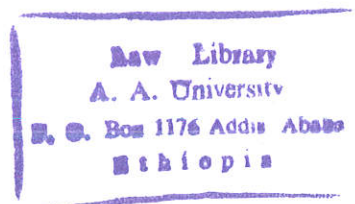


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**THE ROLE OF DELIVERY IN THE TRANSFER  
OF OWNERSHIP AND RISKS IN SALE OF  
CORPOREAL CHATTELS UNDER ETHIOPIAN  
LAW: A COMPARATIVE STUDY.**



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ASSISTANT PROFESSOR)**

**MAY, 2002**

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**SUBMITTED IN PARTIAL FULFILMENT  
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**TO MY BELOVED MOTHER, ABWA**

35 pages

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You foolish, don't know that Almighty is Creator and not creature?

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## Introduction

Sale is one of the special contracts envisaged by the Ethiopian Civil Code. It is perhaps the contract in which we most regularly engage. The importance of sale lies in its essential object, i.e. transfer of ownership for price. Thus, one of the main question that the law of sale must answer, therefore, is how this transfer shall be effected. The other principal issue that the law of sale shall solve is the question of risk. As the title suggests, this paper aimed at analyzing the role of delivery in the transfer of ownership and risk in sale of corporeal chattels under Ethiopian law. In a contract of sale, it is the obligation of the seller and the <sup>payment of price</sup> buyer to effect and take delivery of the thing sold respectively. Delivery plays a prominent role in the transfer of ownership in sale of corporeal chattels. In sales contract, as it has been underscored under Arts. 2266 cum 2273(2) of the Ethiopian Civil Code it is the obligation of the seller to transfer ownership over the thing sold to the buyer. But, how this transfer shall be effected? When does the buyer become the owner of the thing he bought and when does the seller cease to exercise the right of ownership over the thing sold? Delivery has also a decisive role to play in the transfer of risk in sale of corporeal chattels. In the normal course of commercial activities it is not always true that the delivery of the thing sold is to be effected at the time of the conclusion of the contract. The parties may agree to effect delivery of the thing sold at a later time than the time of the conclusion of sale contract. Thus, who is going to bear the risk of loss of the thing sold that might occur as a result of some contingent event between the time of conclusion of the contract and the time of delivery? In other words, the question is whether the seller shall bear the risk of the buyer. And when shall the risk of loss be transferred to the buyer? This paper has attempted to answer these questions and other related issues.

Since this research paper is a comparative one, Roman, French and Louisiana law are utilized for purpose of comparison. The Ethiopian law has been compared with the laws of these jurisdictions after the law of each legal system has been discussed and a concluding remarks on these laws have been made.

To accomplish this work, this paper has been divided into four chapters. The first chapter, with a view to make a brief understanding of sale, deals with the definitions and nature of sale.

The second chapter dwells upon the nature and definition of delivery, and the modes of delivery by which it could be effected.

The third chapter is devoted on the time and place of delivery. Under this chapter questions like when and where delivery shall be effected, and what are the consequences of failure to effect and take delivery at the right time and the right place are discussed.

The skeleton and the frame work of this paper which deals with the role that delivery plays in the transfer of ownership and risk in sale of corporeal chattels is dealt with under chapter four.

Finally, this paper comes to an end with conclusion and recommendation.

# CHAPTER ONE

## DEFINITIONS AND NATURE OF SALE

### 1.1 Definitions

Sale is one of the most common type of consensual transactions that have been undertaken in our daily life<sup>1</sup>. The buying and selling activities are everyone's daily encounter. So far, there is no universally accepted way of defining sale. The definition of sale differs from jurisdiction to jurisdiction. Different jurisdictions have defined the term sale differently. The Roman law, to which the civil law system traces back its origin, has defined sale as "a contract by which one person becomes bound to deliver a subject to another with the view of transferring the property in consideration of money price."<sup>2</sup> From this definition we can point out four elements very decisive for the existence of sale. These are;

- i. there shall be a contract concluded between the two parties,
- ii. there shall be a subject of sale ; i.e. a thing to be sold,
- iii. there shall be price expressed in monetary terms,
- iv. and there shall be delivery of the thing sold with the view of transferring ownership from the seller to the buyer.

Thus, according to Roman law, if the above specified elements are met, there shall be sale whereas if one of the elements is missing, there may not be sale.

On the other hand, French law, which was highly influenced by the Roman law, has provided the definition of sale under Art. 1582 of Code Civil as follows:

*Sale is a contract by which the one binds himself to deliver a thing, and the other to pay for it.*

Following the Roman law definition, this definition has incorporated the crucial elements of sale; the contract, the thing, the price and delivery. In fact, it seems to have failed to include the transfer of ownership aspect. However, a scrutiny made in other provisions of the Code Civil reveals that the duty to deliver the thing includes the duty to transfer ownership<sup>3</sup>. Besides this, however, there is a remarkable difference between Roman and French conception of sale. On the one hand, according to French law the existence of a perfect contract of sale suffices to constitute sale without a need for actual delivery of the thing<sup>4</sup> since the obligation to deliver shall be deemed to have been discharged upon the perfection of the contract of sale<sup>5</sup>. A contract of sale is perfected when the parties have agreed as to the thing to be sold and its price. Thus, if there is a perfect contract of sale, that is quite enough to constitute a sale.

→ The Roman conception of sale, on the other hand, holds that the delivery or conveyancing is an essential element to constitute a sale. The existence of a perfect contract of sale, parties' agreement as to the thing to be sold and its price, doesn't by itself constitute sale<sup>6</sup>. There shall also be conveyancing for the existence of sale. From this, it follows that, under Roman law, sale and contract of sale are two different things<sup>7</sup>. The latter is the legal basis upon which the former proceeds. And a contract of sales creates only a personal commitment between the parties and it is only when

conveyancing is effected a sale is deemed to be constituted<sup>8</sup>. Consequently, ~~sale is the summation of the two.~~

The Louisiana Civil Code, which took Code Napoleon as its model, defines sale in the following manner:

*Sale is an agreement by which one gives  
a thing for price in current money  
and the other gives the price in order  
to have the thing itself.*<sup>9</sup>

This definition has envisaged all the elements, which are essential for the existence of sale. Of course, it seems to have overlooked the element of delivery and transfer of ownership. However, this definition has embodied such elements because the clause "... the one gives the thing..." implies three things; transfer of ownership, delivery of the thing and keeping the thing safe until delivery<sup>10</sup>.

Under Louisiana law, like under French law, as opposed to Roman law, sale and contract of sale are one and the same<sup>11</sup>. The actual delivery of the thing is not an essential requirement to constitute a sale<sup>12</sup>. The conclusion of a perfect contract of sale suffices for the existence of sale.

The above discussed definitions have in common the contract, the thing and the price as essential elements for the existence of sale. Now let's consider the Ethiopian law.

Art.2266 of the Ethiopian Civil Code provides the definition of sale as follows:

A contract of sale is a contract where by  
one of the parties, the seller, undertakes

to deliver a thing and transfer its ownership  
to another party, the buyer, in consideration  
of price expressed in money which the buyer  
undertakes to pay him.

- delivery
- thing
- transfer of ownership
- price (expressed in money)



This definition is so long as compared to respective definitions given by Roman, French, and Louisiana law. Nonetheless, it has included all the elements that are incorporated in the definitions given by the above mentioned jurisdictions. Furthermore, it has taken sale and contract of sale to mean the same thing, like French and Louisiana law, as opposed to Roman law, in saying "a contract of sale is..." x 99

According to Ethiopian law definition of sale, to begin with, sale is a contract. It emanates from a contract not from the law. As contract, it shall comply with the mandatory provisions of the law. The buyer and seller shall have the requisite capacity to enter into a juridical act<sup>13</sup>. Needless to mention, they shall also give a defect free consent which is sustainable at law<sup>14</sup>. Besides the object of the contract shall be sufficiently defined and be possible, lawful and shall not be immoral one<sup>15</sup>. If there is a prescribed form, it shall be complied with<sup>16</sup>.

The seller is duty bound to deliver the thing sold. The thing could be currently existing and belonging to the seller or a third person, or not existing currently but to be produced or manufactured by the seller in the future<sup>17</sup>. Transfer of ownership is also another obligation of the seller. This is to be effected through delivery. Delivery entails transfer of possession thereby causing transfer of ownership for majority of corporeal movables<sup>18</sup>. Moreover, the seller is expected to transfer unassailable right over the thing to the buyer<sup>19</sup>.

contra → also risk

unassailable

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Correspondingly, the buyer is obliged to pay a price in money. The buyer acquires ownership over the thing not gratuitously but for consideration. However, the consideration shall be expressed in monetary terms since sale is an exchange of goods for money. This excludes barter form sale. There may not be sale if the price is not fixed and expressed in money.

In all the legal systems under consideration, the three elements, the contract (the consent), the thing and the price are the determining factors for the existence of sale. If one of them is lacking, there is no sale. For this reason, this writer has found it necessary that they deserve special consideration, particularly the price and the thing. So, we will discuss the price and the thing separately in the following two sections.

## 1.2 The Thing

Obviously the subject of sale is a thing since sale is an exchange of a thing for money. But, the question is what does the term thing refers to in a contract of sale. In other words what kind of things are susceptible to sale? The meaning of the term thing as the subject of sale differs from jurisdiction to jurisdiction. On account of this difference what is considered as a sale contract in one jurisdiction may be taken otherwise in another jurisdiction.

According to Roman law, *res corporalis*, i.e. both movables and immovable, being the typical one anything "adapted to commerce and susceptible for appropriation" may be the subject matter of sale unless the sale of such a thing is forbidden by law<sup>20</sup>. Therefore, in addition to corporeal things, incorporeal may be taken as subject of sale.

The same position is reflected under French and Louisiana law. The former states that any thing that belongs to the seller, be it corporeal or incorporeal, may be sold so long as the right over it is transferable and there is no legal prohibition against its sale<sup>21</sup>. The Louisiana Civil Code provides that any thing corporeal or incorporeal may be sold if it is susceptible to ownership and the sale of that is not prohibited by law<sup>22</sup>.

By contrast, the Ethiopian law holds that it is only corporeal things, i.e. both movable and immovables, that may be sold provided no legal prohibition to this effect has been imposed<sup>23</sup>. Contracts regarding transfer of incorporeal rights for consideration are, however, treated as contracts allied to sale under Ethiopian law<sup>24</sup>.

Nevertheless, in all the systems, a sale of the thing shall result in the transfer of ownership over the thing from the seller to the buyer<sup>25</sup>. What is transferred from the seller to the buyer must not be the use of the thing or the benefit of service. But if what is transferred to the buyer is either the use of the thing or the benefit of service it is not a contract of sale. This excludes usufruct of the thing and benefit of service from being the subject matter of sale. In this regard the Ethiopian Civil Code has provided that transfer of usufruct for consideration is a contract allied to sale<sup>26</sup> and transfer of benefit of service for consideration is treated as a contract of service<sup>27</sup>.

In all jurisdictions, the subject matter of sale may be existing or non-existing thing<sup>28</sup>. However, the existing thing to be sold may not have been perished before the contract.<sup>29</sup> The subject matter of sale may properly be a future thing, i.e. currently non-existing<sup>30</sup>. Under Roman and Louisiana law, there are two forms of sale of future thing. The one is a sale of a thing that comes into existence in the future; for example, a thing that will be produced or manufactured by the seller, or "seller's next year crop"<sup>31</sup>. In such cases the

CLW

See Art 1129 of the civil code it says corporeal thing not chattles!

sale sale

5

1854  
+ 150  
2004

Sale → Condition precedent

sale is conditional, that is to say the coming into existence of the thing is a condition that suspends the effect of sale<sup>32</sup>. For this reason the price is payable only if the thing comes into existence<sup>33</sup>. According to Louisiana law, however, a party who prevents the coming into existence of the thing through his fault is liable for damage<sup>34</sup>. The other is the sale of chance or hope; for instance, the sale of "as many as fish as may be caught in the next cast of the net"<sup>35</sup>. In such situations the sale is not conditional and the buyer is obliged to pay the price even though the hope or the chance has vanished<sup>36</sup>.

Whereas under French law a future thing, except succession of a living person, may be the subject matter of sale but it is the parties who determine whether the coming into existence of the thing is a condition that suspends the effect of sale or not<sup>37</sup>. If the seller and the buyer have intended to subordinate their contract of sale to the coming into existence of the thing, such a sale shall be conditional<sup>38</sup>. However, if they intended otherwise, that sale would be unconditional and the buyer would be obliged to pay the price whether it comes into existence or not<sup>39</sup>. Under Ethiopian law, similar with the jurisdiction discussed hereinabove, a future thing may be the subject of sale<sup>40</sup>. However, a sale of chance or hope as future thing is not envisaged under Ethiopian law as opposed to Roman, French and Louisiana law.

(Handwritten mark)

It is also necessary to note that a thing belonging to a third person may properly be the subject of sale in Roman and Ethiopian law<sup>41</sup> in contrast to French and Louisiana law. According to French and Louisiana law, a sale of a thing belonging to a third person is void<sup>42</sup>. However, French courts have argued that this provision shall not be construed so as to make the contract absolutely void but "as entitling the purchaser alone to have the sale set aside"<sup>43</sup>. Moreover, such a right will be lost if the sale is confirmed by the real owner or the seller gets ownership over the thing sold<sup>44</sup>.

This being so, however, the writer wants to remind that the scope of this paper is limited to sale of ordinary corporeal movables. Thus, for the purpose of this paper, it is advisable to note that the term thing refers to ordinary corporeal chattels unless expressly referred otherwise.

### 1.3 The Price

In a sale contract, it is the duty of the buyer to pay the price, i.e. a consideration expressed in money. The price must be certain or capable of being ascertained<sup>45</sup>. No sale for reasonable price<sup>46</sup> that is to say the price must not be left for subsequent consideration by the parties or court<sup>47</sup>. From this it follows that, a contract of sale shall fix a definite price. However, this does not always mean it shall fix the actual figure but at least it shall define the price by reference to some existing fact, for instance, "current market price" or "today's market price"<sup>48</sup>. Therefore, if no price is fixed in the above ways, there is no sale.

By way of exception, however, under Ethiopia and Louisiana law, unlike under Roman and French law, there may be a contract of sale though the price is not agreed on either by fixing the actual figure or by defining the price by reference to certain existing fact provided that the sale relates to;<sup>49</sup>

- i) a thing quoted on market price or has current price,
  - ii) or a thing normally sold by the seller.
- 2306/07

In the first case, the seller and the buyer shall be presumed to have concluded the contract at current price taking into account the time when and the place where the delivery is to be effected. In the second situation, the parties are considered to have concluded the sale "at the price normally charged by the

"when the price is set"

seller" taking into account the time when and the place where delivery is to be made. ✓

In all the legal systems under consideration it is possible to refer the determination of the price to a third person<sup>50</sup>. This third person could be an expert or an ordinary person<sup>51</sup>. This being so, however, there would be no sale if such a third party failed to fix the price for whatever reason in Roman, French and Ethiopian law<sup>52</sup> in contrast to Louisiana law. According to Louisiana law, in such a situation the price may be determined by court<sup>53</sup>. The very controversial issue regarding determination of price by a third person is whether the parties are bound to accept for grants the price quoted by a third person<sup>54</sup>. In other words, whether the function of the third person is an arbitration or appraisal.

Nothing has been expressly stated in all the legal systems under consideration as to the effect of the price quoted by a third person. However, this writer is of the opinion that the price quoted by a third party shall not have a binding effect between the parties unless they have agreed in advance to be bound by whatever price that would be quoted or have assented to the price after it has been quoted by such a third person. Because the consent of the parties is one of the decisive elements of sale, their consent as to the price quoted shall be secured. Therefore, the determination of the price by a third party is an appraisal not arbitration.

In this regard, the respective provisions of French Code Civil and Ethiopian Civil Code are, however, misleading. The wordings of these provisions seems to refer to arbitration. Art. 1592 of French Code Civil provides that "price may be...left to the arbitration of a third person." /emphasis mine/ The Ethiopian Civil Code also provides that, as per Art.2271(1), "The price may be referred to the arbitration of a third

imposed  
consideration

party.”/emphasis mine/ However, the use of the term arbitration in the above cited provisions is not proper. Because the attending circumstance is not in line with the very notion <sup>of</sup> arbitration. Arbitration presupposes a dispute that has ~~arise~~ or that will arise in the future from already existing right<sup>55</sup> not a determination of price regarding a contract that is going to be made.

