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FACULTY OF LAW**

LL.B THESIS

**THE LAW AND THE PRACTICE RELATING TO
TRANSFERABLE SECURITIES IN ETHIOPIA**

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**ADDIS ABABA, ETHIOPIA
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Statement of Declaration

I here by declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation.

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Signed _____

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Chapter One

Research Proposal

Statement of the Problem

The problems surrounding transferable securities in Ethiopia are numerous. To begin, with the said transferable securities are nowhere defined in the Ethiopian legal system. So also, no area of law including our commercial code, clearly identifies or provides for the categories of transferable securities among the wider family of negotiable instruments. On top of these, the laws governing the issuance of transferable securities are vague and incomplete. With regard to non payment (non settlement) of transferable securities, there is no special area of law that provides the remedy which is believed to be suitable and commensurate, owing perhaps to the understanding of the then legislator.

Besides, legal and practical problems pertaining to both primary and secondary market for transferable securities require an urgent solution. Financial institutions whose role, among others, is to facilitate the transfer of transferable securities are almost uncommon or unknown in this country. Specially, the absence of investment bank has significantly affected the function of primary markets for securities such stocks and debt securities.

The before mention legal and practical problems around transferable securities necessitate a through legal research that will come up with proper solution, that recommends the issuance of new area of laws and/ or amendment of the existing laws.

Objective of the Study

The objective of the study, among others, is to identify transferable securities, among the broad family of negotiable instruments and define same. The objective of this study also include to investigate the laws and

practice relating to transferable securities with the view to enabling those concerned bodies understand the vague and incomplete nature of the laws governing the issuance, negotiation and settlement of transferable securities and come up with a better law either by amending the existing laws or by issuing new area of laws.

Specific Objective

The specific objective that is hoped to achieved out of this research is the following

- Identify what transferable securities are and discuss their nature
- How these instruments are issued transferred /negotiated and settled
- To demonstrate the variance between the law and the practice
- To propose a solution for the areas uncovered in the subject matter under the study.

Significance of the Study

The benefit that will be gained out of this research is that

- Readers will have a better understanding of what transferable securities are
- Since transferable securities are alternative source of capital government, private and public enterprises need to know the nature of issuance, negotiation and settlement of these instruments.
- It could serve as a source material for students, other researchers to deal with the subject matter in depth.

Literature Review

There is no literature written on transferable securities at the domestic level. The research is mostly based on the laws relating to

transferable securities, which are found scattered in different areas of laws and foreign laws and practice.

Research Methodology

The research of this paper heavily relied on literature dealing with transferable securities and published in print sources wise, books, encyclopedia, article, and Directives and Proclamations. The writer of this paper also interviewed Ato Shileshi Mekonnen Head, Accounts Ledger Division of the National Bank of Ethiopia.

Scope of the Study

The research is confined to the identifying what transferable securities are with examining their nature and methods of negotiation. Also examines the variance between the law and the practice in that regard.

Organization of the Study

The research is organized as follows:-

Chapter one presents the Research Proposal.

Chapter two discusses securities in general.

Chapter three hosts, life insurance to order, bearer share, that is, form of transfer, nature and their settlement.

Chapter four explains the nature, transferability and settlement of another category of transferable debt securities that is, debenture treasury bills and government bond. At last, conclusion and recommendation would be forwarded.

Chapter Two

2. Securities in General

2.1 Definition

In most of literature, the definition of securities includes, notes, stock, bonds debentures; warrants, subscription oil, gas, minerals and limited partnership interest. Thus, security is defined as every investment that gives the owner evidence of indebtedness or business participation.¹

Balk's law dictionary defines security in a broader sense as:

*“ Any interest or instrument relating to finances, including a note, treasury stocks, bond, debenture, evidence of indebtedness, certificate of interest in a profit sharing agreement, collateral trust certificate or subscription, transferable share, investment contract, voting trust certificate, of deposit for security, fractional undivided interest in oil, gas or other mineral rights, or certificate interest in participation on temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase these things”.*²

Generally there are two types of securities; these are debt securities and equity securities.³ This chapter discusses both respectively.

2.2 Debt Securities

Is a security representing or evidencing a debtor-creditor relationship, set forth the obligations of the corporation to pay the holder of the instrument the borrowed money on a specific maturity date. Debt securities may be issued for consideration equivalent to their principal amount, or for a greater consideration (“premium”- a market price higher

¹ Lokesh.R. Encyclopedia of Law, 2007

² B.A Garner, Black's Law Dictionary, 2004

³ Harry Johan and R. Alexander, Law of Corporations, P. 876

than the principal amount), or for a lesser consideration (discount- a market price lower than the principal amount) ⁴.

2.3 Classification of Debt Securities

There are debt securities that mature for a shorter period (terms (one year or less) such as treasury bills which represents indebtedness by the government, thus, are government securities.⁵

In Ethiopia the power to issue treasury bills is vested in the National Bank of Ethiopia.⁶ Long term debt securities on the other hand, are securities that mature longer than short term debt securities (more than one year) example of such is debenture also known as bond.⁷ The term debenture has derived from the Latin word “debenture” and means “are due” and is classified under debt securities, which could be secured or unsecured, redeemable or irredeemable.⁸

Debt securities are further divided into the following and are common in U.S.A.

a. Construction Debt Securities: - are those debt securities issued to finance construction of the corporation’s physical property in the sense that the proceeds realized from their issue are intended to be applied to pay for construction.⁹ That is to say, the sole purpose of these debt securities is for construction of the corporation physical property.

b. Extension Securities: - these are debt securities issued for the purpose of application of their proceeds to pay for extension of physical

⁴ R .A Prentice, Law of Business Organizations and Securities Regulation., 2nd ed. 1994 P.266

⁵ Supra note 3 P.386

⁶ Monetary and Banking Proclamation No.83/1994 art.27(3)b

⁷ Ibid

⁸ Denis Keen, Company Law for Students., 11th, 1999 P. 384

⁹ Supra note3, P. 388

property.¹⁰ For instance, for expansion of further branches, the corporation could issue extension debt securities.

