Position of the Business Community on the Revision of the Commercial Code of Ethiopia

Prepared by

A Team of Fourteen National Experts

July 2008
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acronyms</td>
<td>3</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>5</td>
</tr>
</tbody>
</table>

## PART I


Background

Observations and Recommendations

## PART II


Title I: General Provisions

Title II: Ordinary Partnership

Title III: Joint Venture

Title IV: General Partnership

Title V: Limited Partnership

Title VI: Companies Limited by Shares

Title VII: Private Limited Companies

Title VIII: Conversion and Amalgamation

Title IX: Business Organizations Incorporated Abroad

## PART III


Carriage Law

Insurance Law
PART IV
Negotiable Instruments.......................................................................................................................................47
Banking Transactions.............................................................................................................................................69

PART V

PART VI
Comments on Accounting, Finance/Investment, Business Organization and Management........................................................................................................................113
Book I: Traders and Businesses.........................................................................................................................113
Book II: Business Organizations........................................................................................................................117
Book III: Carriage and Insurance......................................................................................................................122
Book IV: Negotiable Instruments and Banking Transactions.......................................................................123
Book V: Bankruptcy and Schemes of Arrangement.....................................................................................124

REFERENCES .....................................................................................................................................................127
<table>
<thead>
<tr>
<th>ACRONYMS</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>AACCSA</td>
<td>Addis Ababa Chamber of Commerce and Sectoral Associations</td>
</tr>
<tr>
<td>CBE</td>
<td>Commercial Bank of Ethiopia</td>
</tr>
<tr>
<td>ICT</td>
<td>Information and Communication Technology</td>
</tr>
<tr>
<td>MoJ</td>
<td>Ministry of Justice</td>
</tr>
<tr>
<td>NBE</td>
<td>National Bank of Ethiopia</td>
</tr>
<tr>
<td>OD</td>
<td>Overdraft</td>
</tr>
<tr>
<td>OHADA</td>
<td>Organization pour l’Harmonisation du Droit des Affaires en Afrique (Organization for the Harmonization of Business Law in Africa, occasionally referred to in English as OHBLA)</td>
</tr>
<tr>
<td>PSD</td>
<td>Private Sector Development</td>
</tr>
<tr>
<td>Sida</td>
<td>Swedish Agency for International Development Cooperation</td>
</tr>
<tr>
<td>UCP</td>
<td>Uniform Customs and Practice Documentary Credits</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
</tbody>
</table>
INTRODUCTION

One of the ambitious tasks undertaken by the Government following the adoption of the Constitution of the Federal Democratic Republic of Ethiopia in December 1994 was to review and revise the basic laws of the country (“Codes” as they are officially designated) that have been in use since the late 1950s and early 1960s. Attempts have been made to ensure their compatibility with the relevant provisions of the Constitution and to further let them keep abreast with the changing economic and social realities of the nation. Works done on the enactment of the Revised Family Code of 2000 and the 2005 Criminal Code are cases in point in this regard. In pursuance of this daunting task, the Ministry of Justice (MoJ) of the Federal Government has, a few years back, come up with the Draft Revised Version of the 1960 Commercial Code of Ethiopia.

Much as this work is treasured by all likely stakeholders of the forthcoming Revised Commercial Code, the Ethiopian business community, however, felt that its concerns have not been fully accommodated in this noble exercise as it had a very little or no say in the drafting process. As is clear to everyone, the significance of the participation of the private sector in the revision of the Commercial Code cannot be over-emphasized. By and large, the sector can come up with suggestions and recommendations that would complement the works of the draftspersons. This may, inter alia, be by forwarding ideas on the inclusion of rules and institutions which are hitherto lacking or by way of recommending the repeal of provisions of the Code or abrogation of institutions that are deemed to impede the growth and smooth functioning of business. The Addis Ababa Chamber of Commerce and Sectorial Associations (AACCSA), as a representative of an important sector of this community, cordially approached and requested the MoJ to offer its collaboration and services by way of making suggestions and recommendations on the provisions, chapters and books of the Draft Revised Version that it feels are of prime concern to its constituency. The Ministry favourably accepted the offer made to it and provided the opportunity for the AACCSA to contribute its inputs towards the finalization of the Draft by making available a copy of the Revised Draft Version, to which the latter is very grateful.

In July 2006 the Private Sector Development (PSD) Hub, that operates under the auspices of the AACCSA, brought together some Ethiopian practicing lawyers and academics and commissioned them to undertake work on review of the Revised Draft Version having due regard to the interests and concerns of the Ethiopian business community. Accordingly, the following legal experts were entrusted with the task of the review work.

