement setting out all the incoming and outgoing in respect of a customer. Where the customer receives money from the bank his account will be debited and when he gives money to the bank his account will be credited.

Although the Commercial code does not clearly say, an account may generally be classified into current account, savings account, and fixed time deposit account.

**Current account**: Current account is dealt with by Articles 925-937 of the Commercial code. However, these Articles deal the term in a very different way than the way banks treat current account. Therefore, the term current account is here discussed in the sense banks are now applying it.

Current account is "a running account which is continuously in operation". The depositor can draw upon the current account, as many times as he likes so long as funds to his credit. Money is withdrawn from a current account by issuing a cheque and may also be credited by depositing a cheque. Due to nature, the account is known by some laws as chequing account. Normally current account bears no interest. Since the money here is at call, necessitating a high degree of liquidity, the general practice is not to pay interest on current account balances.

**Fixed time account**: Here funds are kept for a long period of time and they are not as such subject to regular withdrawal. This type of account is opened by a person who has no immediate need for the money. The depositor may not normally request payment before the expiry of the period fixed in the contract. Here, as funds are kept relatively for a long period of time the bank may use the money for long-term loan or investment. From this it follows that a fixed time deposit bears whose minimum rate may be determined by the National bank of Ethiopia.

**Saving Account**: The other type of account, which may be opened in a bank, is saving account. This account is usually maintained by those who want to save money for emergency, or educational purpose or other similar purpose or other similar purposes. It may also be opened to earn interest. It, thus, goes without saying that interest accrues on saving account.
Again, the minimum interest rate is determined by agreement of the parties provided that it is not below the minimum rate determined by the National bank of Ethiopia.

**Forms of deposit**

Be it current account, fixed time deposit, or saving account, deposit of funds shall be at sight unless otherwise agreed. It means the person who is opening an account give the funds at the moment the account is opened. Save agreement otherwise, the customer should hand over the funds to the banker at the time the account is opened.

On the other hand, although the bank obtains ownership right over the funds deposited by the customer, the latter has a right to dispose the funds at any time. The customer may withdraw the hole or part of the deposit. However, this right of disposal may be made subject to notice or the expiry of a fixed period. Depending upon their agreement, the customer may be required to give advance notice to the bank before requesting withdrawal of the funds deposited.

In relation to withdrawal of funds, it should be noted that the customer's right of disposal is limited to the amount of money deposited. It in no way entitles him to an overdraft i.e. withdrawal of more than the deposited money (Article 899).

**Statements of account**: Once an account is opened, each transaction between the bank and its customer should be entered into the account. We have seen earlier that the bank need to enter by was of credit and debit all transactions carried out with the depositor or on his behalf with third parties. Given the nature of the transactions and their frequency, it is obvious that the customer needs to know the outstanding balance in his account. In response to this need, the law under Article 900 makes it incumbent upon the bank to send to the depositor a copy of the account showing series of transactions carried out and the balance to be carried forward to the depositor once each year or more frequently where customary or agreed.

**Place of transactions**: It refers to which office of the bank the customer may deposit or withdraw funds. Where the bank different branches, a question usually arises as to whether
the depositor can deposit or withdraw at any branch of the bank. Article 901 rules that in principle, deposits and drawings shall be effected at the bank where the account was opened. But this rule may be derogated from by agreement of the bank and the customer to the effect that the customer may effect deposits and drawings at any branch of the bank even though it is not the office where the account was opened. Therefore, where there is agreement otherwise, a customer who has an account in the Commercial Bank of Ethiopia, Finine branch, may make a deposit or withdrawal at another branch of the Commercial Bank of Ethiopia in Addis Ababa or in regional branch.

Again a customer may have several accounts at the same bank (branch). For example, he may have current account and savings account or two different saving accounts. In this case, each account shall operate separately; i.e. all transactions carried out in respect of one account shall be entered into that account and not into the other accounts. Also where a customer has several accounts at different branches of the same bank the transactions made in respect of each branch shall operate independently. We should, however, note that these rules are subject to agreement otherwise.

B Deposit of securities

The foregoing discussion deals with deposit of funds. But, banking business is not limited to receiving funds as deposit. It also consists of receiving securities as deposit. Why a customer deposits securities in a bank? What are its duties in respect of these securities and other issues will be discussed.