2.4 Distinction between Debt Securities and Equity Securities

Debt securities differ from equity securities in that; the holders of debt securities are creditors of the corporation, not owners.¹¹ Where as, holders of equity securities have membership interest in the corporation, having a role of management of the corporation. Article 336(3) of the commercial code declares that equity shareholders may only participate in an ordinary General meeting that the company cannot redeem ordinary shares. This means ordinary shareholders do normally manage the company by taking part in an ordinary General meeting. Nevertheless, holders of debt securities are entitled to receive regular payment at a fixed interest rate regardless of whether the corporation is profitable. In contrast, holders of equity securities especially common shareholders are generally entitled to dividends only out of corporate profits.¹²

2.5 Equity Securities

Equity securities contemplate the creation of a shareholder relationship, with the corporation, share holders being, in a broader sense ‘insiders’ who have a membership interest. In the corporation as compared to the holders of debts securities, who are ‘outsiders’.¹³ However, when it comes to settlement of debt, during the winding up of the corporation, creditors that is, debt security holders stands first before shareholders. That is why debt securities and preferred shares are sometimes referred to “senior securities”, because the holders thereof have priority over holders

¹⁰ Ibid

¹¹ Commercial code of art .430, 433,

¹² Commercial code of art.501,504 cum 489

¹³ R.T. Mc Dermott, Legal Aspect of Corporate Finance 1995 P. 4

of other securities, in the event of dissolution of the corporation.¹⁴ Shareholders have a property interest in the corporation with respect to earning assets, and control, and often preemptive rights to preserve such proportionate interest.¹⁵

Un equity investment is attractive if it appears that the corporation's business will expand and be profitable, there by increasing the value of the equity security. The income paid on equity securities is usually a distribution of profit of the corporation and is called a dividend.¹⁶ The frequency and amount of these distributions are determined with in the discretion of shareholders.¹⁷ Further more, article 458(4) of the commercial code provides that, unless the shareholders authorize distribution of dividend, no distribution of profit is effected. Shareholders usually have the right to vote and they also have the right to proportionate distribution of corporate assets upon dissolution of the corporation. However, the manner of distribution differs, from one class of share to another.¹⁸

2.5.1 Stages in Equity Security

The article of association must state the amount of capital within which a corporation wants to be registered. A capital has to be fully subscribed before a company is formed as determined by founders.¹⁹Such capital is called authorized share capital. Before the company is registered, one fourth of the subscribed capital shall be paid first, and such capital is called paid up capital of the company.²⁰ As per article 338(2) of the commercial code, the remaining capital will be paid within five years from

¹⁴ Supra note 8, P.320

¹⁵ Commercial Code art. 345(1) & (4), 333(2)b cum 347(1)

¹⁶ Commercial Code art..458(1)

¹⁷ Commercial Code art .458(3)

¹⁸ Commercial Code art. 335-347

¹⁹ Commercial Code art. 304(1)cum 312(1)a

²⁰ Commercial Code art 312(1)b,cum338(1)

the date of registration of the company. Thus, the first step in issuance of equity security is related to describing the characteristics of securities and specifying the number of shares in the article of association. The issue and sale of shares is normally intended by the decision of shareholders to obtain additional capital. Shareholders may not issue more shares than what has been authorized in the articles of association. However, the present shareholders safeguard their pre-emptive rights, if they exist, by offering newly issued shares to existing shareholders, in their respective proportions of share ownership before selling the shares to other investors, that is, outside the corporation.²¹

The distinction between the stages of equity securities is important for several reasons. That is, for equity securities to be fully active (including entitlement to vote, receipt of a proportionate share of assets upon dissolution), shares must be authorized and issued. If shares are authorized and are being issued and sold, they usually must be sold for an amount no less than par value.²² The reason for this could be to equalize the position between the then shareholders and the present shareholders after an increase in capital by issuance of a new share.

2.6 Definition of Share

Under the Ethiopian commercial code, it is difficult to find a distinct definition of share. But one can infer from different articles, on share, which is used in three ways.

The first definition, which could be, inferred from article 304 of the commercial code, in its definition of what a share is. The phrase “dividend into shares” gives the sense that share means a portion of capital of the company; that is a portion of capital contributed by a person holding the same.

²¹ Commercial Code art, 333(2)a

²² Commercial Code art 326(1)

Second, “share” is used to refer the document, which is indicative that a particular person is a shareholder in the company.²³

Finally in a broader sense, “share” is used in practice to refer the bundle of rights and duties, which make up the membership interest in the company, Such as, the right of pre-emption, the right of shareholders to buy shares at first hand when a company issues a new share, the right to control over the management and activities of the organization, the right to the payment of proportionate share of profit.

2.7 Class of Equity Securities

There could be different classes of equity securities or shares, among which the most common are common/ ordinary/ share and preference share.²⁴

2.7.1 Common/ Ordinary/ Share

The holders of these shares are entitled to the equity interest in the corporation, either in the form of dividends, when and as declared by shareholders of the corporation, or distribution of asset.²⁵ The holders of these securities are called a good citizen of a company because all ups and downs of the corporation normally are shouldered by these persons. It can be referred from the same article that, they stand last during distribution of dividend, or distribution of assets upon winding up.

2.7.2 Preference Share

The other type of equity security is preference share. Preference share carries the following characteristics.

²³ Commercial Code art, 330

²⁴ Commercial Code art 335, 336cum 337

²⁵ Commercial Code art 345(1)

Preference share have priority over other classes of shares, in the event of dividend distribution, or priority over the assets upon dissolution of a company.²⁶ That is, common shareholders will not be paid unless distribution is effected to preference share holders. Dividends on preference share are fixed and are fixed before hand in the articles of association.²⁷ Thus, it can be said that preference shares enjoy preferential rights both with respect to payment of dividend upon declaration by the discretion of share holders and to payment of asset upon dissolution of the company, if any.

2.8 Forms of Preference Shares

Preference shares take different forms. These are: -

a) Cumulative and Non-Cumulative Preference Shares: Preference share are said to be cumulative, where there are dividends, carried over and continues accumulating and the same be claimed as distributable profits of next years.²⁸ And termed non cumulative if there is no profit that is going to be distributed for a particular year and holders of those shares do not receive dividend for the unpaid dividend in subsequent years either.

b) Participating and Non-Participating Preference Shares: one can understand from the same article mentioned above that, preference shares are said to be participating, if they carry a fixed rate of dividend in preference to ordinary shares and further, the right to participate in the remaining balance of dividend after ordinary share holders are being paid up.

²⁶ Commercial Code art 336(1)

²⁷ Commercial Code art 337(2)

²⁸ Commercial Code art,337(1)

Thus, there could be two different kinds of dividends – one fixed and the other differs depending on the magnitude of the remaining/ surplus profit. In the case of non-participating shares, they enjoy only the fixed rate of dividend in preference to any other classes of shares and no claim exists in the excess profits.

c) Convertible and Non-Convertible Preference Shares: If it is given as a right for preference shares to convert their preference share into ordinary shares in a specified period, the preference shareholders are known as convertible preference shareholders.²⁹ In the case of non-convertible preference shares, they may not be given the right to convert into other classes of shares. Thus, called are non-convertible preference shares.³⁰

²⁹ Commercial Code art,337

³⁰ Ibid

Chapter Three

3. Categories of Transferable Securities

Article 715 (2) of the 1960 Commercial Code of Ethiopia recognizes three categories of negotiable instruments, namely, commercial instruments transferable securities, and, documents of title to goods. Nevertheless, neither the commercial code nor any other law in the legal system of Ethiopia clearly define what transferable securities are or identify the instruments of transferable securities among the wider family of negotiable instruments. This paper examines what these transferable securities mean and identifies instruments that are categorized as transferable securities, by probing in to the whole legal system of Ethiopia with in which transferable securities are widely found scattered.