#### 1.4 Sale Distinguished from Barter/Exchange/

Barter is an exchange of a thing for a thing between exchangers<sup>56</sup>. This goes without saying that barter is a contract for consideration from one exchanger to another exchanger and vice versa. The commonality between sale and barter is, firstly both are contracts for consideration. Secondly, in both contracts there is a transfer of ownership aspect. Nonetheless, in contrast to sale, in barter the transfer of ownership is from one exchanger to another and vice versa. Whereas in sale ownership is transferred from the seller to the buyer. On the other hand, the basic distinguishing feature between sale and barter, however, lies on the fact that sale is an exchange of good for money while barter is an exchange of goods for goods. In sale the consideration is expressed in money.

This being so, the issue of determining a given transaction as one of sale or barter sometimes happens to be very difficult. This occurs in situation where goods on the one hand are exchanged for goods plus money on the other<sup>57</sup>. Different jurisdictions so far have taken different views on this matter. Some jurisdictions determine this issue taking into account whether the money or the goods is substantial consideration<sup>58</sup>. If the substantial consideration is money, that contract would be taken as one of sale, but if it is the good, it would be taken as one of barter<sup>59</sup>. Other jurisdictions hold that what matters is the intention of the two parties<sup>60</sup>. So if the parties consider the transaction as

one of sale, the contract would be held as such even if the substantial consideration is paid in goods rather than money<sup>61</sup>.

Book V, Title XV, Chapter 2, Section 1 of the Ethiopian Civil Code has provided barter as one of contracts allied to sale. Barter contract confers and imposes the same rights and obligations as a seller on each exchanger<sup>62</sup>. The issue raised in the above paragraph is not a problem under Ethiopian law in the face of Art. 2408(2) of the Civil Code which states that “the exchanger who is bound by barter contract to pay a balance, shall, as regards the payment of such balance have the same obligations as a buyer”./Emphasis mine/. When things subject to exchange are of unequal value, the one who handed over a thing with lesser value is duty bound to pay the balance. This indicates that in a barter contract it is possible that goods on the one hand can be exchanged for goods plus money on the other. However, such a situation is not envisaged in the part of the Civil Code dealing with contract of sale. For these reasons, it is logical to hold that situations where goods on the one hand are exchanged for goods plus money on the other shall be taken as a barter not as a sale.

### **1.5 Sale Distinguished from Hiring Sale**

Hiring sale is a contract whereby the hirer undertakes to hire goods for specified period at a fixed rent and has the option to buy the thing paying all the specified rent<sup>63</sup>. The notable commonality between sale and hiring sale is both of them are contracts for consideration expressed in money. However, the two are different in that in sale contract, the buyer and the seller enters into a commitment that the former shall pay the price of the thing and the latter shall deliver the thing thereby transferring ownership to the buyer<sup>64</sup>. Whereas in hiring sale the hirer is required to pay the rent not the price of the thing and

the owner delivers the things not with the intention to transfer ownership to the hirer unless he has paid all the specified number of instalments<sup>65</sup>. Moreover, in hiring sale, a hirer has only an option to buy the thing after having paid all the specified rent and doesn't legally bind himself to buy it though the real object of such a transaction is the ultimate sale of the thing.<sup>66</sup> From this it follows the hirer can terminate it whenever he pleases.

242 Under Ethiopian law, hiring sale is provided as one contracts allied to sale<sup>67</sup>. The tenant is going to become the owner of the thing hired after having paid all the specified number of instalments<sup>68</sup>. Furthermore, he is entitled to terminate the contract whenever he wants giving back the thing to the lessor<sup>69</sup>.

# CHAPTER TWO

## DELIVERY

### 2.1 Definition and Nature

Delivery is generally understood to mean the transfer of possession from the transferor to the transferee on voluntary basis<sup>1</sup>. By delivery possession is transferred from the seller to the buyer. Hence, what is transferred by delivery primarily is possession. However there is a strong controversy among jurists concerning the very concept of possession. Some argue that possession consists of two elements. These are the physical control over a thing, called corpus and the intention to exercise the physical control over the thing for one's own, termed as animus<sup>2</sup>. On the other hand, others argue that what matters is the actual control exercised over a thing for possession to exist, not the animus aspect<sup>3</sup>.

Regarding this issue, the position of Roman law is that both the *animus* and the *corpus* are necessary to establish possession over a thing<sup>4</sup>. The same view is upheld by French law<sup>5</sup>. Ethiopian law also follows the same principle that possession consists of both the animus and the corpus<sup>6</sup>. The Louisiana law is also found to be faithful to its ancestors, i.e. Roman and French, regarding the constituent elements of possession. That is possession consists of both the physical control over the thing (*corpus*) and the intention to control the thing for one's own (animus)<sup>7</sup>. Nevertheless, there is also a difference among jurists as to the particular animus required to constitute possession<sup>8</sup>. It is not necessary, however, to discuss this issue here for it would be out of the scope of this paper.

if not

As it has been said earlier on, delivery is a voluntary transfer of possession. The cause for delivery could be the prior agreement between the transferor and the transferee<sup>9</sup>. This might be sale, donation, exchange etc. All these types of transaction give rise to delivery of a thing by the transferor to the transferee. However, the nature and effect of delivery varies accordingly with its cause<sup>10</sup>. In this regard Nicholas has stated "... for delivery is in law a colourless act it derives its legal colour from the circumstance in which it is made"<sup>11</sup>. This can be explained as the nature and effect of delivery differs depending on the agreed purpose for which it is effected.

In a contract of sale, delivery is the common obligation of the seller and the buyer<sup>12</sup>. It is the duty of the seller to deliver the thing sold in accordance with terms of the contract and the law and the buyer to take the thing delivered to him so long as it is in accordance with the contract and the law<sup>13</sup>. Besides the delivery must result in providing <sup>the</sup> buyer with the possession not attackable by possessory action<sup>14</sup>.

this is the rule!

Often delivery is to be effected concurrently with the payment of the price, unless it is agreed otherwise<sup>15</sup>. However, if the parties have agreed that the price shall be made later than the time of delivery, for instance in cases of sale on credit, delivery would be effected though the price has not yet been paid.

Furthermore, delivery, by transferring possession from the seller to the buyer, brings about another effect in some legal systems. In Roman law, delivery, as they used to call it traditio, was considered as juridical act not as a material act. It was one of derivative modes of acquisition of ownership over a thing<sup>16</sup>. That is to mean delivery in transferring possession thereby causes transfer of ownership. However, this does not hold true in French and Louisiana law. Under these two legal systems delivery is considered as a simple material act resulting only in transfer of possession<sup>17</sup> and doesn't have

any effect of transferring ownership. On the other hand, under Ethiopian law delivery, like under Roman law, brings about transfer of ownership by transferring possession from the seller to the buyer<sup>18</sup>. Moreover, under Ethiopia and Louisiana law, in contrast to Roman and French law, delivery results in transfer of risk from the seller to the buyer<sup>19</sup>. What is briefed herein ~~above~~ is to be dealt with in detail under chapter four of this paper.

mode of delivery

## 2.2. Modes of Delivery

Modes of delivery refer to manners by which delivery is effected. Delivery can be effected either by physically handing over of the thing or by something which is equivalent in the eyes of the law<sup>20</sup>. Some classical writers identified the former as real delivery and the latter as fictitious and symbolic delivery<sup>21</sup>. But what matters is not the means by which delivery is effected rather it is the putting of the transferee in actual control of the thing<sup>22</sup>. Therefore, delivery may be effected by physically handing over of the thing or by other means which is equivalent to actual delivery for all legal purposes.

mode of delivery

### 2.2.1 Roman Law

The modes of delivery that were provided under Roman law are the sources of other jurisdictions' modes of delivery. Roman law recognized the following modes of delivery only.

- i. Actual delivery<sup>23</sup>: this refers to the handing over of the thing sold by the seller to the buyer. This is the most obvious case. This form of delivery puts the buyer in actual physical control of the thing.
- ii. Traditio longa manu: it is a pointing out of the thing sold to the buyer so that he may take it whenever he pleases<sup>24</sup>. Under this mode of delivery, the actual physical delivery of the thing is not

pointing

possible at the time of sale for one or another reason<sup>25</sup>. But the thing shall be in a condition that it is in the immediate power of the buyer and capable of being taken away later on by him<sup>26</sup>.

- iii. *Traditio brevi manu*: this serves the purpose effecting delivery in a situation where a transferee (the buyer) is in physical control of the thing before the conclusion of a contract of sale between the legal possessor and him<sup>27</sup>. In such cases delivery is effected by the conclusion of the contract alone<sup>28</sup>. This mode of delivery was devised to avoid the unnecessary retaking back of the thing and handing it over again to the transferee (the buyer)<sup>29</sup>. This can be illustrated by the following example. A lends his book to B and later on sells it to B. In such a case there is no need to retake it back from B and hand it over again to B since it would be absurd to do so. Hence delivery is effected by mere consent of the two parties, i.e. the conclusion of sale contract.
- iv. *Constitutum possessorium*: it is the converse of *traditio brevi manu*, that is where the seller and the buyer agreed to the effect that former remains in holding the thing sold on behalf of the latter at the time or after the conclusion of sale contract<sup>30</sup>. In such a case delivery shall be deemed to have been effected when both parties transact that the seller shall be in physical possession of the thing in a different status than possessor<sup>31</sup>. This mode of delivery is intended to avoid the absurdity that would happen by handing over the thing sold to the buyer and retaking it back to the seller again<sup>32</sup>.
- v. Symbolic *traditio*: it is also called approximate delivery<sup>33</sup>. By this mode of delivery, transfer of possession from the seller to the buyer is effected by giving to the latter the means of control of the thing, i.e. objects which serve as symbol and control of the thing sold<sup>34</sup>. These could be the key of the warehouse where the thing sold is

placed or the document representing the thing and without which it can't be transferred<sup>35</sup>.

These being the modes delivery recognized by Roman law, however, nothing has been said as to which one of them is the principal mode.<sup>36</sup> That is the mode by which delivery is to be effected in the absence of any stipulation in the contract referring to the application of one of the modes in particular.

### 2.2.2 French Law

Delivery, in French law of sales, refers to the obligation of the seller to transfer the thing sold to the power and possession of the buyer.<sup>37</sup> To this effect Art. 1606 of Code Napoleon has recognized different modes of delivery by which it can be effected. These modes of delivery are:

- a) **Actual delivery**, which refers to the physical handing over of the thing sold to the buyer. This could be done by handing over the thing to the buyer in person or to his legal representative at the time and place of delivery.<sup>38</sup> The thing to be delivered shall be the one set forth in the contract.<sup>39</sup>
- b) **Delivery of the key of the store where the thing(s) sold is (are) placed in**. This is referred as symbolic traditio under Roman law. The seller discharges his obligation to deliver by handing over the key of the store, which serves as means of control, to the buyer.
- c) **Delivery by mere consent alone**: 1) where the actual delivery of the thing sold is impossible in its practical sense at the time of sale. Thus the seller discharges his obligation to deliver the thing sold by pointing it out to the buyer thereby authorizing him to take it and where the buyer understands that.<sup>40</sup> Such mode of delivery is identified under Roman law as traditio longa manu. 2) Where the buyer is already in physical control of the thing sold at the time when the sale contract is concluded. Due to this fact delivery is deemed to be effected at the moment the sale contract is concluded. It is with the view of avoiding the absurdity that might occur by

resorting to actual delivery, i.e. retaking back the thing sold to the seller and hand it over again to the buyer. In such cases, therefore legally speaking, delivery is effected by mere consent alone of the parties in entering into sale contract. This is because before the conclusion of the contract of sale the buyer was not holding the thing on his own behalf; meaning, he has the corpus but not the animus.<sup>41</sup> As a result he was not a possessor. However, when the contract of sale is concluded, the animus shifts from the seller to the buyer making the latter a possessor thereof. This mode of delivery is the same as that of Roman's traditio brevi manu. ✓

At this juncture, it is necessary to note that neither of the above mentioned modes of delivery are taken as a rule under the French law. This can be observed from the wordings of Art. 1606 of Code Napoleon which goes "delivery of moveable things is effected" and lists the above modes of delivery as alternatives. Hence, in the absence of any express agreement in favour of any one of the modes in particular, delivery may be effected by one of them. In other words, the seller can discharge his obligation by resorting to any one of the modes of delivery if there is no agreement for the application of one of the modes. Because neither of them is a principal mode of delivery.

Furthermore the close reading of Art. 1606 of the Code Napoleon also reveals that the seller and the buyer are not at liberty to come up with a new mode of delivery than those provided in the Code Civil. This is because the listing of the said article is exhaustive. Thus, they can agree to effect delivery only by one of the modes provided in Art. 1606 of the Code Napoleon.

### 2.2.3 Louisiana Law

The Louisiana Civil Code defines delivery as the transfer of the thing sold into the power and possession of the buyer.<sup>42</sup> This definition is a verbatim

copy of the definition given under Art. 1604 of the French Code Civil. This being so, Art. 2471 of the Louisiana Civil Code lists some modes of delivery by which ~~it~~ may be effected. Pursuant to this article, delivery is to be effected by handing over of the thing to the buyer as a matter of principle. Meaning, in the absence of an agreement to the effect that delivery shall be made in another manner than actual delivery, the latter is presumed. Hence parties can agree that delivery shall be effected by one particular mode but if they failed, delivery shall only be effected by handing over of the thing sold to the buyer or his legal representative. Therefore, the seller shall only be deemed to have discharged his obligation to deliver the thing sold when he actually delivers it provided that there is no agreement otherwise.

The rule being actual delivery of the thing sold, however, parties can agree to effect delivery in another manner. Not only that, they can also create a new mode of delivery than those expressly provided since the listing of Art. 2471 is illustrative which says "...if the parties so intend delivery may take place in another manner such as ...". So the phrase "such as" indicates that the listing is not exhaustive. Hence, the parties are at liberty to come up with a new mode of delivery.

Bearing what has been said above in mind, generally, in addition to actual delivery, the above cited article provides for three modes of delivery. These are handing over of the key of the warehouse where the thing sold is stored; delivery by mere consent of the parties; and handing over of documents. With regard to the first two modes there is no need for further discussion since the discussion made in relation to respective modes of delivery under French law is also applicable to them. However, in relation the third mode, i.e., handing over "the document of title to the thing" the following could be said. This document shall represent the thing sold and be the one

without which the thing can't be disposed of. This document could be bill of lading, warehouse receipt, or the like.

## 2.2.4 Concluding Remarks

From the discussion that has been made so far we can point out the following remarks. The Roman law has embodied all modes of delivery that have been envisaged under French and Louisiana law. The actual delivery is one of the modes of delivery employed in all three legal systems. Similarly, all have incorporated *traditio brevi manu* as a mode of effecting delivery where the buyer is already in physical control of the thing sold at the time of sale. Symbolic delivery referring to handing over the key of the warehouse where the thing is placed or a document of title to the thing is also another mode of delivery recognized by Roman and Louisiana law. The French law, however, has acknowledged only handing over of the key of the warehouse where the thing sold is stored as symbolic delivery; not the handing over documents of title to the thing, which serves as mode of delivery of immovable provided that it is followed by registration.<sup>43</sup> The other commonly shared mode of delivery is traditio longa manu referring to pointing out of the thing sold by the seller to the buyer so that delivery shall be deemed to be effected. Moreover, there is also another mode of delivery which is peculiar to Roman law and foreign to French and Louisiana law. That is *constitutum* possessorium; where the parties agreed that the seller shall remain in physical control of the thing on behalf of the buyer.

In relation to the application of the modes of delivery, French law has provided that unless there is an agreement referring to the application of any one of the respective modes of delivery in particular, the

seller can discharge his obligation to deliver by either of the modes provided in the Code Civil. Because no particular mode of delivery is preferred than the others as a principal mode of delivery in this legal regime. On the other hand, Louisiana law has provided that actual delivery is the rule. Thus in the absence of any agreement for the application of other modes, delivery shall be effected only by handing over of the thing sold. However, nothing has been provided under Roman law in this regard.

Finally, a remark can also be made that under Roman and French law parties are not at liberty to come up with a new mode of delivery than those provided in the respective laws. Whereas Louisiana law has let the seller and the buyer free to create a new mode of delivery than those envisaged in the Civil Code.