1. Ato Tilahun Teshome, Associate Professor of Law, Addis Ababa University, Team Leader.
2. Ato Aman Assefa, Lecturer in Law, Addis Ababa University, member.
3. Ato Aklilu Wolde Amanuel, Consultant and Attorney-at-Law, member.
4. Ato Belay Kebede, Consultant and Attorney-at-Law, member.
5. Ato Israel Tekle, Consultant and Attorney-at-Law, member.
6. Ato Mekbib Tsegaw, Consultant and Attorney-at-Law, member.
7. Ato Taddesse Lencho, Lecturer in Law, Addis Ababa University, member.
8. Ato Tamiru Wondimagegnehu, Consultant and Attorney-at-Law, member.
9. Ato Teodros Mihret, Consultant and Attorney-at-Law, member.
10. Ato Yazachew Belew, Lecturer in Law, Addis Ababa University, member.
11. Ato Zekarias Kenea, Assistant Professor of Law, Addis Ababa University, member.
The team also consisted of three prominent personalities from the related fields of accounting, auditing and management. They were:

1. Professor Johannes Kinfu, Professor Emeritus of Accounting and Finance, Addis Ababa University.
2. Dr. Zewdie Shibrie, Associate Professor, Faculty of Business and Economics, Addis Ababa University.
3. Dr. Mehari Mekonnen, Finance and Investment Consultant.

The 1960 Commercial Code of Ethiopia comprises of five books with each having several titles, chapters, sections and hundreds of individual articles covering a long range of matters in the field of commerce. The Revised draft Version too has not made any substantial change on the present arrangement of the Code. In view of this, five sub-teams were formed consisting of two lawyers each to look into and review works done in the Revised Draft Version by MoJ on each one of the five Books that make up the Code. The sixth sub-team, that has the experts on accounting, auditing and management as its members, was entrusted with the responsibility of reviewing and making recommendations on the revision exercise from the vantage points of their expertise. All the six sub-teams came up with the first drafts of their comments and recommendations on their respective assignments on which a number of plenary sessions were conducted in Addis Ababa and in the towns of Adama, Ambo, Debreberhan and Wolliso. After thorough deliberations on the Revised Draft Version in the light of the preliminary comments and observations contained in the reports of each individual sub-team, position papers were adopted on what the revised version of each book of the forthcoming Commercial Code should look like in order to best accommodate the interests and concerns of the Ethiopian business community.

Since the revision exercise of such an important branch of private law as the Commercial Code that carries close to twelve hundred articles is a relatively tedious and cumbersome undertaking that requires looking into the subject matter intended to be regulated by every single article and drawing comparison with a host of related legal, organizational and economic concepts, a summarized position paper on the Revised Draft Version is quite difficult to come by. Instead, it is felt appropriate to append the final versions of the comments and observations, as edited hereof, to reflect the position of the larger team and eventually that of the AACCSA and the broader business community of the nation. The comments and recommendations of the sub-team on accounting, auditing and management, which were immensely beneficial to the finalization work of the drafting process, are also appended to this compiled report as part VI.

Finally, the team of experts that has been working on the Revised Draft Version would like to extend its appreciation and gratitude to all those who, in one way or another, have contributed to the smooth functioning and success of its business including, but not limited to, the Ministry of Justice of the Federal Democratic Republic of Ethiopia, the Swedish Agency for International Development Cooperation (Sida) for its generous financial support, the AACCSA and the staff of the PSD Hub of the AACCSA for their excellent cooperation that made the work of the Team what it is today.

_Tilahun Teshome, Associate Professor of Law, A.A.U, (Team Leader and Editor of the Compiled Report)_
_Taddese Lencho, Lecturer, Addis Ababa University, Faculty of Law, (Editor and member of the team of experts)_

---

*There is a sixth book, consisting of transitory provisions (Articles 1171-1182), but the operative books are really five.*
PART I

Comments and Recommendations Regarding the Provision of Book One of the Commercial Code of Ethiopia and the Revised Draft Version of the Code

1.1 Background

The factors that inspired or necessitated the promulgation of a uniform law of commerce have been succinctly outlined in the speech made by the then Emperor of Ethiopia, Haile Sellassie I, which appears as a Preface to the Code. It is stated thus:

In the modern world, no nation can hope to expand its commercial and economic life unless there exists a firm legal basis which will ensure the necessary elements of stability and security in business transaction while at the same time providing a sufficiently articulated yet flexible framework within which trade and commerce may flourish and grow.