Though, there is no clear definition set forth as to the meaning of transferable securities in the Ethiopian legal system, some how one could draw a commonly understandable meaning of transferable securities by examining especially the provision of the commercial code dealing with negotiable instruments. Negotiable instruments are instruments, which incorporate a right to an entitlement in such a manner that, one cannot enforce the right enshrined in the instrument in isolation from the instrument.¹ As a negotiable instrument, transferable securities could be understood to mean those instruments transferred either by mere delivery of the instrument- where the document is of a bearer form or by endorsement and delivery- where the instrument is of an order one.² Mere presentment of the instrument gives the holder of a bearer instrument to transfer the right embodied in the instrument.³ In the case of order document, delivery alone does not give the holder of such instrument to enforce the right embodied in it

¹ Commercial code art 715(1)

² Commercial code art 721(1) cum 724(1)

³ Commercial code art721(2)

but has to also be endorsed.⁴ Thus, transferable securities are negotiable instruments capable of being transferred either by simple delivery or through endorsement and delivery.

If that is so, one may wonder, what are the instruments that are included under the family of transferable securities under the Ethiopian legal system? These are, life insurance policy made or issued to order envisaged in article 696 of the commercial code, debenture stated under article 429, barer share stipulated under article 340 of the same code, Treasury Bills stated under proclamation No.263/1969 and Bonds introduced by proclamation No262/1969.

3.1 Life Insurance Policy to Order

Before directly going to the discussion of the nature of life insurance and its transferability, the author of this paper would like to say few things on life insurance.

3.2 Life Insurance in General

Our lives are filled with risk. These include lose of property or lose of our very lives. To bear alone such loss is usually beyond the capacity of most individuals or organizations. Thus, by sharing the risk on some equitable basis an individual or organization is protected against such losses with the help of insurance.

Article 645(1) of the commercial code that defines an insurance contract reads as follows:

⁴ Commercial code art 724(1)

“An insurance policy is a contract where by a person called the insured, Undertakes against payment of one or more premiums to pay to a person called the beneficiary, a sum of money where a specified risk materialized.”

The above definition of an insurance contract reveals that we can insure our insurable risks with an insurer against payment of premium.

An insurance is, therefore, a mechanism adopted to share the financial losses that might occur to an individual or his family or an organization on the happening of a specified risk.⁵ Thus, risk transfers from one individual to a group of persons who agree to share the financial loss voluntarily or through publicity or through solicitation of agents.⁶

Insurance occupies an important place in modern world because the risk which can be insured, have increased in number and extent owing to the growing complexity of present day economic system. Insurance plays a fundamental role in the life of every citizen and has developed on an enormous scale leading to the evolution of many different types of insurance. Among the different types of insurance life insurance could be mentioned being under the family of insurance of persons including insurance against illness and accidents.⁷

Article 689 of the commercial code has made clear that contract of life insurance is not contract of indemnity. Since principles such as double insurance, over insurance, subrogation, etc that are applicable to insurance of indemnity do not at all applicable to life insurance.

⁵ B.S Bondla M.C Grape, K.P. Singh Insurance: Fundamentals, Environment and Procedure, 2003, P.5

⁶ Ibid

⁷ Commercial code art 689

3.3 Definition of Life Insurance

“A life insurance is defined as a contract where by the insurer undertakes against the payment of one or more premiums to pay to the subscriber or to the beneficiary a specified sum on certain conditions or dependant upon the life or death of the subscriber or third party insured”⁸

As it can be understood from the above mentioned definition, a life insurance policy is a contract as a result the general rules on contract is also applicable. A contract of life insurance hence must have all the essentials of a valid contract such as offer and acceptance, capacity to contract, free consent of parties, lawful consideration, lawful object, etc.⁹In addition, the particular envisaged under article 658 and 695 of the commercial code Such as, the name of the insured, the name of the beneficiary, the occurrence on which the payment of the agreed amount depends and the like, should be included in the life insurance policy.

In the Ethiopian context, life insurance includes many different types of coverage. Some of the terms used to describe and distinguish different types of life insurance are discussed here under.

a) Whole Life Policy: - is a life policy which provides for the payment of a lump sum upon the death of the insured.¹⁰ Thus, in order the beneficiary get benefit out of the policy, death of the insured is a condition precedent.

b) Pure Endowment Policy: - This type of life insurance policy provides for the payment of a definite sum at a certain date or when the assured

⁸ Commercial code art 691

⁹ Civil code art 1678

¹⁰ Commercial code art 692(2)

attains a certain years of age.¹¹ In order for the assured to benefit out of the policy he/she must be alive at the date specified in the policy.

c) Combined Policy- This type of life insurance policy on the other hand, is the combination of whole life and endowment policy that is, the proceeds of the policy will be payable to the insured himself if he is alive at the date specified in the police or to the beneficiary of the insured dies before the date specified in the policy, which ever occurs first.¹²

3.4 Insurable Interest in Life Insurance

Insurable interest is a doctrine which requires that there has to be some significant relationship between the insured person, the object insured, or the activity insured; - that is, the subject matter of insurance.¹³ The specified justification articulated for such doctrine of insurability is-to avoid one or more potential evils which might result from allowing insurance contract that afford opportunities for net gain as a result of occurrence of an insured event.¹⁴ An insurable interest hence is the financial interest of the insured towards the thing insured. The subject matter of insurance can be any type of property, liability or life, limb or health. It should be understood that it is not the house, ship, machinery or potential liability or life that is insured but it is the pecuniary interest of the insured in that house, ship, machinery, limb or life or health which is insured.

In the case of life insurance, the subject matter of insurance is the life of a person. There for a person must have insurable interest in the life sought to be insured. Every capable individual has an insurable interest in his own life and may insure his life.

¹¹ Commercial code art 692(1)

¹² Commercial code art 692(3)

¹³ Commercial code art 675

¹⁴ R.E Keeton, Alan I. Wdiss, Insurance Law: A Guide to Fundamental Principles Legal Doctrines and Commercial Practices, 1988 P. 136

In this regard Buyon says:

*“Every man presumed to possess an insurable interest in his estate for the loss of his future gains or savings which might be the result of his premature death”.*¹⁵

Article 692(1) of the Commercial Code connotes that a person has an insurable interest in his own life. Since every person has a right to life,¹⁶ there is no reason why every person can not have insurable interest in his own life.

3.5 Insurable Interest in Another person’s Life

A person may also have an insurable interest in the life of another person so long as he has some pecuniary interest in the life of the said another person. Such person has to however show that he/she will suffer a monetary loss as the consequence of death of the said another person.

Article 694 of the commercial code prohibits insurance for the event of death of an incapable person even where the legal representatives of the said incapable person do consent to the said insurance. The writer of this paper do not want to show the defect of article 694, as it would be beyond the scope of the paper.

One may understand from the laws of life insurance contained in the Commercial Code not only there is no express or implied prohibition of insuring the life of one of the spouse by another spouse but also that article 693 of the same code permits any person to insure the life of another person in so far as he/she has insurable interest in the life insured, let alone insuring the life of one of the spouses by the other spouse. However, when we resort to the practice, for instance, the

¹⁵ Supra Note 5

¹⁶ Art 15 of the FDRE Constitution

Ethiopian Insurance Corporation does not at all allow one of the spouses to insure the life of the other spouse.