### **2.3 Delivery Under Ethiopian Law**

The term delivery is not expressly defined under Ethiopian law. Nevertheless, it is possible to gather its definition from Arts. 1143, 1144(1) and 2274 of the Civil Code. In fact the first article answers the question when is possession transferred. But Art. 1143 in saying "any transfer of possession made by virtue of a contract shall be effective at the time when the thing is delivered" (emphasis mine) and Art 1144 (1) in saying "possession may be transferred to a new possessor by the delivery of documents ..." (emphasis mine) indicate that possession is voluntarily transferred from the transferor to the transferee by delivery. Moreover, Art. 2274 has provided that "delivery consists in the handing over of a thing..." Handing over of the thing by the seller to the buyer implies transfer of possession. A fortiori, delivery implies transfer of possession from the seller to the buyer. Therefore, it, seems that delivery could be defined as the voluntary transfer of possession from the transferor

Willingful

①

to the transferee. Its voluntary aspect is reflected by the word “contract” under Art. 1143 of the Civil Code.

In Ethiopian law of sale, delivery of the thing sold to the buyer is one of the primary obligations of the seller.<sup>44</sup> The seller is duty bound to put the buyer in possession of the thing sold. To this effect, Art. 2273(1) of the Ethiopian Civil Code has provided that:

*The seller shall deliver the thing to the  
buyer in accordance with the provision  
of the contract and of this code.*  
*(Emphasis mine)*

*the seller is*

In relation to the modes of delivery, the above quoted article is saying that delivery shall be effected in pursuance of the terms of the contract and the law. However, Art. 2274 of the Ethiopian Civil Code provides that “delivery consists in handing over of a thing...”. Does this mean handing over of the thing sold is the only mode of delivery under Ethiopian law? If this is so, what does the phrase “in accordance with provisions of the contract and of this code” under Art. 2273(1) refer to in relation to modes of delivery?

According to Art. 2274, of course it seems that delivery is to be effected only by handing over of the thing sold. However, this is not acceptable because the phrase “in accordance with the contract” under Art. 2273 (1); among other things, may indicate that parties can agree on a particular manner in which delivery is to be effected<sup>45</sup>. The handing over of the thing sold is not the only way by which delivery is to be effected. It can also be effected in another manner. This being so, what does the phrase “in accordance with this code” refer to? It implies that though parties are at liberty to agree on a particular mode, they are not allowed to resort to other modes of delivery than those provided in the Civil Code.<sup>46</sup> But, what if the parties came up with a new mode of delivery than those provided in the Civil Code? To this writer, it

*the seller is*

would not be considered as delivery for all legal purposes since the requirements of Art. 2273(1) are both mandatory and cumulative. So non-compliance with these mandatory requirements result in taking away the legal effects that would have been brought about by delivery.

Bearing all these in mind, what are these modes of delivery provided in the Civil Code? Book V Title XV Chapter 1 of the Civil Code is silent about other modes of delivery than actual physical handing over of the thing. However, it is possible to gather these modes of delivery from the other part of the Civil Code. Book III Title VI Chapter 2 of the Civil Code has expressly provided for two modes of delivery in addition to actual delivery. Moreover, one more mode of delivery can be added through construction; from the close reading of Art. 1147 (1) and (2) of the Civil Code, it is possible to construe one additional mode of delivery. Therefore, it can be said that there are four modes of delivery under Ethiopian Law. These are:

- ① efforts
- i Actual delivery - ✓
  - ii Handing over of documents ✓
  - iii Constructive possession (*Constitutum possessorium*)
  - iv Delivery effected by agreement alone (*Traditio Brevi Manu*)

Having said this much about Ethiopian modes of delivery as a general overview, now let's consider each mode of delivery separately.

### 2.3.1 Actual Delivery

*Contractual  
Obligation*

This refers to the physical handing over of the thing sold to the buyer. Art. 2274 of the Ethiopian Civil Code provides that the seller is under obligation to hand over the thing with its accessories to the buyer in conformity with the contract. The seller is expectedly required to deliver the one which is

2

Obligation

agreed upon in the contract not another thing. Therefore, the seller shall be deemed to have discharged his obligation to deliver the thing sold, in the absence of any agreement to the contrary, only where he hands over the thing to the buyer.<sup>47</sup>

1300

The handing over of the thing sold could be made to the buyer or to his legal representative as it has been underscored under Art. 1741 of the Ethiopian Civil Code. Thus the seller can discharge his obligation to deliver by handing over of the thing to the buyer in person or to a person authorized by the buyer to that effect. A clear example of the latter case is envisaged in a contract of sale which implies the ~~carriage~~ of the thing sold by carrier. In such situations handing over of the thing to the carrier shall be deemed by the law as actual delivery to the buyer in the absence any agreement otherwise.<sup>47</sup>

However, if the handing over of the thing sold to the carrier is not intended by the seller to execute the contract, the latter shall not be considered as having discharged his obligation to deliver.<sup>48</sup> Nevertheless, this could be rectified if the seller gives notice of ~~transport~~ transport to the buyer and sent him, if need be, a document describing it.<sup>49</sup>

### 2.3.2 Handing Over of Documents

Delivery could be effected by handing over of document to the buyer by the seller with a view of discharging his obligation ~~to~~ to deliver.<sup>50</sup> Admittedly, the documents delivered must not be ordinary ones. They shall represent the thing and make it at the disposal of the buyer.<sup>51</sup> Bill of lading and warehouse receipt are the pertinent examples to be mentioned for the purpose of this mode of delivery.

However, it should be remarked that there must be a prior agreement to the effect that delivery shall be made by handing over of documents in order

for the seller to be considered as having discharged his obligation to deliver. Therefore, although the handing over of documents has the effect of transferring possession from the seller to the buyer, the latter can refuse the delivery of documents and demand actual delivery where there is no prior agreement for delivery by handing over of documents. This is a derivative of the rule that delivery shall be made in accordance with the terms of contract and the law. So, if there is no agreement as to the mode of delivery, actual physical handing over of the thing is presumed.

Delivery effected by handing over of documents, however, has a prejudicial effect against the buyer. This happens where dispute arises later on between the holder of the thing and the buyer holding only documents. In such cases the law prefers the former as a possessor unless his bad faith is proved.<sup>52</sup>

### 2.3.3 Constructive Possession (Constitutum Possessorium)

Constructive possession is another mode by which delivery could be effected. To this effect, Art. 1145 (1) of the Ethiopian Civil Code has provided the following:

*The possession of things which are certain and things pertaining to a generic species which have been individualized shall be deemed to be transferred to the new possessor where the person who exercises actual control over the thing declares that he shall henceforth detain it on behalf of the new possessor.*  
(emphasis mine)

no agreement  
agreement

22AA

22AA

This article seems to have been formulated having in mind the scenario that the seller and the buyer have entered into an agreement to the effect that the former remains in physical control of the thing sold in some other capacity than that of owner. In such cases, delivery shall be deemed to be effected at the moment the seller declares that he is holding the thing on behalf of the buyer provided the thing sold is specific or individualized fungible thing. Nevertheless, nothing has been said in the Civil Code with regard to the way by which the declaration may be made. In the opinion of this writer, however, it seems that since no prescribed form is provided, the declaration could be made in any manner so long as it communicates that the seller is holding the thing on behalf of the buyer.

Despite the fact that constructive possession, *constitutum possessorium*, serves the purpose of effecting delivery, like handing over of documents, it has prejudicial effect on the buyer. Because the creditors of the seller are entitled to exercise their right against the thing sold where the seller has been declared bankrupt.<sup>53</sup>

#### 2.3.4 Delivery Effected by Agreement Alone (*Traditio Brevi Manu*)

This mode of delivery serves the purpose of effecting delivery in situations where a sale is concluded between the possessor and the mere holder of a thing.<sup>54</sup> In such cases delivery is effected by mere agreement of the parties alone.<sup>55</sup> In fact there is no any express provision under Ethiopian Civil Code dealing with *traditio brevi manu*. Nevertheless, there are situations in which contract of sale is concluded between the seller and the buyer while the former being a possessor and the latter being a mere holder. So, how shall delivery be effected? Are we going to apply one of the above mentioned modes of delivery? It would be absurd to resort to modes of delivery discussed in the

preceding sub-sections; for instance to retake back the thing from the mere holder to the seller and hand it over again to him. Thus, what is the way out?

According to this writer, though there is no express provision as to the application of *traditio brevi manu*, it can be inferred from the close reading of Art. 1147(1) which states that “unless the contrary is proved he who began to possess on behalf of another person shall be regarded as mere holder,” and Sub-art. 2 of the same article goes “proof to the contrary may be adduced by any manner”. (emphasis mine) From this it follows that if a person who has begun to possess the thing on behalf of another proves by using any kind of evidence that he possesses the thing on his own behalf he shall be regarded as possessor. Thus, possession is transferred from the possessor who was exercising it through another person to the mere holder who was exercising it on behalf of the former. Therefore, in a contract of sale concluded between the possessor and the mere holder, the latter becomes a possessor by using the contract of sale as a means of proof that he is holding the thing on his own behalf. This happens as a result of the fact that the buyer is already in physical control of the thing sold, meaning he has the *corpus*. What he was lacking is the *animus*. In the mean time, when he concludes the contract of sale, the *animus* automatically shifts from the seller to the buyer making the latter a possessor. In other words, possession is transferred from the seller to the buyer who was a mere holder by the consent of the two parties alone.

## 2.4 Comparative Overview

The modes of delivery that are recognized under Ethiopian law shares some features in common with those provided by Roman, French and Louisiana law. This could be due to the fact that Ethiopian Civil Code was much more influenced by French law, which traces back its origin to Roman law and was also the model of Louisiana Civil Code. Nonetheless, there are

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also matters which Ethiopian law doesn't share in common with these laws. Given this fact, let's consider some points of similarity and difference, which are of major importance, that Ethiopian law has with the others regarding the modes of delivery.

To begin with, under Ethiopian law of sale, unlike under Roman, French and Louisiana law, there is no express provision which provides different modes of delivery other than actual delivery by which the seller may discharge his obligation to deliver. However, it is possible to infer those modes of delivery from the provisions of the Civil Code. So, similar with Roman, French and Louisiana law, actual delivery and *traditio brevi manu* are recognized as a means of effecting delivery under Ethiopian law. On the other hand, in contrast to French and Louisiana law, following Roman law, Ethiopian law has incorporated *constitutum possessorium*, i.e. constructive possession, to effect delivery. But, in contrast to Roman law, Ethiopian law has provided that the seller shall declare that he is holding the thing on behalf of the buyer to effect delivery through *constitutum possessorium*.

According to Ethiopian law, the seller may discharge his obligation to deliver by handing over of documents, which represent the thing and without which the thing can't be disposed of, as it is also enshrined under Roman and Louisiana law. By contrast, this does hold true under French law. On the other hand, <sup>↗</sup>in contradistinction to Roman, French and Louisiana law, effecting delivery by handing over of the key of the warehouse where the thing sold is stored has not been recognized under Ethiopian law. Similarly, unlike other jurisdictions, Ethiopian Civil Code has not devised *traditio longa manu* as one mode of delivery.

With regard to the application of these modes of delivery the following comparison can be made. Under Ethiopian law, like Louisiana law, actual

delivery is the rule. That is to say in the absence of any express stipulation in the contract referring to a particular mode of delivery, the seller is duty bound to hand over the thing sold to the buyer. However, this doesn't hold true under French law. According to French Code Civil, if no particular mode of delivery is agreed on, the seller can discharge his obligation to deliver by resorting to any one of the modes of delivery provided by the law .On the other hand, nothing has been said in this regard under Roman law. Finally, in contrast to Louisiana law, similar with Roman and French law, Ethiopian law provides that though parties are at liberty to agree on a particular mode of delivery, they are not allowed to come up with a new mode of delivery than those expressly or impliedly provided in the Civil Code.

# CHAPTER THREE

## TIME AND PLACE OF DELIVERY

### 3.1. Time of Delivery

Generally, in all kinds of contract, time of performance is one of the terms that may be stipulated by the parties to the contract <sup>1</sup>. In sales contract too, time of delivery is to be agreed on by the seller and the buyer <sup>2</sup>. This may be done by specifying a particular calendar date, for example, 10<sup>th</sup> of March 2002; or by reference to a period of time, like 10 days from the conclusion of the contract, etc. <sup>3</sup> However, where parties have failed to stipulate the date of delivery, the law steps in and sets it <sup>4</sup>.

The date of delivery, be it the one agreed upon in the contract or the one set by the law in default of the agreed one, is binding between the parties. <sup>5</sup>

Therefore, the seller is duty bound to effect delivery of the thing to the buyer on the date of delivery. *A fortiori*, the buyer has the right to demand delivery of the thing on this date. Conversely, he can't request the delivery of the thing prior to the date of delivery.

Furthermore, time of delivery being an essential term of sales, non-compliance to it gives rise to a number of legal consequences <sup>6</sup>. For instance, seller's failure to effect delivery at the date of delivery may constitute breach of contract justifying the repudiation of the contract; the buyer's failure to take timely delivery has its own consequences <sup>7</sup>.

#### 3.1.1. ROMAN LAW

According to Roman law, the performance of an obligation is to be made at the time mentioned in the contract. <sup>8</sup> However, if no time is agreed on

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in the contract, it could be demanded immediately<sup>9</sup>. But a reasonable time varying with the nature of the contract must be permitted for performance taking into account the attending circumstances.<sup>10</sup>

Therefore, the debtor and the buyer are required to make and accept respectively the performance of an obligation timely. However, where the debtor fails to perform his obligation on the date of performance he shall be liable for any eventualities that may occur.<sup>11</sup> On the other hand, if the creditor failed to accept performance, this would release the debtor from duty of preservation.<sup>12</sup>

This being so in relation to general contract, in sales contract the seller is under obligation to effect deliver at the date of delivery. Under Roman law, time of delivery is subject to the express and implied terms of the contract.<sup>13</sup> In the absence of such agreement in the contract, the buyer can demand delivery immediately, however, a reasonable time should be given to put the thing in deliverable condition.<sup>14</sup>

Thus the seller shall expectedly deliver the thing at the time expressly or impliedly specified in the contract or in default of this, within a reasonable time following the request of the buyer. If the buyer does not request, the seller can require the buyer through notice to take delivery within a reasonable time.<sup>15</sup> How it is reasonable is a question of fact varying from case to case. So, if the seller is late in effecting delivery, as Romans used to call it *mora*, however, he shall be liable not only for due care but also for accidental loss of the thing. This is in addition to payment of compensation to the buyer for any loss he incurs as a result of the seller's *mora*.<sup>16</sup>

On the other hand, if the buyer is in delay (*mora*), he will not be held for any liability and his act will not be considered as breach of the contract.<sup>17</sup> The only effect that follows the buyer's delay in taking delivery is the seller will be released from the duty of preserving the thing and he will be liable only for willful misconduct or gross negligence like a deposittee.<sup>18</sup>

### 3.1.2.French Law

Under French law it has been provided that the payment, i.e. performance, of an obligation should be made immediately where there is no term (time) agreed on in the contract.<sup>19</sup> The term would be better be expressed, fixing its duration by establishing a definite date but the term can also be tacit where the obligation is of a nature that can't be performed immediately for one or another reason.<sup>20</sup> In such cases duration of the term is determined by usage, or by court taking into account the surrounding circumstances.<sup>21</sup>

This general principle of law of obligation is also reflected in sales contract. In contract of sales, the seller shall deliver the thing sold to the buyer within the term provided in the contract.<sup>22</sup> The term could be a period of time or a certain day. If the contract is silent about the time of delivery, the buyer is entitled to demand the delivery of the thing immediately.<sup>23</sup>

However, where the seller fails to deliver the thing on time, it constitutes breach of contract. As a result the buyer can demand "his being put into possession" or cancellation (resolution) of the contract.<sup>24</sup> In all cases, the buyer is entitled to claim damages, if any.<sup>25</sup> Therefore, the seller must deliver the thing on time. However, this is without prejudice to the seller's right of retention.<sup>26</sup> In other words, the seller can refuse delivery of the thing where the price is to be paid concurrently with delivery and the buyer fails to pay.<sup>27</sup> The

seller can also exercise this right even where the sale is on credit if the buyer is declared to be bankrupt or insolvent.<sup>28</sup>

This being so with respect to seller's delay in effecting delivery, nothing has been said under French law regarding buyer's failure to ~~take~~ delivery on time. This could be attributable to the fact that taking delivery is not an obligation of the buyer under French law.<sup>29</sup> This might also be for the reason that risk is transferred to the buyer at the time of the conclusion of the contract despite delivery is not effected<sup>30</sup> so that the buyer will be held to pay the price whether he takes the delivery of the thing or not.