In those days, it was found necessary to enact a sufficiently detailed commercial law because “... the development of commerce [had] outgrown the provisions of the law...” hitherto existing or prevailing. Today, the same may tangentially hold true but the foremost problem arises from the fact that economic and social realities have lagged far behind legal postulates. In many instances, provisions of the Code have not been effectively tested. Save for a handful of provisions dealing with insurance, negotiable instruments, carriage of goods or persons and companies limited by shares, many of them have remained dead letters since there have been rare occasions for their practical implementation. Even where the circumstances called for practical implementation of the Code, there were many occasions when the provisions of the Code were not correctly or judiciously applied. Hence, any meaningful attempt to revise the provisions of the Code must, of necessity, take into account these harsh realities.

Book I of the Code contains 209 Articles. As the drafter of Books I and III of the Code, Professor Alfred Jauffret, points out that Book I “... concerns the very basis of commercial law, i.e., the regulation of traders”. The provisions of Book I form the common foundation on which stand the different legal regimes covered by Books II, III, IV and V of the Code. The subject matters covered by Book I are, thus, quite important and must be seriously scrutinized and carefully tailored in order to avoid any inconsistency or ambiguity.

1 Alfred Jauffret, General Report: Book I, Background Documents of the Ethiopian Commercial Code of 1960, Edited and translated by Peter Winship, Faculty of Law, Haile Selassie I University, Artistic Printers, 1974, p. 50.

2 The task of drafting the Code was initially entrusted upon Professor Jean Escarra, then professor of comparative commercial law at the University of Paris. Professor Escarra died in 1954 after having drafted the bulk of what later constituted Books II, IV and V of the Code. Professor Alfred Jauffret took over the task and drafted the texts of Books I and III and revised the works of Professor Escarra.
1.2 Observations and Recommendations

Save for certain alterations made here and there, the draft revised version does not, as a whole, introduce any sweeping or fundamental changes to the contents of the existing provisions of Book I of the Code. In many ways, this is a positive step that has to be welcome since an awful injustice would have been done by tampering with many provisions of the existing Code that have not yet been practically tested.

1. The Code is a specialized part of civil law. It is, thus, logical to stipulate under Article 1 of the Code that the provisions of the Civil Code shall apply to matters relating to the activities of individual traders and business organizations in the event where such matters are not specifically covered or regulated by provisions of the Code. The revised draft version does not introduce any changes to the provisions of Article 1 of the Code. While the basic concept expressed under Article 1 should be maintained, we, however, recommend that the purposes of clarity, the provisions of Article 1 be drafted as follows:

(Article 1 - The relevant provisions of the Civil Code shall apply to all matters which are not specifically covered or governed by the present Code.)

2. The revised draft version has not fundamentally altered the provisions of Articles 2 and 3 of the Code. We see no need for discarding or modifying them and we recommend that the provisions of those two Articles should be maintained in their present form.

3. Article 4 of the Code lists a number of bodies corporate which will not be considered as traders in the circumstances where they carry out any one of the activities enumerated under Article 5. The revised draft version has, however, struck out from the list of bodies corporate covered by the provisions of Article 4. Religious institutions as a matter of principle should not of course be encouraged to carry out trade activities since their sole objective is and, indeed, should be the fulfilment of the spiritual needs of their followers. However, it will be a wise and prudent policy to permit religious institutions to carry out very limited trade activities without ever being considered as traders in order to enable them to generate some income to cover the costs of their humanitarian and social goals. We, therefore, recommend that the list of bodies corporate under Article 4 of the Code be left untouched. It must also be noted that the cases where trade activities may be carried out by administrative bodies, religious institutions and other public undertakings as well the conditions and effects of such trade activities must be prescribed by a special law as is clearly indicated by the provisions of Article 27 of the Code currently in force.

4. The revised draft version of Article 5, while following the approach adopted by the original drafter of the Code, has, nevertheless, partially removed the contents of the Article and has also added a few new items to the list of activities considered to be trade activities by the law. Article 5 is quite an important piece of law that raises several crucial issues.

First, the legislator has to choose between two approaches to the definition of trade activities. The choice involves either the adoption of an elaborate enumeration of the activities which shall be subject to the commercial law or the insertion of a blanket formula designed to accommodate different kinds of commercial activities. The original drafter, Professor Jean Escarra, opted for a formula that enumerates a long list of activities that will be governed by the Code. His approach has, in our opinion, substantial validity even today since the adoption of such a formula will help avoid administrative arbitrariness in determining as to which activities must be regarded as trade activities.
Second, another issue that is highly involved in this context is whether the activities enumerated or listed under Article 5 should be considered as exhaustive or merely indicative. The original drafter of the Code was of the opinion that the list was sufficiently detailed enough to cover trade activities and should, therefore, be regarded as exhaustive. It is, however, our considered opinion that the list should only be taken as indicative and not exhaustive in the face of an expanding economic transformation that is taking place in the country. The nature and scope of trade activities that existed at the time of the promulgation of the Code is certainly far more limited than what exists nearly half a century after its enactment.