Having said so much about life insurance, let us now resort to consider the negotiability (transferability) of life insurance here below very briefly.

As it can be gatherable from articles 696 and 697 of the commercial code life insurance policy to order can be negotiated or pledged by endorsement. In the wording of article 696 an endorsement must show the name of the beneficiary and must be dated failing which it (the endorsement) shall be of no effect. Pledging life insurance by endorsement is also believed to require the mentioning of the pledge and the date of endorsement. Whenever life insurance is negotiated by endorsement or transferred by ordinary assignment or pledge or whenever the beneficiary is changed the insured person has to agree as stated in article 698. Failing to obtain the consent of the insured would make the endorsement, the pledge or the assignment of no effect as stipulated in article 698 of the commercial code.

In connection with life insurance one may note that even the transferability (negotiability) of life insurance to order is difficult as the beneficiary has to always obtain the consent of the insured before he/she negotiate the policy. The other problem relating to transferability of life Insurance to order is the holding of the courts regarding the beneficiary of life insurance policy. Some courts, despite the clear provision of articles 696, 706(1) (2) & (3), 708 etc that do confirm that the beneficiary designated in the policy is the sole beneficiary of the proceeds of the policy, by unduly interpreting the provisions of article 701(2) apportion the said proceed of life insurance among the spouse and children of the insured even where the said spouse and children have not been designated as beneficiaries. One can therefore conclude that it is only

pure endowment policy stated in article 692(1) of the commercial code that is negotiable under the Ethiopian legal system with out difficulty.

3.6 Bear Share

As shown under chapter two of this paper, share represents the bundle of rights and duties, which make up the membership interest of shareholder. As stipulated under article 340 of the commercial code share can either be in the registered form or in bearer form. Registered shares are those forms of shares that a company keeps record on. The assignment or transfer of such share can only be effected, by entering the name of the transferee in the company's register.¹⁷ Thus, registered shares are not transferable by simple delivery unlike that of bearer share. This is because the pre-emptive right of the already existing shareholder's right has to be respected before share is transferred to outsiders.¹⁸ Sub article one of article 333 of the same code indicates that restriction of free transfer of share could be made either in the article of association or by resolution of an extra ordinary general meeting. Thus, registered share is non-transferable security. Bearer shares on the other hand, are freely negotiable by mere delivery without further requirement. This is because bearer share belongs to the family of negotiable instrument, and fall under the category of transferable security. Since mere delivery suffices for transfer of bearer share from one person to another, the company does not know who the owner of the bearer share is at a particular time as there is no registered holder.

¹⁷ Commercial code art 341(1)

¹⁸ Commercial code art 333(2)

Chapter Four

4. Transferable Debt Securities

I have tried to show under chapter two of this paper; debenture and treasury bills are among transferable debt securities. This chapter will discuss the nature and negotiation of debenture under Ethiopian law.

4.1 Debenture

4.1.1 Definition

In a fashion similar to various countries, the commercial code of Ethiopia does not define the term debenture. Despite the clear legal definition of debenture, some authorities have attempted to give their own definition such as Plame who stated that;

“A debenture is an acknowledgement of a debt, given under the common seal of a company, and containing a contract for the repayment of the principal and interest sum at a specified date”¹

Tobhan on the other hand, defines debenture as “a document given by a company as evidence of a debt to the holder usually arising out of loan and most commonly secured by charge².”

4.2 Characteristics of Debenture

The word debenture is applied to the instrument evidencing the debt. The instrument evidencing such debt is referred to as debenture certificate. Debenture certificate therefore represents two things, that is, the instrument and the right which is stated in the instrument. It represents a monetary obligation. As one could understand from the readings of articles

¹ D.P Jain. Company Law, 1997 P.247

² Ibid

430(1) a, 431,432, 433(h) and 429 of the commercial code debenture refers to both the debt embodied in the instrument and the instrument itself. A debenture is a negotiable instrument since it is one of the transferable securities. A debenture is therefore a document, which incorporates the right its holder has and evidences indebtedness of the company, which promises to pay interest and principal at the agreed time. It is thus a contract between the holder (the creditor) and the company (the borrower). Accordingly, a valid contract cannot be concluded unless the parties to it have capacity and can give consent sustainable at law. The object of the contract must be legal and compliance with formal requirement prescribed by law is mandatory. Since debenture is a negotiable instrument, one has to possess it in order to exercise the right it embodies. Thus one cannot transfer or enforce the right without having control over the document.³ The said contract involves offer by the company usually by prospectus and acceptance by the would be debenture holder by subscription.⁴ The acceptance of the debenture holder of the offer made by the company makes the contract.

However, debenture is not a straightforward contract whose effect is strictly limited as between the contracting parties. A contract of debenture is always supported by a document. As the agreement of the parties is incorporated in such an indivisible instrument that the right of the creditor is negotiable. Although in simple terms a debenture certificate is said to be an evidence of indebtedness, not all documents evidencing indebtedness are debenture certificate. For instance, a loan contract involving above birr 500 must be made in writing.⁵ In such case; the written instrument evidences indebtedness. Nevertheless, it does not have the elements which render a document (the loan agreement) a debenture certificate. The right the

³ Commercial code.art.715 (2)

⁴ commercial code, art.318cum434

⁵ civil code, art.2427(1)

creditor has there under the loan agreement is assignable rather than negotiable.

The consequence of such distinction is that where as ordinary assignee cannot have any better right than the assignor, the holder of debenture may have a better title than the transferor. The assignment of a contractual right has to be brought to the attention of the debtor who will be released if he pays the debt to the assignor before he is aware of the assignment.⁶ In the case of debenture, on the other hand, since it is an instrument to which a right is attached in such a way that it is not possible to transfer or enforce it in isolation from the instrument, the debtor company may discharge its obligation towards a person who comes with the instrument establishing that he entered in to possession of it lawfully.⁷ Irrespective of the fact that it is transferable with out his knowledge, the creditor of the company is he who comes to possess the document in accordance with the rules applicable to negotiation of such instrument. That is why debentures are appealing to creditors since the contractual right they embody is easily transferable.

4.3 Issuance of Debenture

As stated earlier, debenture is one of transferable securities that only share companies can issue. Art. 429(1) of the commercial code disengages individuals from issuing (a negotiable) debenture. Thus, in Ethiopia, as is the practice in other jurisdictions, no individual may issue a transferable security to borrow money. A joint venture cannot issue negotiable securities, which include debentures owing to the prohibition of article 274 of the commercial code. Article 510(3) in a similar fashion prohibits Private limited companies from issuing transferable securities in any form. Although, the commercial code clearly forbids issuance of debentures by joint ventures and private limited companies, there is no similar provision which is

⁶ Civil code, art. 1976(1)

⁷ commercial code, art. 716

provided to prohibit other form of business organizations vis general partnership and limited partnership from issuing transferable securities. It should however be noted that debentures are special in that they are part of the title dealing with share companies. Thus are not applicable to partnership by reference.