### **3.1.3. Louisiana Law**

Art. 1777 of the Louisiana Civil Code dealing with contract in general states "a term for the performance of an obligation may be express or it may be implied by the nature of the contract. Performance of an obligation not subject to a term is due immediately." The word 'term' refers to period of time or a specific date given for the performance of an obligation. This term could be certain or uncertain. It is certain when it is not expressly fixed.<sup>31</sup> But it is uncertain when it is not expressly fixed, it rather can be implied from the intent of the parties or from the attending circumstances.<sup>32</sup> Moreover, according to this article the performance of an obligation shall be effected immediately where there is no any stipulation in the contract as to the time of performance. Nonetheless, the debtor must be given a reasonable time to accomplish the performance taking into consideration the nature of the contract.<sup>33</sup>

Part of the Louisiana Civil Code dealing with contract of sale doesn't provide any express provision regarding time of delivery. However, since provisions governing contract in general are applicable to special contracts,<sup>34</sup> provisions of the Civil Code governing time of delivery in general contract is

applicable to sales contract. Therefore, in sales contract the seller shall deliver the thing at the date stipulated in the contract. In default of agreed time, the buyer can demand the immediate delivery of the thing subject to a reasonable time necessary to put the thing in deliverable state.

However, in cases where the seller fails to ~~effect~~ timely delivery, the buyer has the right to request specific performance or dissolution (cancellation) and damage, if any, without prejudice to the general rules of obligations concerning the granting of specific performance, dissolution of contract and damage.<sup>35</sup> Nonetheless, the seller can refuse delivery of the thing to the buyer at the time of delivery should the buyer fail to pay the price where it is to be paid concurrently with delivery.<sup>36</sup> He can do so even when time is given for the payment of the price if the buyer is declared to be insolvent or bankrupt unless he gives security for the payment of the price.<sup>37</sup>

On the other hand, the buyer is also obliged to take delivery timely when it is tendered by the seller.<sup>38</sup> However, if he fails to take delivery tendered on the date of delivery, he shall be liable for expenses incurred by the seller in preserving the thing and for other damage sustained by seller as a result of his delay in taking delivery.<sup>39</sup> Moreover, risk of loss of the thing shifts to him immediately following his delay in taking delivery.<sup>40</sup>

### **3.1.4 Summary**

From what has been discussed earlier on we can draw the following remarks. Time of delivery is a very crucial matter in a contract of sale. Under Roman French and Louisiana law time of delivery is the one agreed on in the contract by the parties. In the absence of any stipulation in the contract providing for the time of delivery, the buyer can demand the thing to be delivered to him immediately. Nonetheless, Roman and Louisiana law have

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construed the word "immediately" to mean after reasonable time following the buyer's demand for delivery. This is not envisaged under French law however.

With respect to the seller's failure to effect delivery on time, Roman law provided that the seller shall be liable not only for due care but also for accidental loss of the thing in addition to payment of compensation for the loss sustained by the buyer as a result of the delay. However, under Roman law seller's failure to deliver the thing to the buyer at the date of delivery doesn't entitle the latter to require specific performance or cancellation of the contract. According to French and Louisiana law, seller's delay in effecting delivery may serve as a ground for the buyer to ask forced performance or cancellation of the contract in addition to claim damage for the loss sustained as a result of delay in effecting delivery.

Buyer's delay in taking delivery is not sanctioned in Roman law. The only effect that it may bring about is the seller will be released from his duty of preserving the thing until delivery. French law has not also imposed any sanction on the buyer's failure to take delivery timely. However, Louisiana law has provided that the buyer shall bear the risk of loss and shall be held liable for expenses incurred by the seller in preserving the thing and for other damage sustained by the seller where he is late in taking delivery.

### 3.2 Time of Delivery Under Ethiopian Law

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In Ethiopian law of sale, time of delivery plays very decisive roles. To mention few, it marks the point at which transfer of ownership and risk takes place.<sup>41</sup> It also serves as crucial moment at which examination of defect and non-conformity in the thing is to be undertaken.<sup>42</sup>

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According to Ethiopia law, time of delivery is to be agreed on by the parties in the contract.<sup>43</sup> Thus delivery shall be effected at the time agreed in

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the contract. This 'time' could be a certain period, a specific day or even it could be a specific hour. But in the absence of an agreement to the effect that delivery shall be made at a certain date, delivery shall be made at the time provided by the law, i.e. forthwith.<sup>44</sup> 1756

### 3.2.1 Where There is Agreed Time of Delivery

In a contract of sale the seller and the buyer <sup>may</sup> stipulate that delivery shall be effected on a specific day or within a given period of time. When a specific day is fixed in the contract, the buyer can't demand delivery before that day. And the seller is obliged to deliver the thing on that day. On the other hand, if the parties agreed that delivery shall be made within certain period of time without marking a specific day, it is the option of the seller to determine the exact date of delivery.<sup>45</sup> 2247 Thus the buyer can't demand delivery before the agreed period lapses provided such period is not fixed to his exclusive interest.<sup>46</sup> 2152 But if circumstances justify that the buyer shall be given the option to fix the exact date, the seller shall deliver the thing on the date fixed by the buyer. In both cases the date of delivery is compulsory, that is no extension will be granted from that date.<sup>47</sup> 2337(4) 235(5)

### 3.2.2 Where There is No Agreed Time of Delivery

The Ethiopian Civil Code under Art. 2276 has provided that "where the date of delivery can't be inferred from the will of the parties, the seller shall deliver the <sup>thing</sup> as soon as the buyer requires him to do so". /emphasis mine/ Where time of delivery is neither expressly nor impliedly indicated in the contract (since the phrase "the will of the parties" refers to both express and implied agreement), the seller is duty bound to deliver the thing immediately upon the buyer's request. However, in the opinion <sup>of</sup> this writer, it would be absurd to take

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this provision for granted. Firstly, compelling the seller to make immediate delivery following the buyer's request is very prejudicial to the seller because he will be caught by surprise for he might not have the thing in deliverable state and might need sometime to bring it into such state. In fact, it might be argued that the seller's obligation to make immediate delivery following the buyer's request is balanced by his right to demand immediate payment of the price where the sale is <sup>not</sup> on credit and no date of payment is fixed in the contract.<sup>48</sup> Thus Art. 2276 is not prejudicial to the seller and it should be taken as it is. Nevertheless, this argument is defective because it took a single case as a representative of all other different cases. So, what about other cases where the seller can't demand the immediate payment of the price, are they not prejudicial to the seller? Even in cases where the seller can exercise the right to demand immediate payment of the price, though it is not prejudicial to the seller, it is absurd to oblige the seller to effect delivery immediately following the buyer's request for the reason that will be mentioned herein below.


Secondly, the practical application of Art. 2276 will not be feasible. This can be substantiated by the following hypothetical example. The seller and the buyer have entered into a contract of sale, the former undertaking to deliver a thing that he will manufacture in accordance with the specification tendered by the buyer but without fixing the date of delivery. In this example, could the seller deliver the thing immediately if the buyer requires the deliver of the thing immediately? To be honest, the seller might be going through the specification tendered by the buyer to understand the specification itself.

The third reason is an inference from the second one. From what has been said herein <sup>above</sup> it follows that requiring the seller to effect delivery as soon as the buyer demands so may in effect mean providing the buyer with a ground for the cancellation of the contract since it is preclear that the seller

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will not be able to effect immediate delivery when the buyer requires so. However, it is not the purpose of the law to get the contract cancelled rather the law is interested in maintaining the contract. Hence it would be against the purpose of the law to entitle the buyer with right to require immediate delivery in the absence of any stipulation in the contract fixing the date of delivery. Since in the final analysis it leads to the cancellation of the contract.

Therefore, according to this writer, in order to avert the absurdity that might occur, Art. 2276 of the Ethiopian Civil Code should not be taken for granted and we should have to inject a reasonable time into it. Accordingly, Art. 2276 of the Ethiopian Civil Code should be construed to mean that when no time of delivery is indicated whether expressly or impliedly in the contract, the seller shall deliver the thing within a reasonable time following the buyer's demand for delivery of the thing.

The other point that should be raised here in relation to Art. 2276 is what if the buyer fails to request for delivery of the thing, can the seller require him to take delivery? Nothing has been expressly provided in the Civil Code in this regard. However, a reference to provisions of contracts in general may, by implication, give an answer to this question. Under Art. 1772 of the Ethiopian Civil Code it has been stated that "a party may only ~~invoke~~ non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligation in the contract". The reading of this article together with Art. 1676(1) reveals that in order to avail himself of the buyer's non performance, i.e. buyer's failure <sup>to</sup> take delivery (since it is the buyer's obligation to take delivery), the seller may require the buyer by notice to discharge the latter's obligation, i.e. taking delivery, when the latter fails to do so. Therefore, it is possible to argue that

there is nothing that bars the seller from requiring the buyer through notice to take delivery when the latter fails to request the delivery of the thing.

### 3.2.3 Consequences of Delay in Effecting and Taking Delivery

As it has been pointed out earlier, the seller is obliged to effect delivery at the time stipulated in the contract or in default of this, within a reasonable time upon the buyer's request for delivery. Consequently, the buyer has the right to demand delivery at the date of delivery. Furthermore, he may not be obliged to take delivery that is tendered prior to or latter than the time of delivery. Therefore the seller shall deliver the thing to the buyer on the date of delivery. Nevertheless, the seller has the right to refuse delivery of the thing until the price is paid where the price is to be paid concurrently with delivery.<sup>49</sup> The seller can also exercise such a right even if the sale is on credit where the buyer shows that he will not perform his obligation, or when he has been declared bankrupt or insolvent unless he produces sufficient security to pay the price at the time of payment.<sup>50</sup>

However, in all other cases, the seller shall effect delivery at the date of delivery whether the price is paid or not. If he fails to meet this obligation, this amounts to non-performance of the contract.<sup>51</sup> This in turn may lead to specific performance or cancellation of the contract in addition to payment of damage,<sup>52</sup> however, subject to the provisions of the Civil Code dealing with specific performance, cancellation of contract and damage.

On the other hand, the buyer is also obliged to take delivery timely. Where he is late in taking delivery,<sup>53</sup> risk will be transferred to him.<sup>54</sup> Besides he will be liable for expenses incurred by the seller in preserving the thing from the time he is late in taking delivery.<sup>55</sup>

### 3.3 Comparative Overview on Time of Delivery

In all legal systems a stipulation regarding the time of delivery is an essential term of sales contract. Ethiopian law, similar with Roman, French and Louisiana law, has provided that the seller shall deliver the thing at the time of delivery; the time named in the contract. In default of this, delivery shall be effected at the date set by the law, i.e. immediately upon the request of the buyer. In this regard, Roman and Louisiana law on one hand differ from French and Ethiopia law by implying that reasonable time should be granted to the seller where no time of delivery is agreed on. Both Ethiopian and French law don't provide that the seller shall be given a reasonable time to deliver the thing in cases where there is no stipulation fixing the date of delivery in the contract.

★ The fact that the seller is under obligation to effect delivery at the date of delivery is recognized as a rule in all jurisdictions under consideration. Moreover, failure to meet this obligation gives rise to different legal consequences. Accordingly, Ethiopian law similar with French and Louisiana law, provides that the seller's failure to effect timely delivery may result in cancellation, or specific performance of the contract in addition to liability for damage that might arise from the delay. By contrast, under Roman law, seller's delay in effecting delivery may not lead to specific performance or cancellation of the contract. Rather, its effect is limited to transferring the risk of loss of the thing from the buyer to the seller and holding the seller liable for any damage that might arise as a result of the delay.

However, in all the legal systems under consideration except Roman law, the seller's duty to effect delivery is subject to his right of retention. In Ethiopian law, like in French and Louisiana law, the seller can refuse to deliver

\* the thing at the time of delivery if the buyer does not pay the price, a) where the price is to be paid simultaneously with delivery, b) where the buyer has been declared to be insolvent or bankrupt unless he produces security that he will pay the price at the date of payment. Ethiopian law adds one more ground for the exercise of right of retention; that is where the buyer declares that he will not pay the price.

With regard to buyer's delay in taking delivery, Roman and French law have imposed nothing on the buyer as a sanction. In fact, according to Roman law the seller will be released from his duty of preserving the thing and will be liable only to his willful misconduct. On the other hand, buyer's failure to take delivery is sanctioned under Ethiopian and Louisiana law. Both in Ethiopia and Louisiana law, the buyer will be held liable to pay compensation for any damage that arise as a result of delay in taking delivery, and will be held liable to expenses incurred in preserving the thing. In addition to this, risk will be transferred to the buyer if he is late in taking delivery.

### 3.4 Place of Delivery +

In the law of obligation, the place of performance is one of the terms of the contract on which the two parties are expected to agree.<sup>56</sup> Non-compliance with the stipulation in the contract designating the place of performance in discharging contractual obligation has its own legal consequences.<sup>57</sup> Moreover, where the two parties fails to designate the place of performance in the contract, the law steps in and designates the place of performance.<sup>58</sup>

The above general principle is enshrined in sale contracts. In all legal systems the place of delivery is primarily to be designated by the seller and the buyer in the contract.<sup>59</sup> The stipulation made by the seller and the buyer designating the place of delivery is binding between the two parties.<sup>60</sup> From

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this it follows that the seller is duty bound to deliver the thing at the place indicated in the contract. The buyer, on his part, may not demand delivery elsewhere than the place designated in the contract. Consequently, the buyer is under no obligation to take delivery tendered in another place than the agreed one. The seller as well may not be bound to deliver the thing elsewhere.

Furthermore, in the absence of any stipulation in the contract which indicates the place of delivery, it is the law that plays a gap filling role by designating the place of delivery.<sup>61</sup> Therefore, the buyer can refuse delivery tendered in another place than the place designated by the law and the seller can't be compelled to effect delivery elsewhere than this place.

### 3.4.1 Roman Law

According to Roman Law of sale, the seller is duty bound to deliver the thing sold to the buyer at the place of delivery.<sup>62</sup> The place of delivery is the one expressly or impliedly indicated in the contract.<sup>63</sup> However, in the absence of such implied or express agreement as to the place of delivery, delivery shall be effected at the place where the thing was at the time of the conclusion of the contract.<sup>64</sup>

Therefore, the seller and the buyer are not obliged to effect and take delivery respectively at another place than the one designated in the contract and in default of such designation, the one provided by the law, i.e. the place where the thing was at the time of the conclusion of the contract. Obversely, the buyer is not entitled to demand delivery elsewhere than the place of delivery. By the same token the seller may not deliver the thing elsewhere than the place of delivery. The problem here is that what if the seller deliver the thing elsewhere than the place of delivery? Would it be taken as breach of contract?

Roman law of sale did not provide any sanction for failure to deliver the thing at the right place. Besides it is only delay and impossibility of performance that were considered as breach of contract under Roman law.<sup>65</sup> Therefore, despite the binding nature of stipulations designating the place of delivery in the contract, they are not sanctioned under Roman law.

### **3.4.2 French Law**

Part of the French Code Civil dealing with the law of obligation provides under Art. 1242 that payment, i.e. performance, of an obligation shall be made at the place expressly designated in the contract. In default of such stipulation designating the place of payment, it shall be made at the place where the thing was situated at the time of the contract where “the debt has as its object a specific thing”. On the other hand, if the debt relates to non-specific thing, payment should be made at the domicile of the debtor.

This general principle governing contracts in general is also incorporated in French law of sale. In sale contracts the seller is required to deliver the thing at the place of delivery. According to Art. 1609 of French Code Civil the place of delivery is the one where the thing sold was situated at the time of sale unless the seller and buyer expressly agreed otherwise. However, this article is not complete because it doesn't make any distinction between delivery of specific and non-specific things unlike Art. 1247. Thus a complete rule governing the place of delivery can be drawn by reading Art. 1609 together with Art. 1247 which makes a distinction between the place of payment of specific things and non-specific things. Therefore, pursuant to Art. 1609 cum Art. 1247, in a contract of sale delivery shall be effected, unless otherwise expressly agreed, at the place where the thing is situated at the time of the contract provided that thing is specific. Specific things refer to things

which are not fungible.<sup>66</sup> But if the thing is non-specific one, i.e., fungible things or things pertaining to generic species,<sup>67</sup> delivery shall be made at the domicile of the seller.