Securities are documents incorporating rights, which may include negotiable instruments such as commercial instruments, transferable securities etc and other non-transferable instruments. A person may deposit securities in a bank for various reasons. He may deposit them for the purpose of safekeeping. They may also be deposited for proper handling by the bank of the rights contained in them. For whatever reasons they are deposited, the bank shall have the obligations mentioned below in respect of these securities.
It is noted in section 2.1 that relationship between a bank and its customer, including deposit of securities, is contractual, which may be manifested as a debtor-creditor, bailee bailor, and agent-principal relationship. The relationship between a banker and a customer whereby the latter deposits his securities in the former constitutes a bailee-bailor, and an agent-principal relationship.

i. **Bank as a bailee (duty to provide custody)**

Where securities such as negotiable instruments, transferable securities and other are deposited in a bank, the bank becomes the bailee and depositor the bailor. Article 913 of the commercial code stipulates that a bank shall ensure the custody of the securities and act in relation thereto with the due care required of a public bailee under the Civil law. Here all the rules regarding bailment (Article 2779, and the following, of the Civil Code) come to apply to the relationship of the depositor and the bank.

Bailee-bailor relationship is defined in article 2779 of the Civil Code as a contract where-by one person, the bailee undertakes to receive a chattel another, the bailor, and to keep it on the latter's behalf. Thus, the bank being a bailee has an obligation to provide safe custody of the securities it receives from the customer.

The bank may in no way hand over the securities to other person without the authorization of the customer. However, the bank may surrender the securities to another person under a transaction requiring such surrender (Article 913 (2)). For example, as will be discussed below, the bank may under some circumstances be required to collect the rights incorporated in the securities. In order to do this, the transaction may necessitate surrendering or handing over of the securities to the person from whom the right is to be claimed. In this case the bank may surrender the securities because the situation or transaction so requires.

ii. **Bank as an agent (duty to yields of securities and collateral obligations)**

Once of the important services a bank render to its customer is to collect the latter's cheques, dividend and other credit instruments. It also purchases and sells securities, draws, endorses,
makes periodical payment of debts, premium fees, etc. The bank does all these things when the customer given power either in writing or otherwise.

When we come to deposit of securities the transaction itself; i.e. the transaction whereby a customer deposits securities in a bank, given rise to an agent-relationship. The mere fact of deposits securities in a bank creates an obligation on the bank to take what-ever measure necessary not only to ensure their safe custody but also to collect yields of securities and other collateral obligations.

Article 914 of the code confirms this duty of the bank. According to this Article unless otherwise agreed, a bank shall collect the amount of interest, dividend, capital repayments. Amortization and any other entitlements arising under the securities deposited as soon as they can be claimed. The bank is also duty bound to collect free scrip issues and join them to the deposit. Where necessary the bank is required to carry out transactions for the safekeeping of the rights arising out of the securities, such as regrouping, exchange, renewal of coupon sheets and stamping.

The bank performs all these activities on behalf of the depositor and for his benefit. Unless otherwise agreed in writing, a bank may only handle securities and rights relating thereto exclusively on behalf of the depositor (Article 912). It follows, then, that the bank shall place the sums it collected from the securities at the disposal of the depositor by making an entry to the credit of his deposit account.

iii. Duty to notify the depositor

Although the bank may, in its capacity as an agent, perform many activities on behalf of the depositor, there are some acts, which should be performed only by the depositor.

These acts require the depositor's personal involvement, and cannot be carried out by the bank. According to Article 915 of the Commercial Code, the bank shall notify the depositor by registered letter if transactions, which involve the exercise of an option by the owner of the securities, arise. Upon notification, the depositor should exercise his option. Where the
depositor after being notified fails to give instructions in due time, the bank should transact, on behalf of the depositor, the rights which the depositor has not exercised.

The other duty of notification, which is a little bit different in its purpose, is duty of the bank to inform to the depositor of any claim regarding the securities which has been made in court and of which the bank has notice. Some times third parties may bring an action to court claiming the ownership right or otherwise regarding the deposited securities. In such a case, the bank is duty bound to notify the depositor of this fact, where it has knowledge of the fact.

iv. Duty to restitute

When a bank receives securities as deposit, the purpose is to ensure safe of them and to handle them exclusively on behalf of the depositor. Unlike deposit of funds, deposit of securities does not give any ownership right to the bank over the securities deposited. It is, thus, logical that the bank shall restitute these securities to the depositor.