Although a company may undoubtedly issue debentures, not all companies do so. There are requirements set forth by law. For instance, in order for a company to issue (a negotiable debenture) the capital must be fully paid up. A company, which has not yet issued a balance sheet for its first financial year, cannot issue debentures.⁸

It is a general rule that the amount of money a company borrows by issuing debentures can not exceed the amount of paid up capital as stated in the last adopted balance sheet.⁹ However, there are cases where such amount may be exceeded. Article 430(1) a and (b) of the commercial code indicates that where the company's immoveable are mortgaged and the debt incurred does not exceed two-thirds of the value of the mortgage or where the amount in excess of the paid up capital is guaranteed by the government, a company may incur indebttness in excess of the paid up capital by means of debenture.

Article 432(1) of the commercial code lays down the rules according to which that debentures may be issued at a price higher than their par value. Unless provided otherwise by special laws, sub-article two of the same article prohibits issuing debentures at a lower price than their par value. The same is true for shares as stated in article 326(1) of the same code. Thus, it is a general rule under Ethiopian law that it is not possible to issue both shares and debentures at a discount though both instruments can be

⁸ Commercial code, art, 429(2) cum(3)

⁹ Commercial code, art, 430(1)

discounted at a secondary market. However, the lack of secondary market in Ethiopia creates a problem especially for investors who wanted to cash these instruments whenever the need arises. The purpose of par value of Shares is to ensure the maintenance of capital.

A company can issue debenture through its borrowing power. Policy matters that include borrowing are within the scope of powers of directors so long as they are not restricted. For instance, by making it subject to prior approval, by law or memorandum or articles of association or a resolution at general meeting. Hence, one can say that issuance of debentures is contingent upon borrowing power.

Jurisdictions are not the same with regard to the body charged with the issuing debenture. Some legislations make authorization by a general meeting necessary curbing any form of delegation while others require only authorization by a general terms and issue debentures when the business needs of the company so demand.¹⁰ According to article 419(2) of the commercial code, the issue of debentures and guarantees attached there to require the approval of an ordinary general meeting. The decision by the board of directors must secure the approval of an ordinary general meeting so as to validly issue debentures. Convertibility of debentures to be issued shifts the approval required to that of an extra ordinary general meeting. Art. 474 of the commercial code provide that the issue of convertible debenture is subject to prior approval of extraordinary meeting. The conversion results in increase in capital of the company.

4.4 Forms and Kinds of Debentures

As mentioned in the proceeding chapters, debentures are of different forms and kinds. This section will discuss the peculiar characteristics of

¹⁰ A.B. Levy, Private corporations and their control, 1950 vol. II P.545

debentures with the view to identifying, which, among different types of debentures, are recognized under Ethiopian law.

4.4.1 Registered and Bearer Debentures

A debenture could be either registered or bearer. Registered debentures are those debentures which are payable to the registered holder, that is, one whose name appears both on the debenture certificate and register of debenture of the company. On the other hand, a bearer debenture (also known as unregistered debenture) are those which are payable to bearer. The commercial code of Ethiopia recognizes both forms of debentures in its articles 719 cum article 340 and 341. Bearer debentures are transferred by mere delivery. Thus, are negotiable debentures. Where as registered debentures are not negotiable. In common law legal system, it is disputed whether registered debentures are to be regarded as negotiable instruments.¹¹

4.4.2 Secured and Unsecured /Naked/ Simple/ Debenture

Unsecured debentures are debentures which do not, have any charge on the assets of the company, and are called as unsecured or naked debentures. It is a mere acknowledgement of indebtedness whose holder has not any better right than an ordinary creditor. Secured debentures in contrast, are those, which are secured by a charge on the assets of the company.

The commercial code of Ethiopia contains several provisions that do imply that debenture may be secured. Article 419(2), 433 (f) and 443 (1) denote that debentures are always secured. To be more precise, article. 433(f) makes it mandatory for a debenture certificate to state the guaranty attached to the debt it evidences and the debt of the deed setting up such guarantees. Due to those provisions of debentures, some argue that it is

¹¹ C.D. Thomas, Company Law for Accountants, 1985 P.304

illegal to issue unsecured debentures in Ethiopia.¹² In many jurisdictions there is no legal obligation on the part of the company to give security to whomever it issues debentures.

4.4.3 Convertible and Non-Convertible Debenture

Conversion is the act of exchanging one class of securities for another. Convertible debentures are therefore, those debentures, which have the option of getting their investment converted into preference or ordinary shares at stated rates of change after a certain period. Two reasons could be maintained: - that is, the desires of companies to raise common capital and improve the market acceptance of debentures.¹³

Ethiopian company law permits the issue of convertible debentures with the approval of an extra ordinary General meeting. The approval of an ordinary General meeting has to accompany by renunciation by shareholders having preference right of subscription of the shares to be issued. The renunciation ought to be express and in favor of the convertible debentures.¹⁴ A conversion clause is one of the items to be specified in a debenture Certificate in cases where the debenture is convertible. However, debenture holders by no means should be compelled to convert their debenture into another type of securities. Article 433(h) of the commercial code requires the certificate of a convertible debenture to set out the period or periods of time within which debenture holders may convert their debentures into shares. Debentures that may be issued in Ethiopia may be convertible at the option of the holder or non-convertible (that is, a type of debentures, which do not enjoy any such right to get themselves converted into preference or ordinary shares).¹⁵

¹² Efrem H/ Mariam, Protection of Rights of Creditors and Shareholders under Ethiopian Law 1996 P.43

¹³ Ralf J. Baker and W.L Carry, Cases and Materials on Corporations. 1958 P.1000

¹⁴ Commercial Code art. 474

¹⁵ Supra note 2.P. 250

4.4.4 Irredeemable and Redeemable Debentures

Irredeemable /Perpetual/ debenture is not repayable during the life of a company, when the company goes into liquidation, or in cases of serious default on the part of the company Viz, non payment of interest they can be redeemable.¹⁶ Redeemable debenture in contrast, is payable before or on a fixed date which is certain. Unless there is a prepayment for one reason or another, the principal will be paid at the time when the debt matures:-that is, where the creditor demands payment.¹⁷

Since debenture evidences a debt, it implies that the debtor company is under obligation for the repayment of such debt. Article 433 (e) of the commercial code makes the term of redemption of a debenture one of the items to be stated in the certificate. That may be taken to mean that debentures are always redeemable under Ethiopian law. It can therefore be said that due to the mandatory provision of article 443 a company may not issue a perpetual debenture in Ethiopia.

4.5 Negotiation of Debenture

Since debenture is a property it is subject to transactions such as sale and pledge. Such transactions usually presuppose that there is always some one who owns in the sense of having title to it. The first holder of a debenture becomes an owner (possessor) by issuance. A company, which issues a debenture, offers to the public for subscription by a prospectus. Whosoever interested in buying such debenture should make an application on the form provided and deposited in the application stated in the prospectus.¹⁸ In practice so far, there are only few fully government owned enterprises in Ethiopia that are engaged in issuing debenture /bond/ (as the commercial code makes no distinction). Namely, the Ethiopian Electric Power

¹⁶ Supra note 12 P. 304

¹⁷ 1756(3) of the civil code

¹⁸ Commercial code, art, 319

Corporation and Ethiopian Airlines. This is because lack of knowledge of business men and other companies as to the nature of debenture being transferable securities. Further more, absence of secondary market contributed for the issuance of debenture to be confined to the above mentioned government enterprises.