Accordingly, the place of delivery designated by the parties and in default of this by the law is binding between the seller and buyer. Hence the seller is obliged to deliver the thing sold at the right place of delivery. However, the law is mute with respect the seller's failure to deliver the thing at the right place of delivery. Both Art. 1247 and Art. 1609 of the French Code Civil are toothless. Because in spite of the binding nature of the stipulation designating the place of delivery, no sanction has been provided for failure to deliver the thing at the place of delivery.

### **3.4.3 Louisiana Law**

Louisiana Civil Code provides under Art. 2484 that in a contract of sale delivery shall be made at the place agreed on by the parties or intended by them. Consequently, the seller is obliged to deliver the thing at the place expressly or impliedly provided in the contract. However, in default of such implied or express stipulation, delivery shall be effected at the place where the thing was situated at the time of the contract.

Therefore, the seller may not deliver or be obliged to deliver the thing elsewhere than the place of delivery. So also the buyer can refuse to take delivery tendered elsewhere than the place of delivery. Nonetheless, Art. 2484, though mandatory, is not sanctioned. No sanction is provided for delivery effected at ~~any~~ place other than the place of delivery.

### 3.4.4 Summary

In all the three legal systems discussed in the preceding sub-sections, the place of delivery is subject to the agreement of the parties. Under Roman and Louisiana law the place of delivery could be the one indicated expressly or impliedly in the contract. French law provides that the place of delivery should be the one expressly designated in the contract.

In all the three jurisdictions, in the absence of an agreement as to the place of delivery, delivery shall be effected at the place designated by law. In this regard, Roman and Louisiana law have provided that for all kinds of things the place of delivery is the one where <sup>specific thing & was in</sup> the thing was at the time of the conclusion of the contract. On the other hand French law makes a distinction between specific and non specific things. Accordingly, the place of delivery of specific things is the place where it was situated at the time of sale. While delivery of non-specific things is to be made at the domicile of the seller.

*↳ obligation to be fulfilled not portable*

Finally, the writer wants to point out that in all the three legal systems the rules dealing with the place of delivery are toothless. No sanction is provided for failure to deliver the thing at the right place, the place indicated in the contract and in default of this, at the place designated by the respective laws.

### 3.5 Place of Delivery Under Ethiopian Law

Under Ethiopian law, place of delivery has a special importance in a contract of sale. It serves as a standard in determining the price of the thing where the sale relates to the thing whose price is to be quoted on the market or has a current price<sup>68</sup> and “where the sale relates to a thing which the seller

normally sells.<sup>69</sup> Moreover, the question who bears expenses of transport is to be determined by taking into account the place of delivery.<sup>70</sup>

This being so as to its significance, under Ethiopian law place of delivery is subject to the agreement of the parties, but in default of any stipulation in the contract, the law designates the place of delivery.<sup>71</sup>

### 3.5.1 Where there is Agreed Place of Delivery

Under Ethiopian law the seller is required to deliver the thing at the place of delivery. The cumulative reading of Art. 1755 and Art. 2279 of the Ethiopian Civil Code provides the place of delivery is the one agreed upon in the contract. The agreement could be either explicit or implicit. Hence the seller shall deliver the thing at that particular place indicated in the contract. Accordingly, the seller may not deliver or be obliged to deliver the thing at another place than the one stipulated in the contract. It follows that the buyers can also refuse delivery effected elsewhere than the place agreed on in the contract. However he may not also demand delivery of the thing elsewhere than the place of delivery unless he bears the expenses incurred to effect delivery at the new site.<sup>72</sup>

### 3.5.2 Where there is No Agreed Place of Delivery

In default of stipulation in the contract designating the place of delivery, as a general rule delivery shall be made at the seller's place of business or in default of this, his residence at the time of the conclusion of the contract.<sup>73</sup> As an exception to this general rule, however, the place of delivery shall be the place where the thing is located at the time of the contract in the following situations.<sup>74</sup> Firstly, where the sale relates to a specific thing and the two parties know the place where such thing is situated at the time of sale. Secondly, to use the language of the

Civil Code, where the sale relates to fungible things selected from stock or a specified supply or to things which are to be made or produced in the place known to the parties at the time of the contract.

Therefore, in the absence of any provision in the contract indicating the place of delivery, the seller shall deliver the thing to the buyer at his place of business or residence, or at the place where the thing is situated at the time of sale, as the case may be, depending on the nature of the thing sold and the awareness of the parties as to the locus of the thing at the time when the contract was made.

### 3.5.3 Failure to Effect Delivery at the Right Place

The seller is duty bound to deliver the thing sold at the place of delivery. In other words, the seller is obliged to effect delivery at the place agreed on in the contract ~~or~~ in default of this, at the place provided by law. However, if he fails to deliver the thing at the right place, meaning if he delivers the thing elsewhere than the place of delivery, this will amount to breach of contract.<sup>75</sup> This may serve as a ground for the buyer to get the contract cancelled through court provided the way in which the contract is enforced amounts to a "fundamental breach of contract".<sup>76</sup> However, it is very difficult to determine whether a given breach of contract is fundamental or not. In fact, Arts. 1676 (1) cum 1785(3) has provided the standard for fundamental breach of contract. Even in view of 1785 (3), however, George Kruzeczunowicz has underscored that the phrase "fundamental breach" under Art. 1785 (2) is vague.<sup>77</sup> He further proposed that to avoid the vagueness of this phrase, sub-art. 3 of Art. 1785 should be reframed in the following manner:

*The Breach is fundamental where, because of its importance in relation to the whole contract, it can be reasonably assumed that the claimant would not have concluded the contract had he for seen such breach.*

Therefore, the seller's effecting delivery elsewhere than the place of delivery constitutes fundamental breach of contract where taking into consideration the importance of effecting delivery at the right place in relation to the whole contract, it is reasonable to assume that the buyer would not have entered into the sale contract had he known such seller's failure. This can be illustrated by the following hypothetical example.

Mr. A, a building contractor has been engaged in constructing buildings of two schools, one in Oromia and the other in Tigray. Mr. A, knowing in advance that the building work in Oromia is going to be interrupted due to shortage of cement, he decided to transfer the excess cement that is found at his site in Tigray to his site in Oromia. Meanwhile he changed his mind, lest the high transport expense he should incur, and entered into a contract of sale with X Cement Factory. The latter has undertaken to deliver 700 Quintals of cement at Mr. A'S construction site in Oromia. To Mr. A's dismay, however, the X Cement Factory delivered the cement at his construction site in Tigray.

In this hypothetical example we can appreciate that Mr. A has entered into sale contract with X Cement Factory believing that the latter would deliver the cement at his construction site in Oromia. Moreover, he preferred to buy cement from X Cement Factory than to transfer the surplus cement that is found at his site in Tigray to his construction site in Oromia with a view to avoid expenses of transport. In effect, this implies that delivery of the cement at Mr. A'S construction site in Oromia is a major importance in relation to the whole contract. In other words it is the basis for the contract. Thus, it is possible to assume that Mr. A would not have entered into contract of sale with

X Cement Factory had he known that the latter would deliver the cement at his construction site in Tigray. Accordingly, Mr. A can get this contract of sale cancelled through court.

Nevertheless, the contract will not be cancelled where the seller can make good the breach within the time fixed by law or contract.<sup>78</sup> Thus, in the above hypothetical example, if X Cement Factory manages to redeliver the cement at the right place, i.e. the buyer's construction site in Oromia, within the time provided by law or contract, the contract will be maintained.

### 3.6 Comparative Overview on Place of Delivery

Under Ethiopia Law of sale, similar with Roman, French and Louisiana law, the place of delivery is the one agreed in the contract. However, in cases where no place of delivery is stipulated in the contract, Ethiopian law follows the same trend with what Roman, French and Louisiana law do. That is in default of agreed place of delivery in the contract, delivery shall be effected at the place designated by law. However, the place of delivery designated by Ethiopian law is some how different from other laws. Unlike Roman and Louisiana law, Ethiopian law provides that as a rule delivery shall be effected at the place of business of <sup>failing such,</sup> residence of the seller. However, Louisiana and Roman law have provided that delivery shall be made at the place where the thing was situated at the time of sale, be it specific or fungible. On the other hand, French law though very much similar with Ethiopian law in this regard, it makes the domicile of the seller the place of delivery where the thing sold is non-specific (fungible) thing.

However, as an exception to the rule, similar with French law, delivery of specific thing shall be made at the place where the thing was located at the

time of the contract provided that parties know the where about of the thing. However, the last proviso is missing in French law.

Furthermore, in contrast to French law, according to Ethiopian law, delivery of ~~the thing sold~~ shall be made at the place where they were situated at the time of the contract in the following cases. Firstly, where the sale relates to fungible things selected from stock. Secondly, where the sale relates to a specified supply. And thirdly, where the sale relates to things which are to be made or manufactured in the place known to the parties at the time of sale.

Finally, the salient distinction between Ethiopian law on the one hand and Roman, French and Louisiana law on the other is marked by the fact that the seller's failure to deliver the thing at the right place is sanctioned in Ethiopian law in contradistinction to the other laws under consideration. Thus if the seller delivers the thing at another place than he is bound to deliver, the contract will be cancelled by the court upon the request of the buyer provided that the requirements of the law are met.

↳ USA Constitution fundamental breaker

## CHAPTER FOUR

# The Role of Delivery in the Transfer of Ownership and Risks in Sale of Corporeal Chattels

### 4.1 Ownership of Corporeal Chattels

Ownership or title, the common form of real right, is a complete legal power of a person over a thing. <sup>1</sup> It has been defined as " a right by virtue of which the thing is absolutely and exclusively subject to the volition and action of a person." <sup>2</sup> But it should be noted that, despite the fact that the ownership right is absolute, it may not be exercised against its legal limits. <sup>3</sup> The Ethiopian Civil Code has also defined ownership under Art. 1204 as " the widest right that may be had on a corporeal thing". This definition, however, merely compares ownership with other real rights. It doesn't even describe the essence of ownership. It is rather under Art. 1205 of the Civil Code ownership is better described. The latter provision shows at least the prerogatives which an owner may have over the thing he owns. Pursuant to this article the owner may use the thing he owns and exploit it as he thinks fit, and may dispose it for consideration or gratuitously without prejudice to such restrictions as are prescribed by law.

Rights embodied in complete ownership can be reducible to the right to use or enjoy /usus/, the right to collect the fruits of the thing /fructus/ and the right to dispose the thing /abusus/, to the exclusion of all other persons. <sup>4</sup> A person is presumed to have ownership right over a corporeal chattels. i.e. things which have material existence and can move or can be transported from place to place without being damaged and losing their identity, when he is in possession of it. <sup>5</sup> The right of ownership over a thing can be transferred from one person to another provided that the transferor is a man of title. <sup>6</sup> There can't be transfer of ownership if the transferor is not the right owner. Because, as the Roman maxim goes nemo dat quod non habet, no one can transfer a right that he himself doesn't have. <sup>7</sup>

Sale is one of the media by which ownership is transferred from one person to another. In a contract of sale, transfer of ownership is one of the primary obligations of the seller. However, the way transfer of ownership is effected divides the world legal systems into two as far as sale of corporeal chattels is concerned. Some legal systems provide that a contract of

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sale is translation of ownership; so, ownership is transferred from the seller to the buyer at the time of conclusion of a valid sale contract.<sup>8</sup> On the other hand, other jurisdictions have laid down the rule that transfer of ownership shall be accomplished at the moment the thing sold is delivered to the buyer.<sup>9</sup> The position of different legal systems regarding the way title is transferred is going to be dealt with next to the next section.

## 4.2 Theory of Risks

The issue of risks of loss comes into picture where there are two reciprocal obligations emanating from the same contract and where accident happens rendering the performance of the obligation of one of the parties impossible.<sup>10</sup> As a result, the one whose obligation is rendered impossible will be released.<sup>11</sup> So, shall the other party be duty bound to perform his obligation? The issue of risk presupposes reprocity of obligation which is a peculiar feature of synallagmatic contracts.<sup>12</sup>

In sale, as Smith has defined it, risk refers to:

*the patrimonial loss suffered by the seller or the buyer as the case may be by reason of the physical destruction of goods or such damage thereto that they cease to be of the kind described by the contract of sale, but in such circumstances that the party suffering the loss is not thereby released from performing his obligation under the contract.*<sup>13</sup>

Loss of the sea

cannot

This writer has attempted to define risks of loss effect wise. But this definition doesn't describe the scenario on which the issue of risk arises.

In contract of sale of corporeal chattels the issue of risk surfaces up where the thing sold is lost, stolen, perished or suffers from physical deterioration in between the time of conclusion of the contract and its delivery

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without the fault of neither of the parties.<sup>14</sup> So, which one of the parties is going to bear the risk of loss? Is the seller to bear the risk or shall the buyer pay the price or shall not reclaim the price if <sup>he</sup> has already paid it and go without receiving anything or receiving something of lesser value than the one agreed upon?<sup>15</sup> These are the questions which could be raised in relation to risks of loss.

Nevertheless, there shall not be problem of risk of loss where there is an express provision in the contract dealing with it.<sup>16</sup> That is making one of the parties bear the risk of loss. There shall not also be question of risk in cases of cash sale where the contract is made and performed, i.e. the price is paid and the thing is delivered actually or symbolically, all at the time of the conclusion of the contract.<sup>17</sup>

It is, therefore, the law's business to set rules which answers the question of risk where the thing sold is lost, stolen or perished or physically deteriorated between the time of conclusion of the contract and the delivery of the thing in the absence of any express provision in the contract making one of the parties bear the risk of loss.

There is no universally agreed rule governing the question of risk. Different legal systems have recognized different doctrines of risk. According to some jurisdictions risk is transferred upon the conclusion of perfect sale contract. Others provide that risk shall be transferred at the time delivery is effected.<sup>18</sup> We will be considering this in the coming sections.

## 4.3 Transfer of Ownership and Risks in Sale of Corporeal Chattels

### 4.3.1 Roman Law

The Roman law of sale drew a clear distinction between the contract of sale and the conveyance (delivery) as it could be remembered from what has been discussed under chapter one of this paper. This distinction is of a considerable importance with regard to transfer of ownership in sale of corporeal chattels. According to Roman law, ownership over a thing sold is transferred from the seller to the buyer by delivery or, as Roman used to call it, *traditio*.<sup>19</sup> Needless to mention, a contract of sale doesn't effect transfer of ownership. What it can do is that it creates only a personal commitment between the parties which requires delivery of the thing in pursuance of the contract to transfer ownership.<sup>20</sup> Title is transferred from the seller to the buyer only upon the accomplishment of delivery. In other words at the time of transfer of possession.

Romans attempted to justify this principle by referring to the concept of real rights and personal rights. They said that a juridical act which creates personal right doesn't create a real right and vice versa.<sup>21</sup> This principle applies to distinguish contract from conveyance. The contract of sale of corporeal chattels doesn't create or transfer real right it rather creates personal right, i.e. a claim against the seller to have the thing delivered.<sup>22</sup> And ownership is a real right, thus it can't be created or transferred by the contract alone.<sup>23</sup> There shall be delivery to have ownership transferred from the seller to the buyer. Therefore, delivery is necessary, be it actual or fictitious or symbolic, to transfer ownership.<sup>24</sup> It follows that ownership will be transferred from the seller to the buyer when delivery is effected by either physically handing over of the thing, *traditio brevi manu*, *constitutio in possessionem*, *traditio longa*

*manu* or symbolic *traditio*, i.e. handing over of the key of the warehouse in which the thing is placed or documents representing the thing.<sup>25</sup>

However, the parties can stipulate in the contract that despite delivery ownership of the thing sold shall be reserved to the seller until the price is paid fully.<sup>26</sup> In such cases the buyer will not be owner upon the delivery of the thing till the price is paid.<sup>27</sup>

With respect to risk, Roman law provided that, outside contracts of sale, as a general rule risk of accidental loss or damage is to be borne by the owner; that is *resperit domino*.<sup>28</sup> However, in sale of corporeal chattels, Roman law treated the issue of risk differently.