Article 916 and 917 determine the time when, the place where and to whom the securities should be restituted. Concerning the time of restitution, the law says that a bank shall restore securities at any time, upon the demand of the depositor, and within the period of time provided in the conditions of custody. The depositor has a right to claim restitution of the securities deposited and the bank has a concomitant duty to return them to the depositor. But the depositor's right to claim his securities is subject to the bank's lien right or right of retention. The bank may refuse to restore the securities to the depositor where it has an unsettled claim against the depositor, which may arise either in relation to the securities or in relation to other transaction between itself and the customer. Concerning the place of restitution, the bank shall restore the securities at the place where the deposit was made. The securities to be restored to the depositor shall be the titles deposited, unless restitution of different titles has been agreed by the parties or is permitted by law.

With regard to the person to whom the bank should restore the securities, the law that restitution shall only be made to the depositor. It is also possible to make restitution to the persons who have got rights from the depositor. In other words, persons who have got a right
either by a contract or by inheritance may claim restitution of these securities from the bank. In this case, the bank shall restore them to these persons. In addition, restitution may be made to those persons authorized by the depositor or by those having rights from the depositor.

In relation to restitution of securities, there are two more issues worth considering. The first one is that it may happen that the securities deposited in the bank are the property of third parties and not the depositor. To whom should the bank restore such securities—to the depositor or to the owners of the securities? The law in Article 917 sub-article 1 says that securities should be restored not to the owners but to the depositor. This is because the owners do not have any kind of relationship with the bank. The bank should return the securities to the depositor, who has a contractual relation with it.

The second issue is the securities may be deposited by a person who has a usufruct right over them. In this case, to whom should restitution be made—to the usufructuary or to the bare owner? Again restitution should be made to the usufructuary who is a depositor. But where the usufructuary is dead and the bare owner proves his death the securities may be validly handed to the bare owner.

7.1.2 Bank Transfer

Among the many services a bank provides to its customers, money transfer from one account to another is one. Banks have their branches throughout the entire country and therefore, they serve as best mediums for remittance of funds from one place to another. Bank transfer is defined under Article 903 of the commercial code as a transaction by which a bank debits the account of a depositor, upon his written instructions, and credits by its entry another account with the same amount. Usually customers who have one or several accounts in a bank or different branches of the same bank wish to transfer money from one account to another which may be in the same bank or other branch of the bank. They may also wish to transfer money from their account to the credit of another person’s account. This they do by giving written instruction to the bank and by fixing the conditions of the issue of transfer orders by agreement with the bank.
When we consider the definition given in article 903 of the commercial code in light of the practical functioning of transfer of money it seems narrow. The article clearly indicates that this service is available to customers of the bank who have account. But in practice bank transfer of money is available to both customers who maintained an account and those who do not.

Bank transfer may be of two types:-

- **Internal**
- **External**

  Internal transfer refers to transfer of money from one account to another in the same bank, which is made by crediting and debiting these accounts. External transfer on the other hand, refers to transfer of money from one branch to another branch of the same bank (Look at Article 904 of the Commercial Code).

A customer may order the bank to transfer money already into his account or money to be entered in the account within a period determined in advance by agreement with the bank. The question here is when exactly does the person to whose benefit the order is made obtain title over the money? Article 906 sub-article 1 of the Commercial Code states that the beneficiary under a transfer obtains title to the sum to be transferred at the time when the bank debits the account of the person who orders transfer.

Once the account of the transfer is debited, the transfer order may not be can called. Cancellation is possible only before the bank debits the account from which money is transferred (see Article 906 (s)). The transferor should, therefore, be cautious in ordering transfer of his money to another account.

There is, however, one situation where the person ordering transfer may oppose the execution of a transfer order. He may validly oppose the execution of a transfer order, notwithstanding that it has been evidenced by an instrument handed to the beneficiary, from the date of the judgment. Declaring the bankruptcy of the beneficiary or granting him the benefit of a composition with creditors (Article 910).
7.1.3 Hiring of Safes

In addition to the transactions, which we have considered earlier, banks provide service for the safe custody of valuables such as jeweler, negotiable securities, documents of title to property, etc. The modern bank being equipped with safe and strong room is naturally a very safe and convenient depository of valuables.

There are two ways thought which a modern bank ensures safe custody of its customer’s valuable properties.

1. By accepting the valuables from the customers for safe custody;
2. By hiring out safe deposit vaults or lockers or boxes to the customers.

As far as the first service or way is concerned, we have thoroughly considered it while we were discussing deposits of securities. We do not need, therefore, to repeat it. But concerning with the second way i.e. hiring out of safe deposit boxes, also known of safes we will have brief discussion.