The holder of a debenture may transfer his right embodied in the debenture certificate. By definition, a negotiable instrument among which debenture is under play, is a document incorporating a right to an entitlement in such a way that is not possible to transfer or enforce the right in isolation from the instrument. Thus, the right of a debenture holder is closely related with the document that is transferable by transferring the instrument. As pointed out earlier, a debenture is a transferable security that the manner of transfer and establishment of one's right are subject to different set of rules.

Bearer debentures are transferred by delivery. Their assignment is not subject to any requirement other than delivery. Anyone who comes into possession of it establishes his right to the entitlement as expressed in the instrument by sole fact of presentment of the instrument.¹⁹ In cases of registered debentures, since the instrument is in a specified name, delivery alone does not transfer possession. Article 341 of the commercial code provides that ownership of a registered debenture is established by the relevant entry in the register kept at head office of the company. The transfer of a registered debenture becomes complete solely by such entry. In contrast, as regards transfer of instruments in a specified name, articles 723 of the same code lays down that entry of the name of the transferee in the instrument and in the register held by the person issuing the instrument are simultaneously necessary.

¹⁹ Commercial Code art. 721 cum 340(1)

Registered debenture may also be transferred by delivery of a new instrument in the name of the new holder, which should be entered in the register as well. When the holder of a debenture requests the registration of the instrument in favor of another person, or delivery of a new instrument registered in the name of the second, he has to establish his identity and his capacity to dispose of the same. The appearance of the transferor is dispensable in which case the transferee is required to produce instrument and establish his rights by a deed drawn up by public officer²⁰.

A debenture may be pledged to guarantee the performance of any obligation. Under Ethiopia law a pledge is not restricted only to corporeal movable but also extends to intangible properties. Article 950 of commercial code provides that any transferable security may be pledged irrespective of its form. Similarly, a debenture may be subject to a usufruct. In such a case ownership is dismembered and the abuses and usufruct rights are vested in two persons. The usufructuary may use or enjoy the right subject to the duty to preserve it.²¹ Where a debenture is pledged or is subject to a usufruct, article 329 of the commercial code states that the right to vote at meetings shall be exercised by the pledgee or usufructuary.

4.6 Treasury Bills

4.6.1 Characteristics of Bills

As Pointed out earlier, Treasury bills are amongst the wider categories of transferable debt securities. Government issues t-bills in order to finance fiscal deficit and in order to regulate the market supply in the economy.²² That is, whenever the economy is strangulate by inadequate money. In this

²⁰ Commercial Code art. 723(1) cum(2)

²¹ Civil code art. 1309(1)

²² Yisehak Mengesha, Towards Promoting Capital Market in Ethiopia: Opportunities and challenges, 2000, p.12

respect the government enters the market not only as a supplier of securities but also as a buyer.²³

A bill is a form of undertaking to pay a specific amount of money at a future date.²⁴ Bills can be categorized according to who has given the undertaking to pay. T-bills are issued by the treasury department of a national government and are loans of the government. For instance, the National Bank of Ethiopia is the one who is entrusted for such duty.

Before directly, going to the discussion of the actual dealings of T-bills in Ethiopia. It's better to say few things about history of security dealings in Ethiopia. Ethiopian's experience on security market goes back to 1960s. In 1960 a share market was introduced. The bond market followed in 1963. The treasury bills market, which was reintroduced in 1995 with a maturity structure of 91 days, has been operational since 1969. Inter Bank money and foreign exchange markets are recent phenomena introduced only in 1998.²⁵

4.7 The Silent Features of T-bills Auction Market in Ethiopia

T-bills are issued by a government, to finance short-term cash shortages for its spending programmes. In Ethiopia, they are issued mostly for a term of 28 days, 91 days, and 182 days.²⁶ In UK for instance, T-bills have a maturity of 91 days, although bills occasionally are issued with tender of 182 days.²⁷ In USA, they are issued for a tender of 91 days, 126 week or one year.²⁸ Thus, T-bills are short-term securities, and are usually issued in denomination of 5,000 Ethiopian birr, which formerly issued with

²³ Ibid

²⁴ Brian Colyle Money Market 2001, P. 34

²⁵ State Bank of Ethiopia, Annual Report 1963 P.9

²⁶ Yemisrach Aklilu, Reviewing the Auction Market for Treasury Bills: The case of Ethiopia, 2006, p.17

²⁷ Supra note 23 P. 36

²⁸ Ibid

denomination of 50,000 Ethiopian birr.²⁹ The rationale behind the reduction of the denomination is to increase or give chance to the participation of different bidders.³⁰

The commercial bank of Ethiopia used to be the only participant. Currently, Ethiopian Electric Power Corporation, Social Security Authority, Maritime and Transit Service Enterprise do participate in the auction of T-bills³¹.

4.7.1 How to Purchase

T-bills in Ethiopia are auctioned once a week.³² They are purchased for a price less than their par value. For example, 182 days T-bills the purchased value of which is birr 100 has been auctioned and discounted. A dealer did bid for birr 94 and accepted, and paid 94 and 6 months later will receive birr 100 from the government. Thus, the interest is the difference between the purchase price of the security and what the purchasers receive of the security and what the purchasers receive at maturity.

The Treasury bill are issued by and repaid to the National Bank of Ethiopia. The National Bank of Ethiopia, contents of notice of sale T-bill, among others includes the face value of the T-bill to be tendered, the date of the tender and the last date for submission of the tenders.³³ The tender duly filled and signed and indicate the normal value of the bill required. And the tender price should be stated in sealed envelope subscribed indicate whether TENDER FOR 28 days, Treasury bill or TENDER FOR 91 DAYS treasury bill, or TENDER FOR 182 days treasury bill deposited in tender box

²⁹ A proclamation to provide for the issue of Treasury Bills No.263/1969 art.3(2) (IV)

³⁰ Interview with Ato Sileshi Mekonnen, head, Account Ledger Division, of the National Bank of Ethiopia, June 2008

³¹ Ibid

³² Supra note 27 P. 17

³³ Reform made by Ministry of Finance 1998

specially kept for the purpose in the banking hall or in branch office of commercial bank³⁴.

An investor can take part in several tenders, that is, once for each and every tender. Bidders other than commercial Bank of Ethiopia have to in advance submit their tender (s) along with a non-refundable deposited of 5% of the face value of the bid to the National Bank³⁵.