Romans followed the principle of *perfecta emptione periculum ad emptorem respicit*.<sup>29</sup> This means that risk is transferred to the buyer at the moment the contract of sale is perfected.<sup>30</sup> Consequently, if the thing sold is perished or stolen or suffered from physical deterioration while it is in the hands of the seller without the fault on his part, the buyer has to pay the price or can't claim the price if he has already paid it.<sup>31</sup> In other words, provided that seller kept the thing with due care in the period between the contract and delivery, he can claim the price from the buyer no matter what happened to the thing. Conversely, the buyer has no claim against the seller if without the fault of the latter the thing has perished or been damaged or stolen before delivery is effected. However, if the seller fails to effect timely delivery without justifiable cause, the risk of loss shifts back to him provided that it would have not occurred had the delivery been made timely.<sup>32</sup>

As it has been stated earlier on, the *emptio* shall be *perfecta* for the risk to be transferred from the seller to the buyer. A contract of sale is perfected when the subject matter and the price are exactly ascertained, and it is

unconditional.<sup>33</sup> However, if these two are not ascertained, a contract of sale shall be imperfect and risk shall not be transferred to the buyer.<sup>34</sup>

According to Roman law, a contract of sale shall remain imperfect and risk shall not be transferred to the buyer in the following cases.<sup>35</sup> Firstly, where the sale relates to things to be sold by count, weight or measure. In such situations the risk will not be transferred to the buyer until the things have been counted, weighed or measured. Secondly, if the thing to be sold is undetermined, the contract of sale will be imperfect and risk is not to be transferred until the thing has been individualized. Thirdly, where the thing to be sold has not yet come into existence, till the coming into existence of the thing, the contract subsists imperfect and the risk will remain with the seller. Fourthly, if the contract of sale is subject to a suspensive condition, the contract will remain imperfect and the risk of loss may not be transferred up until the condition is met.

### **4.3.2 French Law**

Code Napoleon has provided that in sale of corporeal chattels ownership is transferred between the seller and the buyer upon the perfection of the contract. To this effect, Art. 1583 of the Code Civil provides that the sale "is complete between the parties, and the property is acquired in law by the purchaser with regard to the seller, as soon as the thing and the price is agreed on, though the thing has not been delivered nor the price paid." Moreover, Art 1138 supplements that the obligation of delivery is perfected by the consent of the parties rendering the buyer owner of the thing. Therefore, it is the agreement of parties that perfects the obligation to deliver the thing. No delivery is required for the buyer to be considered as an owner thereof.<sup>36</sup> The

ownership is accomplished immediately as the effect of the

l, in his treatise, has said the following in relation to transfer of  
under French law:

*Contract under French law not merely creates an obligation, as  
it used to do under Roman law, but it may be translatiue of  
ownership ... Mutation of ownership has become as direct and as  
immediate an effect of a contract as has creation of obligation.  
Buyers become owner of the thing at the same time that they  
become creditors of the alienator. The obligation to transfer  
ownership, contracted toward them by the other party is,  
therefore, extinguished when it is assumed.*<sup>37</sup>

Excerpt reveals that the conclusion of the contract of sale not only  
results in the creation of a contractual obligation between the parties but also  
in the immediate transfer of ownership between the parties.

Further, the transfer ownership between the seller and the buyer is  
complete when the perfection of the contract is delayed.<sup>38</sup> The perfection of  
the contract is delayed in the following situations.<sup>39</sup> Firstly, where the sale  
concerns things to be sold by count, weight or measure, the contract of sale  
is not perfected and ownership shall not be transferred to the buyer as  
seller until these things have been counted, weighed or measured.

Moreover, under French law it has been provided that despite the perfection of the contract of sale ownership as between the parties shall not be transferred when the seller and the buyer have agreed to delay the transfer of ownership.<sup>40</sup>

From what have been discussed earlier on, it seems that it is only a valid contract of sale that accomplishes the transfer of ownership. And delivery is considered as having no role to play in the transfer of ownership in sale of corporeal chattels. This view has been exactly pointed out by Planiol. He claimed that “modern French sale does no longer consider tradition (delivery) a juridical act, as effecting the transfer of ownership but only as simple delivery, a material act not having any other effect than transfer of possession.”<sup>41</sup> But this assertion seems not acceptable at least for the writer of this paper. Because, although Code Napoleon has provided for an immediate transfer of ownership by contract of sale, it has restricted the effect of the transfer to the parties. In other words, the buyer can't assert his right of ownership against third parties. Meaning a third party who has come into possession through successive sale will have a priority right than the buyer. It is only when the thing is delivered to him that he can exercise his right of ownership over the thing against everyone else. Therefore, this writer humbly disagrees with Planiol assertion that delivery is no more considered as having the effect of transferring ownership.

Here one thing also seems anomalous with regard to French rule of transfer of ownership is sale of corporeal chattels. That is if the right transferred to the buyer prior to delivery upon perfection of the contract of sale can't be exercised against third party, how could it qualify to be real right of ownership which naturally could be declared against the world? Thus, it

follows that it is delivery which plays the role of transferring ownership in the real legal sense of the term from the seller to the buyer.

This much being so in relation to transfer of ownership, French law has adopted the principle of *res perit domino*, i.e. the thing shall perish to its owner, with regard to risk.<sup>42</sup> Code Napoleon has provided that a sale is to be perfected, and title and risk are to be transferred upon consent of the parties as to subject matter of sale and its price though the thing has not yet been delivered.<sup>43</sup> In other words French law has made risk an incident of ownership. Therefore, risk is transferred from the seller to the buyer upon perfection of a contract of sale.

Nonetheless, the perfection of a contract of sale shall be delayed and risk shall not be transferred in the following cases. Pursuant to Art. 1585 of the Code Civil where the thing is to be sold by count, weight or measure, risk shall not be transferred till the thing has been counted, weighed or measured. Furthermore, a contract of sale shall be deemed to be imperfect where the sale relates to undetermined things, to things to be produced or manufactured in the future, or where a contract of sale is suspensively conditioned on uncertain future event.<sup>44</sup> In such cases risk shall not be transferred to the buyer till the contract is perfected. In cases of sale of undetermined thing, a contract of sale shall be deemed to be perfected when the thing has been individualized.<sup>45</sup> With regard to things to be produced or manufactured in the future, a contract of sale is perfected and risk is transferred to the buyer when the thing is produced or manufactured.<sup>46</sup> Finally, a contract of sale which is suspensively conditioned shall be perfected and risk shall be transferred to the buyer when the condition is fulfilled.<sup>47</sup>

### 4.3.3 Louisiana Law

Under Louisiana law it is the obligation of the seller to transfer ownership of the thing sold to the buyer.<sup>48</sup> But this obligation is deemed to be discharged at the time when a contract of sale is perfected. To this effect Art. 2456 of Louisiana Civil Code has provided that “ownership is transferred between the parties as soon as there is an agreement on the thing to be sold and the price is fixed, even though the thing sold is not yet delivered nor the price is paid.” Therefore, at the time the contract of sale is perfected ownership is transferred to the buyer as against the seller. A contract of sale is perfected once the parties have agreed to sell a specified thing at certain price.<sup>49</sup> Nevertheless, the transfer of ownership may be delayed where the parties intended so or if the perfection of the contract is delayed.<sup>50</sup>

The perfection of a contract of sale shall be delayed where: i) the sale relates to things to be sold by count, weight or measure, up until they have been counted, weighed or measured,<sup>51</sup> ii) the sale relates to undetermined things, till the segregation has taken place,<sup>52</sup> iii) the thing to be sold is to be produced or to be manufactured in the future, up until the thing has been produced or manufactured,<sup>53</sup> or iv) the conclusion of a contract of sale is subject to an uncertain future event, till that event has occurred.<sup>54</sup>

However, the rule that a contract of sale upon its perfection effects the immediate transfer of ownership despite the thing has not yet been delivered, is criticized for not being sound for various reasons. The reasons could be attributable, for one thing, to the fact that an examination of different kinds of sales commonly transacted reveals that transfer of ownership is not effected until delivery even between the parties.<sup>55</sup> For another, despite the parties

agreement to delay the perfection of sale until the buyer pays the price, the actual delivery forces the perfection of the sale contract and thus effects the transfer of ownership,<sup>56</sup> Moreover, even in those cases where the buyer is considered to be owner before delivery is effected, the buyer can't declare his right against third parties which implies that his right is something "less" than ownership.<sup>57</sup> Because, the buyer's right in the thing prior to delivery upon perfection of the contract of sale doesn't coincide with the description of real right of ownership.<sup>58</sup>

From these it follows that, in spite of the rule that ownership is transferred upon perfection of a contract of sale, delivery has role to play in the transfer of ownership of corporeal movables. This occurs, firstly, where the sale relates to undetermined things. In such cases although the sale contract has a sufficient object for valid contract there may not be perfect sale until the thing is "individualized and appropriated to the contract."<sup>59</sup> Consequently, ownership will not be transferred until such an appropriation takes place. However, the general principle in Louisiana jurisprudence is that the thing is appropriated to the contract by the delivery of the thing to the buyer.<sup>60</sup>

Secondly, where the contract of sale relates to things to be sold by weight, count or measure, Art. 2458 of Louisiana Civil Code provides that the sale is not perfected until these things have been weighed, counted or measured respectively. But the measurement alone doesn't suffice, there shall also be delivery.<sup>61</sup> Because such sales involve undetermined things, thus the sale requires delivery to appropriate the goods to the contract so that the contract of sale become perfect thereby causing the transfer of ownership.<sup>62</sup>

Thirdly, delivery also plays a decisive role with regard to the transfer of ownership in sale of corporeal movables where the parties have stipulated in

the contract of sale that ownership shall not be transferred to the buyer unless the price is paid fully.<sup>63</sup> In such situations, the sale shall be deemed to be perfected and ownership shall be transferred to the buyer once the thing is delivered to him notwithstanding the parties stipulated intention to delay the transfer of ownership until the price is paid fully.<sup>64</sup>

Having said this much in relation to the transfer of ownership in sale of corporeal chattels under Louisiana law, let's turn our discussion to the transfer of risk in sale of corporeal movables. According to Art 2467 of the Louisiana Civil Code, the risk of loss of the thing sold caused by "fortuitous event" is transferred to the buyer at the time of delivery. Thus, the buyer is going to bear the risk of loss when the thing is delivered to him by one of the modes provided by law or the contract. Therefore, it could be made either by actually handing over the thing, by handing over of documents or the key of the warehouse where the thing is placed, by consent of the parties where the thing was in the hands of the buyer prior to the sale or where it is very difficult to deliver the thing at the time of conclusion of the contract owing to the bulky nature of the thing.<sup>65</sup> At the time the delivery is effected by either of these modes, as the case may, risk shall be transferred from the seller to the buyer.

Under Louisiana law, despite the fact that ownership is transferred as between the seller and the buyer upon perfection of the contract of sale, risk is not made an incident to ownership until delivery is made. From this it follows that Louisiana law doesn't recognize the principle of *res perit domino*, i.e. risk goes together with ownership.

Nevertheless, Louisiana law has provided two cases by way of exception to the principle that risk shall be transferred to the buyer by delivery. One of the exceptions is in cases the buyer requires the dissolution of the

contract of sale owing to the non-conformity of the thing delivered.<sup>66</sup> In fact the non-conformity of the thing delivered by itself doesn't bar the transfer of risk from the seller to the buyer upon delivery but only when the buyer demands the cancellation of the contract. However, in such cases the buyer is duty bound to preserve <sup>the</sup> thing at the expense of the seller until he returns it back to the latter.<sup>67</sup> If he failed to do so, he would be liable for any risk of loss that would occur thereof.

The other exception is in cases where the buyer is late in taking delivery.<sup>68</sup> In such circumstances, though <sup>the</sup> thing has not yet been delivered to the buyer owing to his delay, risk shall be transferred to him. However, the seller is under obligation to preserve the thing at the expenses of the buyer till he appears and takes it.<sup>69</sup> Failure to observe this obligation will make the seller liable for any loss that ~~might~~ occur therefrom.<sup>70</sup>

Therefore, save the exceptions, according to Louisiana law, it is delivery which transfers risks from the seller to the buyer.

#### **4.3.4 Concluding Remarks for the Section**

Based on what has been dealt with in the preceding sub-sections, the following remarks could be made on the rules governing transfer of ownership and risks in sale of corporeal chattels under Roman, Louisiana and French law.

According to Roman law ownership over a thing sold shall be transferred from the seller to the buyer when delivery is effected by either of the modes of delivery provided by the law. Nevertheless the parties are at liberty to agree that despite delivery ownership of the things sold shall remain ~~with the seller~~ until the price is paid fully.

On the other hand, French law provided that in sale of corporeal chattels transfer of ownership as between the seller and the buyer shall be effected upon the perfection of a contract of sale. A contract of sale is perfected when the subject of the contract and its price are agreed upon by the parties. Nevertheless, the perfection of the contract of sale is delayed and ownership as between the parties is not transferred where the sale relates to things to be sold by count, weight or measure, to things to be produced or manufactured in the future, or to undetermined things, or where the contract of sale is subject to suspensive condition.

Moreover, the rule that ownership shall be transferred to the buyer as regards the seller upon the perfection of the contract is excepted when the parties have expressly stipulated in the contract to delay the transfer of ownership. Besides, transfer of ownership upon perfection of the contract has an effect only between the parties. The buyer's right over the thing sold can't be asserted against third parties prior to delivery has been made. It is by delivery ownership of the thing is transferred to the buyer as regards third parties.

Louisiana law, on its part, has provided that in sale of corporeal chattels ownership is transferred to the buyer as against the seller upon the perfection of the contract of sale. A contract of sale is perfected when the parties have specified the thing to be sold and fixed its price. However, the effect of transfer of ownership to the buyer prior to delivery upon the perfection of the contract is restricted to two parties. It is when the thing has been delivered to the buyer that it will have effect against third parties. Thus, ownership of the thing sold is transferred to the buyer by delivery with regard to third parties.

Furthermore, under Louisiana law, transfer of ownership with regard to the parties upon perfection of a contract of sale is delayed when the perfection of the contract is delayed. The perfection of a contract of sale is delayed where the sale relates to undetermined things, to things to be sold by count, weight or measure, to things to be produced or manufactured in the future, or where the parties have made the conclusion of the contract sale subject to suspensive condition. Besides the parties can agreed that despite the perfection of the contract ownership over the thing sold shall be reserved to the seller until the price is paid fully. But in such cases, despite the stipulation reserving the ownership to the seller, ownership will be transferred to the buyer if the thing is delivered to the latter.

This being so in relation to transfer of ownership in sale of corporeal chattels, with regard to transfer of risks of loss Roman law has provided that risks *prima facie* shall be transferred to the buyer upon perfection of the contract of sale. A contract of sale is perfected when the buyer and the seller have agreed on the thing to be sold and its price. Nevertheless, a contract of sale shall be imperfect and risks shall not be transferred upon the conclusion of the contract where the sale relates to undetermined things, to things to be sold by count, weight or measure, or to things to be manufactured or to be produced in the future, or where the contract of sale is suspensively conditioned on some uncertain future event. Moreover, the risks of loss that have been transferred to the buyer upon the perfection of the contract of sale shall be thrown back to the seller where he is late in effecting delivery.

Following Roman law, French law has laid down the rule that risks of loss shall be transferred upon the perfection of a contract of sale. Since ownership is also transferred upon the perfection of contract of sale, in effect French law has recognized the principle of '*res perit domino*'. However, in cases

where the sale relates to things to be sold by count, weight or measure, things to be produced or manufactured in the future, things of undetermined nature to be selected from stock, or where the contract of sale is subject to suspensive condition, risks or loss shall not be transferred by the mere fact that the seller and the buyer have entered into contract of sale. Because in such cases the contract of sale is imperfect.

On the other hand, Louisiana law has declared that risk of loss shall be transferred to the buyer upon delivery of the thing to him. However, this rule will not be applicable, firstly where the buyer has required the cancellation of the contract owing to the non-conformity of the thing. However, in such situations, the buyer is duty bound to preserve the thing at the expense of the seller lest he should be liable for any loss that would occur in the thing. Secondly, though the thing has not yet been delivered to the buyer, risk shall be transferred to him where he is late in taking delivery. In this case, however, the seller shall take all the necessary actions for the preservation of the thing otherwise he will be liable for any damage to or loss of the thing due to his failure to preserve the thing.

#### **4.4 Transfer of Ownership in Sale of Corporeal Chattels under Ethiopian Law**

In Ethiopian law, contract of sale is one of the means by which ownership over a thing is transferred from one person to another. As it has been underscored in the definition article, i.e. Art 2266 of the Civil Code, it is one of the primary obligations of the Seller to transfer ownership over the thing sold to the buyer. Delivery, in the context of transferring possession, plays a prominent role in the transfer of ownership in sale of corporeal chattels.