**Hiring of safe deposit vaults (boxes)**

Banks provide safe deposit vaults facilities to the public at selected branches. The banks for this purpose have strong rooms generally under the ground floor, which are equipped with safe deposit lockers. The lockers are of different sizes and they are out to the public.

The bank hires out safe deposit boxes based on the agreement to be signed by the hirer (person who is requesting safe deposit box), and hence the relationship between the bank and the hirer is contractual. Article 919 of the Commercial Code affirms the nature of the relationship between the hirer and the bank. Hiring of safes is a contract where by a rent (Article 919). Being a contract, it imposes obligations on the bank and the hirer. Duties of the bank in hiring of safe may be out lined as follow:

- To provide the boxes once the contract is concluded;
- To take all necessary measures to ensure the upkeep and custody of safes;
- To take all necessary measures to enable the hirer empty his safe box in the event of any potential risk before the materialization of the risk;
- To take good care of the strong room in which the properties are deposited;
- To prohibit unauthorized access to the safe deposit boxes;
- To make sure that a third party requiring access has a duty executed order;

The bank has also the following rights in the hiring of safe contracts:
- To collect the rent from the hirer;
- To prohibit deposit of things which are dangerous such as explosives, inflammable, poisons, etc;
- To cancel the contract when such dangerous things are deposited;
- To claim the key of the safe deposit box when the contract is terminated.

On the other hand, the hirer has the following rights and duties arising out of the contract of hiring of safes:

Rights of the hirer:- the hirer has the following rights:
- To have exclusive access to his safe box whenever he wants so long as it is within the business hours of the bank;
- To authorize an agent to have similar right of access;
- To have his property safely kept in his safe box;
- To be compensated if he has incurred loss or damage to his property due to the bank's failure to take ordinary care of the safe deposit box;

Duties of the hirer:- The hirer is duty bound:
- To pay rental charges in advance;
- To deposit some money in advance as a guarantee;
- To use only the key provided by the bank to open his safe box;
- To deposit a copy of power of attorney, if he has given any;
- To immediately report loss of his safe box key;
- To surrender the key at the termination of the contract.
Termination of the contract of hiring of safes

A contract of hiring of safes may be terminated where the hirer fails to pay the rent for the safe box. Failure to pay rent gives the bank a right to terminate the contract (Article 923 of the Commercial Code). The bank may terminate the contract one month after giving a notice by a registered letter, and only when the rent is not paid even after the notice.

Once the contract is terminated, the bank shall call upon the hirer to be present and shall take possession of the safe deposit box (but not its content). Where so called upon does not present himself or refuses up his safe open with its contents removed and to return the key giving combination, the said is be forced in the presence of a court official who draws up a descriptive report which constitutes evidence as regards all interested parties.

7.1.4 Discount

Discounting commercial instruments and other negotiable securities is one of the services modern banks provide to their customers. We have discussed in the second part of this material that commercial instruments contain a right consisting in the payment of a sum of money. If we look at, for example, bills of exchange they set out an entitlement consisting in the payment of a sum of money. Except bills payable at sight, other bills are payable at a future date fixed future date. If they need the money immediately, they cannot get it from the drawee. Where can they get the money then? They can get payment of the bill before its maturity from a bank. They get payment from a bank by an arrangement called a "discount".

A discount is, therefore, according to Article 941 of the commercial code, an agreement where by a bank undertakes to the value of commercial or other negotiable securities having a definite a time of payment, which the holder assigns to the banker subject to repayment of their value if not paid by the person principally liable. In other words, in a discount, agreement the bank pays the amount of money specified in commercial instruments before its maturity date and the holder surrenders the instrument to the bank by way of assignment so that the bank may collect the money at its maturity from the drawee.
A discount agreement gives to the bank firstly, the right to charge interest and further an endorsing or other commission, and secondly, it reserves to the bank a right to claim repayment from the beneficiary of the discount if the drawee refuses to pay the instruments. Therefore, the bank' right in a discount are charging interest and commission, and exercising all the rights arising out of the instrumented by it.

**Calculation of interest and commission.**

The bank does not discount instruments for nothing; it charges interest for its service. According to Article 942, the interest shall be calculated on the basis of the time remaining for the maturity date of the instrument. For example, a bank under a discount arrangement pays an instrument on June 30, 2003. The maturity date of this instrument is October 30, 2003. Now interest shall be charged for the time extending from June 30 to October 30, 2000. The rate of interest shall be determined by agreement of the parties. Again, the commission shall be calculated based on the value of the instrument; and its rate is determined by the agreement of the parties.