If the bid is accepted the bank should deposit/credit the customer's accounts for the 5% amount and for any other payment or receipt in relation to the customer's bill holdings on the basis of mutually agreed arrangements.³⁶

4.7.2 Eligibility for Investment

Any resident in Ethiopia, including individuals, companies, corporate bodies, banks and financial institutions, may purchase the T-bills. Commercial banks and financial institutions are of course, the primary target group of investors. Commercial banks and financial institutions can submit tenders on their own account or on behalf of other investors who purchase T-bill use these financial intermediaries. Other eligible persons can submit their tender(s) to the National Bank directly.³⁷ All commercial banks are appointed as authorized dealers for the sale of T-bills. The National Bank, however reserves the right to delete any authorized dealer from the list of authorized dealers with out assigning any reason for its measure.³⁸ Foreign residents are not allowed to participate in such kind of investment.³⁹

³⁴ Ibid

³⁵ Interview with Ato Sileshi Mekinnen,

³⁶ Ibid

³⁷ Supra note 33

³⁸ Supra note 27 P 18

³⁹ Personal interview with Ato Sileshi Mekonnen

4.7.3 Acceptance of Tenders

An Auction committee constituted by members from National Banks and Ministry of Finance will administer the auction.⁴⁰

The results of the auction are displayed on a notice board kept at a prominent place in the banking Hall on the day following the date stipulated for the submission of tenders. The bidder should check the result of the bid, and if successful, collect the letter of acceptance from the office of the manager, accounts department. The bidder if successful should arrange to deposit the required amount within hours after the date of the auction. In the case of bids, which have not been accepted, a letter of rejection will be sent by post to tenderers.⁴¹

Tenderers are required to fill the tenderer form, which consists of three parts:

Part I consists of the Tender offer

Part II reiterates the authority of the National Bank of Ethiopia to debit the account of the tenderer (or his bank) at the National Bank of Ethiopia on the day of issue with the purchase money due on any T-bills issued to him pursuant to the tender, and

Part III deals with an allotment and Debit advice. This is completed by Treasury Bills office of the National Bank of Ethiopia as soon as the results of the tender are conveyed to the tenderer's office by the secretary of Treasury Bills Auction Committee.⁴²

4.7.4 Repayment

On the expiry of 28-days, 91 days, or 182 –days from the date of issue of T-bill, the bill will be redeemed by and at the National Bank of Ethiopia. Such redemption shall be constituted in the accounts of government as

⁴⁰ Personal interview with Ato Sileshi Mekonnen

⁴¹ Supra note 11 P. 17

⁴² Supra note 34

constituting the domestic reserve of the Government. T-bills redeemed should be returned to ministry of Finance⁴³. The National Bank of Ethiopia verifies before being passed for redemption normally calls T-Bills. Tenderers and holders/other than those who have previously lodged their bills with the National Bank of Ethiopia at the time of issue will be required to present their bill for verification to National Bank two days before the date of maturity.⁴⁴

4.8 Transferability of T-Bills

According to article 9 of Treasury bills Proclamation No. 263 of 1969, T-bills could be issued either to the 'bearer' or to 'a named person'. Nevertheless, according to the reform undertaken by Ministry of Finance in 1998, no bills will be issued to Bearer or in blank. The same article also states that T-bills issued to named person shall be transferred by endorsement. However, such article does not indicate how the endorsement is conducted; thus, the 1960 commercial code of Ethiopia comes to play.

An endorsement is made by adding the signature of the holder of the instrument to the instrument; usually on the back of the instrument (this is endorsement in blank unless it adds the name of the endorsee).⁴⁵ Endorsement can be made either by the holder or by someone who is authorized to sign on behalf of the holder.⁴⁶ If the back of an instrument is full of endorsements further endorsements should be made on a paper (slip) attached firmly to the instrument. Such a paper (slip) is called alonge.⁴⁷ If an order instrument is not transferred without endorsement; the instrument has not been negotiated and the transferee cannot qualify as a holder.

⁴³ Proclamation for the issuance of Treasury Bills No. 263/1969 art. 4

⁴⁴ Ibid

⁴⁵ Commercial Code art. 726

⁴⁶ Commercial Code art.728(1) cum 725(1)

⁴⁷ Commercial Code art. 748(2)

An endorsement has two aspects. First an endorsement is necessary to negotiate an instrument that is payable to the order of a specified payee. Second, endorsements generally do not make a person (endorser) liable on the instrument, unless there is a contrary agreement.⁴⁸

4.8.1 The Four Basic Endorsements

(a) Special Endorsement-A special endorsement contains signature of the endorser along with words indicating to whom, or to whose order, the instrument is payable. Words, such as pay to the order of 'Abebe' are endorsed by Abebe. Such endorsement remains or becomes order instrument.

(b) Blank Endorsement. If an endorser merely signs her/his name and does not specify to who the endorsement is payable, the instrument has been endorsed in blank and such instrument is payable to the bearer: that is, the person in possession of it.⁴⁹ No further endorsement is necessary for negotiation; it can be negotiated by delivery alone unless converted into an order instrument once again.⁵⁰

(c) Restrictive Endorsement: A restrictive endorsement is one that specifies the purpose and the endorsement or the use to be made of the instrument. For example, endorsement aimed at prohibiting further negotiation by including words such as pay to Abebe only.⁵¹ Conditional endorsements, which indicate that they are effective only if a certain condition is satisfied, are among the most common restrictive endorsement. The commercial code of Ethiopia under its articles 725 cum 747(1) prohibits conditional endorsement. If a condition attached to an instrument the condition will have no effect.

⁴⁸ Commercial code. Art. 724(1) cum 727

⁴⁹ Commercial code. Art. 747(3)

⁵⁰ Commercial code. Art. 721 (1)

⁵¹ Commercial code. Art. 750(2)

(d) Qualified Endorsement:- A qualified endorsement is one which the endorser disclaims or limit his liability to make the endorsement good if the drawer defaults on the instrument. The words such as “without recourse” are used to qualify an endorsement. The effect is to limit the contractual liability of endorsee.⁵²

In practice so far, T-bills have never been endorsed.⁵³ The rational behind this is, since most of holders of T-bills are government institution, the money involved is of a huge amount, in that, the possibility of endorsing such instrument is rare.⁵⁴ This is the result of lack of secondary market in Ethiopia. That is, the market were existing securities (be it equity or debt securities) are traded.⁵⁵ The role of which is to determine a fair price for the securities called price discovery-The process of arriving at fair prices for securities and liquidity.⁵⁶

The National Bank of Ethiopia issued a directive that binds Commercial Banks. In order they provide credit to overcome short term liquidity problems. National Bank of Ethiopia ensures the overall stability of the financial system of the country.⁵⁷ The directive provides a re-discounting window facility for a second or more discounting of discountable securities.⁵⁸ In accordance with article 3 of the same directive, Treasury bills, Government bonds and certificates of deposit acceptable to the Bank are the type of securities eligible for discounting and re-discounting.⁵⁹

⁵² Michel B.M.,Jane P.Mallor,Thomas B, Michel J.P, Business law and the Regulatory Environment: concept and cases , P.642

⁵³ Personal interview with Ato Sileshi Mekonnen

⁵⁴ Ibid

⁵⁵ Meir Kotlin, Finical institutions and Markets, 2004 P.308

⁵⁶ Ibid 320

⁵⁷ Discount Window Facility for Commercial Banks, Directive No.RMPD/004/ 2006 Pra. 1&2