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#### 4.4.1 Ownership Transferred with Delivery

The first limb of Art. 2273(2) states that the seller is under obligation to transfer ownership of the thing sold to the buyer. But nothing has been said on how the transfer of ownership could be accomplished. Nevertheless, a reference to the other provision of the Civil Code provides an answer to the question how is transfer of ownership effected. Transfer of ownership of corporeal chattels is to be accomplished when the buyer enters into possession of the thing sold.<sup>71</sup> That is, when possession is transferred from the seller to the buyer. On the other hand, pursuant to Art. 1143 of the Ethiopian Civil Code transfer of possession between two parties in a contract is to be effected by delivery. A fortiori, ownership is transferred from the seller to the buyer in sale of ordinary corporeal chattels by delivery.

Therefore, though there is no express provision under Ethiopian law of sale which states that ownership of corporeal movables shall be transferred by delivery, the cumulative reading of Art. 2273 (2), Art, 1186 (1) and Art. 1143 of the Civil Code reveals that in a contract of sale of corporeal chattels ownership over the thing sold is transferred from the seller to the buyer by delivery. To express it in another way, the seller discharges his obligation of transferring of ownership when he delivers the thing sold to the buyer. It is delivery which plays the decisive role of transferring ownership from the seller to the buyer.

The seller is required to effect delivery of the thing in accordance with the terms of the contract and provisions of the law as it could be remembered from what has been discussed under chapter two of this paper. Consequently, he shall effect delivery in the manner provided in the contract and by the law. The rule is that delivery shall be effected by handing over of the thing to the

buyer. However, the parties can agree that delivery shall be effected in another particular manner. But the manner in which the two parties have agreed to effect delivery shall be the one given by the Civil Code. Let's examine briefly the possible modes of delivery by which ownership is transferred from the seller to the buyer.

To begin with, in the absence of any express provision in the contract referring to a particular mode of delivery, delivery shall be effected by physical handing over of the thing which is called actual delivery.<sup>72</sup> In such cases ownership is transferred from the seller to the buyer where the former hands over the thing to the latter or his legal representative.<sup>73</sup> And where the sale involves the carrying of the thing, ownership is transferred where the thing is delivered to the carrier notwithstanding the seller uses his own means of transport provided he has the intention to execute the contract.<sup>74</sup>

However, the parties can agree that delivery shall be effected by handing over of documents which are representative of the thing and without which the thing can't be disposed of. Thus, transfer of ownership is accomplished when the documents are delivered to the buyer or to his legal representative even if the thing has not been actually delivered.<sup>75</sup> The common examples are, bill of lading and warehouse receipt.

On the other hand, the parties can also covenant that delivery shall be effected through constructive possession. That is where it is stipulated in the contract that the seller shall remain in possession of this thing as mere holder provided the sale relates to a specific thing or individualized fungible things.<sup>76</sup> In such situation ownership is transferred from the seller to the buyer where the former declares that he is holding the thing on behalf of the latter.<sup>77</sup>

Moreover, where the buyer was in possession of the thing as a mere holder prior to the sale contract, delivery shall be deemed to be effected by the contract alone, i.e. *traditio brevi manu*. It follows that transfer of ownership, in such circumstance is effected where the seller and the buyer validly concludes the contract of sale.<sup>78</sup>

To summarize, therefore, in contract of sale of corporeal chattels, regardless of its form, delivery transfers ownership from the seller to the buyer so long as it is made in accordance with the terms of contract and the provisions of the law.

#### 4.4.2 Exceptions

In sale of corporeal chattels, the rule that delivery transfers ownership from the seller to the buyer is not absolute. In the opinion of this writer, it is subject to the following exceptions.

##### 4.4.2.1 Sale on Trial

Sale on trial is one of the conditional sales in which the conclusion of the contract is subject to the declaration by the prospective buyer as to his acceptance after having tried the thing within a specified time or in default of this within reasonable time.<sup>79</sup> Accordingly, until the prospective buyer declares his acceptance or fails to refuse within the time limit provided herein above, there is no sale contract.<sup>80</sup> Therefore, delivery of the thing to the buyer for trial doesn't transfer ownership from the seller to the buyer. Because the sale contract has not yet come into existence. The seller delivers the thing to the buyer not with the intention to transfer ownership rather to let the buyer try the thing and declare his acceptance so that the contract shall be deemed concluded.

Therefore, delivery plays the role of transferring ownership only where there exists a valid sale contract. In the absence of valid sale contract, the mere fact of delivery doesn't effect transfer of ownership. Because it is as a result of a contract that delivery transfers possession thereby effecting transfer of ownership.

#### 4.4.2.2 Sale with Ownership Reserved

This refers to a contract of sale where transfer of ownership is subject to the fulfillment of a condition precedent, i.e., payment of the price.<sup>81</sup> Thus until the price of the thing sold is paid ownership remains with the seller despite delivery of the thing to the buyer. Parties to a contract of sale of corporeal moveable things make such an arrangement as a security for the payment of the price.

Therefore, where the parties have made a stipulation in the contract to the effect that ownership of the thing is reserved with the seller until the price is paid fully, the delivery of the thing to the buyer doesn't result in the transfer of ownership from the seller to the buyer. Because the stipulation reserving the ownership to the seller till the payment of the price sets aside the automatic application of Art. 1186 (1) which states that transfer of ownership of corporeal movables shall be effected by transfer of possession, i.e. delivery.

However, such a stipulation shall not affect third parties except where it has been entered into a public register established for this purpose at the residence of the concerned third party.<sup>82</sup> From this, we can infer that for the sale of corporeal chattels with ownership reserved to have a legal effect against third parties, it shall be made in writing because a contract which is made not in writing can't enter into register.<sup>83</sup>

## **4.5 Transfer of Risks in sale of Corporeal Movable under Ethiopian Law**

Under Ethiopian law, the issue of risk surfaces itself up in a contract of sale of corporeal movables where the thing sold perishes or suffers from physical deterioration as a result of some contingent event between the conclusion of the contract and delivery of the thing. The issue is, who is going to bear the risk of loss, or when is the risk of loss transferred from the seller to the buyer. Is the buyer obliged to pay the price, or can he refuse to pay the price or reclaim it if he has already paid it where the thing perished or damaged due to a contingent event? This will be dealt with in the forth coming sub-sections.

### **4.5.1 Risk Transferred with Delivery**

It is provided under Art. 1758 (1) of the general provisions of contract that "the debtor who is bound to deliver the thing shall bear the risks of loss of or damage to such thing until delivery is made in accordance with the contract."

This general principle is well enshrined in the special provisions dealing with sale under Art. 2324(1) of the Civil Code which goes "the risks shall be transferred to the buyer from the day when the thing has been delivered to him in accordance with the provisions of the contract or of this code." According to this article, delivery plays the role of transferring risks from the seller to the buyer provided it is effected in accordance with the terms of the contract or the provision of the Civil Code. However, there seems mistranslation in making the requirement as to the manner of delivery alternative, i.e., in accordance with the contract or the Civil Code. Because Art. 2273 (1) of the Civil Code and the Amharic version of 2324 (1) has made it



X Thirdly, the buyer and the seller are at liberty to agree that the latter remains in physical control of the thing on behalf of the former provided the thing sold is specific one or pertains to individualized generic species. In such cases, delivery shall be deemed to have been effected when the seller declares that he is holding that thing on behalf of the buyer.<sup>87</sup> Thus, from the time he has made such declaration risks of loss fall on the buyer. But it should be pointed out that risk of loss must not be caused by the fault of the seller.

Fourthly, in case of traditio brevi manu, that is where the buyer was holding the thing in another status than possessor at the time of sale contract, risks of loss are transferred to the buyer at the moment the contract of sale is concluded because delivery is deemed to have been effected at this time.<sup>88</sup> Sum (11+)

Consequently, if the risks are transferred by one of the above modes of delivery as provided in the contract and the Civil Code to the buyer, he shall pay the price to the seller or may not have any right to reclaim the price if he paid it regardless of whatsoever happened to the thing.<sup>89</sup> ✓

From what have been discussed above it can be inferred that the rule that risks shall be transferred with delivery has expectedly behind it the principle of res perit domino. As it has been dealt with in the preceding section, delivery transfers ownership of corporeal chattels from the seller to the buyer in a contract of sale subject to few exceptions. All the same risk of loss <sup>of</sup> or damage to the thing sold is transferred from the seller to the buyer at the time the thing is delivered to the buyer. From these it follows that risk is transferred with ownership, i.e. the principle of res perit domino. However the principle of res perit domino is excepted under Art. 2388 of the Civil Code. According to this article, despite delivery the seller remains with ownership of the thing until the price is paid fully, nevertheless, risk is transferred to the

buyer at the moment the thing is delivered. Therefore, risks fall on non-owner rendering the principle of 'res perit domino' inoperative.

## 4.5.2 Exceptions

At this point, however, it is necessary to note that the principle that risk shall be transferred by delivery is not always operational. There are few exceptional cases where risk is not necessarily transferred by delivery.

### 4.5.2.1 Buyer's Delay in Taking Delivery

Art. 2325(1) of the Civil Code provides that "the risks shall also be transferred to the buyer from the day he is late in paying the price". /emphasis mine/ According to this article risks of loss shall be transferred by operation of the law without delivery being effected where the buyer is late in paying the price. However, the underlined phrase in the above cited provision should not be taken as it is at least in the opinion of this writer. Because, firstly if we take this article as it stands now, its application will be limited to cases where the payment of the price and delivery are to be made simultaneously. Hence, it will not be applicable in situations where concurrent performance of the obligations is not required. So, in order to make this provision effective in all cases, it should be taken to mean where the buyer is late in taking delivery. Secondly, Krzeczunowicz has pointed out that the English translator has distorted the master texts words, *prise de livraison*, i.e. taking delivery, to mean "paying the price".<sup>90</sup> Thus it should have been translated to mean late in taking delivery. Thirdly, Art. 1758 (2) of the general contract provision states that where the creditor "is in default for not taking over the thing", risk shall be transferred to him. In contract of sale this could mean buyer's delay in taking delivery. Therefore, Art. 2325(1) of the Civil Code should be understood to

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mean the risks shall also be transferred to the buyer from the day he is late in taking delivery.


However, the fact that the buyer shall bear the risk of loss when he is late in taking delivery doesn't absolutely relieve the seller from any obligation. The seller is under obligation to preserve the thing at the expenses of the buyer pursuant to Art. 2320(1) of the Civil Code. Desperate enough, however, no sanction is provided should the seller fail to discharge this obligation. Problems might arise where the thing is lost or undergoes physical deterioration due to the failure of the seller to take measures necessary for its preservation. Who is going to be liable, is it the seller or the buyer? The law doesn't have any ready-made answer. However, in the opinion of this writer, the seller shall be liable. Because, for one thing it is a well accepted principle that the issue of risk arises where the thing sold is lost or damaged due to the fault of neither of the parties.<sup>91</sup> If there is fault on the part of either of the parties, the one at fault shall bear the risk. For another, if we make the buyer who is late in taking delivery bear the risk of loss of or damage to the thing, it would be nonsense to incorporate Art. 2320(1) in the Civil Code. Because unless this article is sanctioned by making the seller bear risk of loss in such cases, it is unlikely that the seller will observe his duty of preserving the thing. Therefore, though the Civil Code doesn't provide any express provision, it seems that the seller shall bear the risk where he fails to take necessary measures to preserve the thing in cases the buyer is late in taking delivery.

*liability based on fault*

Moreover, the rule that risks shall be transferred from the seller to the buyer by the operation of the law where the buyer's late in taking delivery is excepted under sub 2 and sub 3 of Art. 2325. The principle in Art 2325(1) applies, it seems, only in relation to specific things. Risks shall not be

transferred from the seller to the buyer by operation of the law owing to the buyer's delay to take delivery if the sale relates to fungible things. 

 This exception has also an exception. Despite the fact that thing sold is fungible, risk shall be transferred from the seller to the buyer when the latter is late in taking delivery provided the seller segregates the thing sold and sets it aside for the performance of the contract and gives notice to the buyer to the effect that he can take delivery of the thing.<sup>92</sup> However, if it is impossible to individualize the thing due to its nature, risk shall be transferred to the buyer where the seller has taken steps necessary to facilitate the delivery of the thing.<sup>93</sup>

Here, an issue could be raised, i.e. whether the seller is required to give notice to the buyer or not,<sup>94</sup> This is in fact arguable. It could be argued that the seller shall give notice to the buyer in order to avail himself of Art. 2325(3) because what is excluded under this article is the requirement of segregation of the thing owing to its nature. The requirement as to giving notice is not expressly excluded. On the other hand, it could be argued that since the seller is not expressly required to give notice to make use of Art. 2325(3), no need for the seller to give notice to the buyer. Nevertheless, this writer opts for the first argument for the reason that it is only the seller's duty of segregating the thing that is excluded. Had the legislature intended to exclude the requirement of giving notice to the buyer, it would have put it expressly as it has done with the requirement of segregation. 

At this juncture a point should not be left without being noted. That is for risk to be transferred from the seller to the buyer by operation of the law, there shall be a compulsory date of delivery. If there is no time frame, one can't talk of delay, and if no lateness, no transfer of risk by the operation of the

Risk → upon delivery

law. In fact one may take that a reasonable period time may be used, but it is very difficult to think that the legislature has intended to employ such broad interpretation.<sup>95</sup> Rather the intention of the legislature must have been a compulsory date of delivery.

#### 4.5.2.2 Sale on Trial

In sale on trial, the conclusion of a contract of sale is subject to a condition precedent that is the prospective buyer's trial of the thing and his express or implied acceptance of the thing. Until the prospective buyer's implied or express acceptance is ascertained, there is no sale contract. In such circumstances, despite the fact that the thing has been delivered to the prospective buyer for trial, risk is not transferred to him rather it remains with the prospective seller.<sup>96</sup> Because it is only where there is a valid contract that delivery transfers risk from the seller to the buyer. The rule enshrined in sale on trial is in line with the principle of *res perit domino*, but it is an exception to the rule that delivery transfers risk from the seller to the buyer.

On the other hand, if the prospective buyer declares his acceptance in the course of trying the thing or remains silent after the trial period has elapsed, the contract shall be deemed to have been concluded and the risk shall be transferred from the seller to the buyer.<sup>97</sup>

But it should be noted that the way the prospective buyer tries the thing matters a lot. It seems that the prospective buyer must follow the normal use process.<sup>98</sup> The trying should be made by putting the thing into its normal use. Otherwise, it would be absurd to make the prospective seller bear the risk of loss of or damage to the thing that has occurred as a result of the prospective buyer's failure to comply with the normal use process in trying the thing.

Moreover, it could be said that we should have to inject into Art. 2383 that the prospective buyer shall be obliged to preserve the thing as of the day he has impliedly or explicitly notified the prospective seller that he rejected the thing. In fact, it might be argued that this would be taking the law too far than what the law maker has intended. Because, no contractual relationship has come into existence creating a mutual commitment between the parties. However, that notwithstanding, at least equity requires the rejecting prospective buyer to preserve the thing at the prospective seller's expenses up until the thing is restituted into the hands of the latter.

#### 4.5.2.3. Buyer's Refusal of Delivery Owing to Defect or Non-Conformity ✓

In principle, risks automatically pass to the buyer when the thing sold is delivered to him. However, this is so provided the buyer accepts what has been delivered. But if the buyer rejects what has been delivered to him on the ground that it is not in conformity with the contract and he declares or requests the cancellation of the contract, or demands the replacement of the thing, despite delivery, risks remain with the seller according to the *a contrario* reading of Art. 2324(2) of the Civil Code of Ethiopia. This article seems to refer only to non-conformity of the thing to the contract. But it also implies defect in the thing. Because as it could be inferred from the close reading of the provisions of the Civil Code dealing with defect and non-conformity, the code in many respects speaks of defect when it speaks about non-conformity and vice versa.<sup>99</sup> Therefore, where there is defect in the thing delivered or the thing delivered doesn't conform to the contract, risks shall not be transferred to the buyer at the time of delivery on condition that , first the warranty against defect or non-conformity has not been lifted up by the contract<sup>100</sup> , second , the

buyer has declared or requested the cancellation of the contract or has demanded the replacement of thing delivered.<sup>101</sup>

However, it should be noted that the defect or the non-conformity shall be a warrantable one for the buyer to make use of Art.2324 (2).<sup>102</sup> A defect is warrantable where: i) the thing delivered doesn't possess the quality necessary for its usual use or its merchantable use, ii) it doesn't have the quality necessary for its special use as stated explicitly or implicitly in the contract, or iii) it doesn't possess "the quality or specification" tendered in the contract.<sup>103</sup>

On the other hand, there shall be a warrantable non-conformity where "the seller delivered to the buyer part only of the thing sold or a greater or less quantity than" he agreed to deliver, or the thing delivered is entirely different or is "of a deferent species" from the one agreed in the contract.<sup>104</sup>

Moreover, prior to declaring or demanding the cancellation of the contract, or requiring the replacement of the thing, the buyer shall give notice immediately to the seller as to the defect in the thing delivered or its non-conformity after having examined it.<sup>105</sup> The examination of the thing shall be made at the time of delivery, i.e. at the time when risks are transferred ~~or would have been transferred~~<sup>106</sup>. Therefore, the buyer to make use of Art. 2324(2), he shall comply with all these procedural requirements. /

The buyer, however, is not absolutely free in such circumstances. He is under obligation to preserve the thing at the expenses of the seller when he rejects delivery.<sup>107</sup> To this writer's surprise, no sanction has been provided in the Civil Code should the buyer fail to discharge his obligation of preserving the thing and as a result the thing has perished or deteriorated. So, who should bear the risks in such cases? Is the seller going to bear the risks or the buyer? In the opinion of this writer, the buyer shall be liable for the loss of or damage to the

thing . Because firstly the issue who bears the risks of loss comes into picture when the thing is lost or deteriorated at the fault of neither of the parties . If either of the parties is at fault, the one who is at fault shall be liable. Secondly, if the seller is made to bear the risks of loss caused due to buyer's failure to discharge his duty of preservation, it would be nonsense for the law to impose such duty on the <sup>seller</sup> buyer. Therefore, though the law is toothless as it stands now, we should have to read into Art.2321 (1) that the buyer shall be liable where the thing is lost or gets damaged as a result of buyer's failure to observe his duty of persevering thing.

#### **4.6. Comparative Analysis for the Chapter**

In the preceding sections it has been attempted to examine the role of delivery in the transfer of ownership and risk in sale of corporeal chattels under different legal systems. Now let's analyze the Ethiopian law in comparison with the three legal systems under consideration.

Under Ethiopia law, as it is under Roman law, in sale of corporeal chattels ownership is transferred from the seller to the buyer by delivery. In both of these two legal systems parties are at liberty to agree to the effect that despite delivery ownership shall remain with the seller up until the price is paid fully. However, peculiar to Ethiopia law, such an agreement will not have effect against third parties unless it has been entered into registry established for this purpose at the locality where the buyer resides. While no such requirement is stated under Roman law.

However, in contradistinction to Ethiopian and Roman laws, French and Louisiana law have incorporated that in sale of corporeal chattels ownership shall be transferred as between the buyer and the seller upon the perfection of contract. In both legal systems a contract of sale is perfected at the moment the

parties have specified the thing to be sold and fixed its price. Moreover, the effect of transfer of title over a thing prior to delivery is limited to the parties, that is, it can't be asserted against third parties. Thus, it is doubtful that the buyer's right over a thing prior to delivery upon perfection of the contract fits the description of real right of ownership. Besides, where third persons are concerned, in both French and Louisiana law, delivery is required to transfer ownership. For this reason it is very difficult to claim that ownership, *stricto sensu*, is transferred to the buyer prior to delivery upon the perfection of the contract of sale. Rather it seems that, it is by delivery ownership in its real sense is transferred from the seller to the buyer.

Moreover, in both French and Louisiana law, transfer of ownership as between the seller and the buyer is delayed if the perfection of the contract is delayed. In both these two legal systems, the perfection of a contract of sale is delayed where: 1) the sale relates to things to be sold by count, weight or measure, 2) the sale relates to undetermined things, 3) the thing to be sold has not yet come into existence, or 4) the contract of sale is suspensively conditioned on an uncertain future event, for instance sale on trial. In the last two cases, a contract of sale shall be perfected and transfer of ownership as between the parties shall be effected as between the parties where the thing to be sold comes into existence and the condition is met, respectively, in both French and Louisiana law. In respect to case (1) and (2) there is substantial difference between French and Louisiana law. According to French law, in cases (1) and (2) the contract is perfected and ownership is transferred as between the parties when the thing have been counted, weighed or measured and the thing has been segregated, respectively. By contrast, Louisiana law provides that in addition to undertaking the acts provided for under French law, there shall be delivery to perfect the contract and thereby transfer ownership.

On the other hand, French and Louisiana law have recognized that parties can agree that despite the perfection of the contract ownership over the thing sold shall remain with the seller until the price is paid fully. Nevertheless, in such circumstances, Louisiana law, in contrast to French law provides that despite such an agreement ownership shall be transferred to the buyer if the thing is once delivered to him though the price has not yet been paid.

In relation to transfer of risks of loss, Ethiopian is , in contrast to Roman and French law , in striking similarity with Louisiana law. Both Ethiopian and Louisiana law have provided that risks of loss of the thing sold shall be transferred to the buyer at the moment the thing has been delivered to him. Nonetheless, there is a notable difference between these two legal systems. Under Ethiopian law, in contrast to Louisiana law, the principle of *res perit domino* is functional save the exceptions since ownership is transferred upon delivery together with risks of loss.

On the other hand, in both Ethiopian and Louisiana law the rule that risks shall be transferred to the buyer by delivery is subject to exceptions. In both these two legal systems risks shall be transferred to the buyer in the absence of delivery where the buyer is late in taking delivery. However, this rule has an exception under Ethiopian law unlike Louisiana law. According to Ethiopian law, the buyers delay to take delivery may not transfer risks from the seller to the buyer if the thing sold is fungible. In such cases, however, by way of exception risks of loss shall be transferred to the buyer where the thing sold has been individualized for the execution of the contact and the sellers has sent notice to the buyer to that effect or, if individualization the thing is impossible owing to its nature, where the seller has taken all the necessary measures to facilitate the delivery of the thing. However, in all those cases where the buyer

is late in taking delivery, the seller is under obligation to preserve the thing at the expenses of the buyer according to both Ethiopian and Louisiana law. Nevertheless, Ethiopian law has provided no sanction for the seller's failure to observe his obligation of preserving the thing while Louisiana law has made the seller liable for risks of loss of the thing that occurs as a result of his failure to preserve the thing notwithstanding the buyer is late in taking delivery.

Moreover, Ethiopian law provides that risk shall not be transferred to the buyer upon delivery where the thing delivered is defective or doesn't conform to the contract provided that the buyer has declared or required the cancellation of the contract, or demanded the replacement of the thing. On the contrary, Louisiana law has restricted the application of the exception that despite delivery risk shall not be transferred to the buyer in cases of non-conformity and provided that the buyer has required the dissolution of the contract. However, in both Ethiopian and Louisiana law, the buyer is obliged to take all the necessary actions for the preservation of the thing. But, in contrast to Louisiana law which has made the buyer liable for any risks of loss that would happen as a result of his non-observance of the duty to preserve the thing, Ethiopian law has imposed no sanction on the buyer should he fail to preserve the thing thereby causing the loss of the thing.

Besides, in contradistinction to Louisiana law, Ethiopian law has recognized one more exception to the rule that risk shall be transferred upon delivery. In sale on trial, risk is not to be transferred to the prospective buyer upon delivery according to Ethiopian law while it is transferred to the prospective buyer upon delivery according to Louisiana law.

On the other hand, in contradistinction to Ethiopian and Louisiana law, French and Roman law have set the rule that risks of loss shall be transferred

er to the buyer upon the perfection of the contract of sale. In both legal systems a contract of sale is perfected when the two parties agree on the thing to be sold and its price. Despite this, however, there is a difference between these two legal systems. The French law has the principle of *res perit domino* while the Roman has not. This is because under the former law a contract of sale is translatory of ownership making it an incident to ownership. While in the latter law contract of sale does not transfer ownership. According to Roman law, in spite of the fact that ownership remains with the seller until delivery, risk of loss is transferred upon the perfection of the contract; this is the converse of the principle of *res perit domino* where the thing perishing to non-owner.

There is also one point of commonality between Roman and French law in these two legal systems, since the transfer of risk from the seller to the buyer is effected upon perfection of the contract of sale, transfer of risk is not effected if the perfection of the contract of sale is delayed. The perfection of the contract of sale shall be delayed and risks of loss may not be transferred to the buyer in the following cases according to Roman and French law. Firstly, where the contract relates to things to be sold by count, weight or measure, upon the perfection of the contract if the thing has been counted, weighed or measured the risk of loss shall be transferred to the buyer. Secondly, where the contract of sale relates to things to be sold by measure, the risk will not be transferred to the buyer until the thing is measured.

## Conclusion and Recommendation

Sale is one of the means by which ownership over a thing is transferred from one person to another. For a sale to be constituted, the three basic elements must exist. These are the price, the thing and the consent (contract). It has also been underscored that in sale of corporeal chattels, it is the obligation of the seller to effect delivery of the thing and the buyer to take it. Delivery commonly refers to the transfer of possession from one person to another. It has been as well pointed out that the legal consequences that delivery could bring about, however, differ from jurisdiction to jurisdiction. It has also been noted that delivery could be made in different manners. The modes of delivery adopted by French, Louisiana and Ethiopian law have remarkable resemblance with that of Roman law. Ethiopian law has expressly provided for three modes of delivery. These are, actual delivery, handing over of documents and constructive possession. However, one more mode of delivery could be added through construction i.e. *traditio brevi manu*. This is by taking the *a contrario* reading of Art. 1147(1) of the Civil Code together with Art. 1147(2). Accordingly, a person who has begun to possess a thing on behalf of another shall be considered as possessor thereof if he proves by any means that he possesses it for himself. Thus, possession is transferred from the lawful possessor of a thing to its mere holder without a need for actual physical handing over of the thing, by *traditio brevi manu*. In a contract of sale concluded between a possessor of a thing and its mere holder, delivery is effected by agreement alone, i.e. *traditio brevi manu*. To this effect, the then mere holder, can adduce the sale contract as a means to prove that he no more possesses the thing on behalf of another person he rather, possesses it for himself.

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It has also been stated that the seller is required to deliver the thing at the right time. In all the legal systems under consideration time of delivery is subject to the agreement of the parties. However, if no time is specified in the contract, delivery shall be made within a reasonable time under Roman and Louisiana law whereas under Ethiopian law, following the French law, it shall be effected immediately upon buyer's request to this effect. Nevertheless, to avoid the absurdity that could arise by requiring the seller to deliver the thing immediately upon the request of the buyer, it is recommendable that Art. 2276 of the Civil Code should be amended to read as if no time of delivery is provided in the contract, delivery shall be made within a reasonable time following the buyer's request for delivery. Moreover, failure to deliver the thing timely could give rise to the demand by the buyer of specific performance or cancellation of the contract and claim for damage, if any, according to French, Louisiana and Ethiopian law while it could only give rise to claim for damage by the buyer under Roman law.

It has been as well remarked that in all the legal systems under consideration, the seller is required to deliver the thing at the place of delivery. The place of delivery is to be designated in the contract in all the jurisdictions under consideration. In the absence of any stipulation in the contract designating the place of delivery, the seller shall deliver the thing at the place designated by the respective laws. However, the obligation to deliver the thing at the right place is not sanctioned under Roman, French and Louisiana law. While Ethiopian law provides that the seller's failure to <sup>effect</sup> delivery of the thing at the place he is bound to deliver may result in the cancellation of the contract and claim for damage where the requirements laid down in the Civil Code are met.

It has been also attempted to spell out the decisive role that delivery plays in the transfer of ownership and risk in sale of corporeal chattels. Ethiopian Law, like Roman law, states that in sale of corporeal chattels the transfer of ownership over a thing is accomplished, from the seller to the buyer, by delivery. The moment the thing is delivered to the buyer, he will become owner thereof. However, there are two cases to which the rule ownership is transferred with delivery doesn't apply. One being, similar with Roman law, sale with ownership reserved, and the other is sale on trial. On the other hand, it has been observed that under French and Louisiana law ownership is transferred to the buyer at the time of the conclusion of perfect sale contract as against the seller save the exceptions. However, it is by delivery ownership is transferred from the seller to the buyer as regards third parties.

A point has also been made to show the role that delivery plays in the transfer of risk from the seller to the buyer. In both Ethiopian and Louisiana law, in sale of corporeal chattels delivery transfers risk from the seller to the buyer save the exceptions. While under Roman and French law, it is the perfection of sale contract that transfers risk from the seller to the buyer. According to Ethiopian law, the moment delivery is effected, risk of loss shifts from the seller to the buyer. However, this rule doesn't hold true where the buyer is "late in paying the price". Nevertheless, it is recommendable that the phrase "paying the price" under Art. 2325(1) of the Civil Code shall be amended to mean "taking delivery". Since it has been identified that there is mistranslation and taking this article as it is will restrict its application purposelessly to cases in which the payment of the price and delivery of the thing is to be effected simultaneously.

In connection with what has been said in the above paragraph, an attempt has been as well made to discuss that where the buyer is late in taking delivery, the seller is under obligation to take all the necessary measures for the preservation of the thing at the expenses of the buyer. Nonetheless, no sanction is provided should the seller fail to discharge his duty of preservation thereby causing damage to the thing. Therefore, it is recommendable to back this obligation of the seller with a sanction by enacting a law which makes the seller liable for the risk of loss of the thing that might occur as a result of his failure to observe his obligation of preservation.

The other case in which the rule that risk shall be transferred to the buyer with delivery will be set aside is where the buyer has pronounced or required the cancellation of the contract or has demanded the replacement of the thing on the ground that the thing delivered is defective or doesn't conform to the contract. In such cases, needless to say, the buyer is under obligation to preserve the thing at the expenses of the seller. All the same, no sanction is made available in the Civil Code should the buyer fail to preserve the thing thereby causing damage to the thing. Thus to back this provision with legal force it is recommendable that a legislation should be issued to the effect that the buyer shall be held liable for any damage that might happen should he fail to observe his duty of preservation. On the other hand, it has been also noted that risk is also not transferred in cases of sale on trial. Despite the delivery of the thing to the prospective buyer, risk remains with the seller. However, it is recommendable that the way a prospective buyer tries the thing must be taken into account in determining the question of risk.

Finally, in the opinion of this writer, Ethiopian law seems to be better off than the other legal systems we have considered in providing that ownership and risk shall be transferred from the seller to the buyer upon

delivery. Because effecting the transfer of ownership or risk, or both prior to delivery has its own problem. For one thing, the right that is transferred to the buyer before delivery is simply tantamount to personal right. Because it can't be asserted against third parties and no sale is effective against third parties until delivery is effected.<sup>1</sup> Thus making the transfer of ownership upon delivery avoids the absurd distinction between ownership with regard to the seller and ownership with regard to all other persons.<sup>2</sup> For another, making the buyer bear the risk before delivery is "inconsistent with the contractual nature of sale and realistic expectation of the parties"<sup>3</sup> This is because, firstly the contract of sale is a synallagmatic or bilateral contract in which the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other. Accordingly, when the performance owed by one becomes impossible because of some contingent event, the contract is dissolved and the obligation of the other extinguished. Secondly, the cause of the buyer obligation to pay is an expectation of a transfer of ownership and delivery, because without both he will not be owner in its true sense. Thus, if the thing is destroyed before delivery, the seller can't perform his obligation of delivery and, consequently, the buyer should be released from his obligation to pay. Therefore, until delivery, the thing should be at the seller's risks. This is "logically consistent and practically efficient".<sup>4</sup> For transferring risks with delivery can be expected usually to conform with the probable intent of the parties in the absence of an express agreement to the contrary.

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<sup>2</sup> Ibid.

<sup>3</sup> Id., p. 1059

<sup>4</sup> Id., p. 1056

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23. Civil Code of Ethiopia, cited above at note 13, Art. ~~1205(2)~~ cum Art. ~~1204(1)~~ cum Art. ~~2266~~ cum Art. ~~2267(2)~~ cum Art. ~~2875~~
24. Id., Art. 2411
25. Nicholas, cited above at note 20, p.172; see also, Code Napoleon, cited above at note 3, Art. 1583; Civil Code of Louisiana, cited above at note 9, Art. 2456; Civil Code of Ethiopia, cited above at note 13, Art. 2266 cum Art. 2273(2)
26. Civil Code of Ethiopia, cited above at note 13, Art. 2410
27. Id., Art. 2610
28. Ryan, cited above at note 4, p. 91
29. Ibid.
30. Id., 92
31. Nicholas, cited above at note 20, p.172; see also, Civil Code of Louisiana, cited above at note 9, Art. 2450
32. Ibid.; see also, Ryan, cited above at note 4, p. 92
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36. Ibid.
37. Planiol, cited above at note 21, p. 779
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