⁵⁸ Ibid art (1.4)

⁵⁹ Ibid art. 3

However, in order holder's of such securities to discount or re-discount the instrument they purchased they need to fulfill certain criteria stated here under:

- 1 All alternatives sources of credit, including the inter-bank money market, must be exhausted and evidence is presented there on;
- 2 Evidence of liquidity shortage in the form of low cash on-hand and liquidity ratios and also signs of excess reserves must be presented;
- 3 Evidence of possession of discountable and rediscount able securities;
4. Absence of prima facie evidence that the liquidity shortage is due to basic problems associated with poor credit risk appraisal, or incompetent financial and non-financial resources management or to fraudulent practices; and
5. Readiness to comply strictly with the provisions of directives and with all other applicable rules and regulations of the Bank.⁶⁰

Thus, one can understand that even though there is an opportunity for cashing such instruments in the event of shortage of money, before their maturity, conditions attached to them do not always guarantee liquidity of the mentioned instruments, unlike what the secondary market offers. Secondary market offers a lot of advantages. For instance, it offers raising capital needed for economic development in return promote economic growth. As there is regulatory system in the security market which regulates unfair trade practices through intermediaries.⁶¹ Such as Investment Banking- a firm which conducts activities related to the issuance of new securities and arrangement of financial transactions.⁶² Activities like, advising the client on the type of security and it's pricing. Gathering information and completing paper work and marketing the issue to investors.⁶³ Hence the need for establishing a secondary market is necessary

⁶⁰ Ibid art. 2

⁶¹ Supra note 55, 324

⁶² Ibid

⁶³ Ibid

so that securities (be it equity or debt security) could be traded easily by investors whenever they wanted to cash them at any time before maturity, in order to overcome short-term liquidity problem. The justice and legal research institution of Ethiopia has attempted to draft a proclamation on March 2003, but still not yet approved by the parliament as a final draft. It has detailed provision on how secondary market is to be conducted, which the writer of this paper suggests that, such draft will be approved by the appropriate organ.

4.9 Loss of T-bills

Where T-bill is stolen, lost or damaged the tenderer or the holder (as the case may be) must inform the T-bills office in writing with full statement of the circumstances within 24 hours of the loss being discovered. If the theft or malpractice is known or suspected he/she should also inform the police immediately. No duplicate of such T-bills will be issued. But where the NBE is satisfied, after due enquiry and (in its sole discretion) after the deposit with it of sworn statement and or a suitable and acceptable form of indemnity against any other person establishing a claim to be right full holder of the bill, the bank may pay (on or after the maturity date) the redemption money due on the person whom it considers, after such enquiry, to be the right full holder.⁶⁴

4.10 Taxes on T-bills

In the wording of Article of the treasury bills proclamation No. of 1969, any income or profit derived from T-bills or on any operation or dealings there in is exempted from any form of tax. Further more, whenever treasury bills mature on weekend/holidays, they will be redeemed on the next working day.⁶⁵

⁶⁴ Personal interview with Ato Sileshi Mekonnen

⁶⁵ Personal interview with Ato Sileshi Mekonnen

4.11 Government bond

The term ‘ bond ‘ applies to instruments, which have maturity of medium to long term. Bonds are simply receipts or promises to pay back money. Bonds could be classified into several types according to the state of the issuer and whether they are secured or not:

- Government Bonds/bonds issued by government/
- Local authority /Public utility bonds/bonds issued by public sectors authority like cities, regions
- Mortgaged and other asset backed bonds (secured bonds)
- Corporate bonds/debenture/ (bonds issued by corporations)
- Islamic bond (bonds that are issued to conform with Islamic law or sharia (common in arias where Islamic law is applied)⁶⁶

In Ethiopia only government bonds and corporate bonds are known.

4.11.1 Features of Government Bond in Ethiopia

The Ministry of Finance is vested with the power to issue government bond in Ethiopia. Even though proclamation no 262/1969 provides for the issuance of government bond, recognizes only one type of maturity that is 10 years, there are also government bonds that mature 20 years, and 30 years.⁶⁷

The total face value of government bonds varies from time to time. in 1961 it was 30,000,000 birr, in 1960 it was raised to 100,000,000. Interests on bonds are fixed though could vary from time to time. Though government bonds could be ‘bearer’ or registered, in Ethiopia it is only bearer bond form, and thus, it follows that government bonds in Ethiopia are easily transferable.⁶⁸ This is because, since they are long term maturity bonds, chasing them will not be easy unless they are in bearer form. Nevertheless,

⁶⁶ Stephen Valdez, An introduction to Global Financial Market 2007 P.130

⁶⁷ Personal interview with Ato Sileshi Mekonnen

⁶⁸ Proclamation the issuance of government bond 1969 art.4(b)

inavailability of secondary market still curbs the transferability of this instrument. Most of the time government bonds are issued where government wants to raise the capital of government enterprises such as Development Bank, Commercial Bank of Ethiopia, etc.⁶⁹

⁶⁹ Public Debt Management Bulletin and Analysis of Financial Information (Annual Report No. 8), Ministry of Finance, July 2006- June 2007

Conclusion

This research paper has made clear that transferable securities are nowhere defined in the legal system of Ethiopia. The research has also made clear that there is no single legal instrument/law/ that identify and lists transferable securities in the Ethiopian legal system. Despite the difficulties, the writer of this paper has encountered, the paper more or less has identified and listed transferable securities which are found scattered in different areas of laws of Ethiopia. The Commercial Code provides for bearer shares, debenture and life insurance policy to order as transferable securities. While treasury bills and government bonds are provided for by the proclamation of government borrowings. These said transferable securities as the paper, beautifully ascertained, are either debt or equity securities. The paper has also analyzed the form of these instruments and how they are negotiated and the problem relating to transferability of these instruments.

The absence of the practice relating to instruments such as bearer share, debenture, life insurance policy to order etc coupled with the non existence of formal security market(exchange) has made business men, business enterprises, concerned government offices and the law schools almost ignorant of the said instruments. Moreover, the inavailability of court cases on instruments of government borrowing (treasury bills and government bond) together with lack of secondary market for these instruments has confined knowledge on these instruments to few banks and insurance enterprises. The paper has also identified the disparity between the law and the practice relating to life insurance. Therefore, the writer of this paper strongly advises concerned bodies in order they take appropriate measures without further delay. The said measures are stated here below as recommendation of the writer of this paper.

Recommendation

A new area of law dealing with transferable securities has to be legislated. The said law has to clearly define and list transferable securities and provide for their form, nature and rules of negotiation. As transferable securities are almost nothing without market, especially secondary market, it is high time to issue laws that establish and regulate capital and money market in general and market for transferable securities in particular. Until the issuance of the said comprehensive law, the provision of the commercial code dealing with life insurance has to be rectified in order it enables one of the spouse to insure the life of the other spouse and in order companies issue order shares that can be negotiated. Further, the laws on government borrowing must be updated and provide for particulars in order they regulate negotiation of government borrowing instruments without much difficulty.

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