Third, a new law on the registration and licensing of businesses (Proclamation No. 67 of 1997) was enacted in 1997 to which is appended a list of several activities that are regarded as trade activities and for which licenses may be issued by the Ministry of Trade and Industry.

In view of the above, we recommend that the opening paragraph of Article 5 should be amended as follows in order to accommodate existing and future pieces of legislation that add or may add other activities to the list:

“Without prejudice to other activities that are or may be characterized as trade activities by another law, persons who professionally and for gain carry out the following activities shall be deemed to be traders”.

We have noted that the Code uses the term “trade” while Proclamation No. 67/1997 uses the word “business” to denote activities that should be governed by commercial law. It is hard to tell as to whether the word “business” in Proclamation No. 67/1997 was chosen by default or by design. We do not see any fundamental conceptual difference between the two terms. However, for purposes of consistency and for avoidance of confusion, we recommend that one of them be chosen and used consistently. If we were to make the choice, we prefer the word “trade” to “business”.

The revised draft version has added a few other activities such as medical and educational activities and all consultancy services to the list of activities enumerated under Article 5. The Appendix to Proclamation No. 67 of 1997 has already included hospital services and higher education to the list of commercial activities for which business licenses may be issued.

The proposal introduced by the revised draft version that was found to be highly controversial was the unqualified inclusion of all consultancy services to the list of trade activities.

We believe that consultancy services should be included in the list of activities enumerated under Article 5 of the Code, but subject to the qualification indicated hereunder:

“Without prejudice to the specific laws and regulations governing the licensing, code of conduct and discipline of the respective professions, consultancy services…”

5. The Code excludes farmers (Article 6), fishermen (Article 8) and handicraftsmen (Article 9) from the list of trade activities enumerated under Article 5. We can surmise that the rationale behind the provisions of Articles 6 and 7 is to encourage and protect small scale trade activities. Given the state of current economic and social realities, it will still be advisable to follow the same legislative policy with regard to farmers and fishermen. However, handicraftsmen should no longer be relegated to the status of farmers and fishermen in the face of today’s economic reality.

The revised draft version has retained Articles 6(1) and 7(1) of the Code but has left out sub-Articles 2 and 3 of the former and sub-Article 2 of the latter. It is hardly possible to figure out any meaningful or convincing reason for leaving out the provisions of the cited sub-Articles. We,
therefore, recommend that the provisions of sub-Articles 2 and 3 of Article 6 and sub-Article 2 of Article 7 remain untouched.

6. The revised draft version has left the provisions of Article 10 of the Code untouched and we fully agree with the draft of the Ministry of Justice.

7. Articles 11 – 15 of the Code deal with the limitations imposed on incapacitated persons to carry out trade activities. Article 11 makes reference to the relevant provisions of the Civil Code, presumably Articles 198 to 338. At the federal level, these Articles have now been replaced by the Revised Family Code of 2000. Some regional states have likewise adopted their own family codes having similar contents and it is expected that those which have not yet done so will follow suit in the foreseeable future. It is, therefore, appropriate for Article 15 of the draft to be made open so as to accommodate changes in the forthcoming Code or any other future law. At any rate, commercial activities must be and are, in fact, regulated by laws promulgated by the Federal Government in accordance with the Constitution of the Federal Democratic Republic of Ethiopia. In view of this fact, we recommend that the provisions of Article 11 be amended to read as follows:

**Article 11 - Incapacity**

1. **Persons who are considered incapable by law may not carry out any trade activities.**
2. **Where incapable persons carry on trade activities, they shall not acquire the status of traders and their acts may be invalidated in accordance with the provisions of relevant laws.**

**Article 12 - Tutors**

_Tutors may not carry on trade on behalf of minors or interdicted persons except in certain specific situations that may be permitted by a specific law._

8. Article 13 of the Code, which imposes limitations on emancipated minors, should be struck out since the institution of the family council has been abolished by the Revised Family Code. Moreover, Article 313 of the Revised Family Code prescribes that an emancipated minor shall be regarded as a person who has attained the age of majority. Since the status and trade activities of physical persons and business organizations must be regulated by laws enacted by the Federal Government, it will be consistent even for Regional States to follow the principle adopted by the Revised Family Code.

9. The revised draft version has left the provisions of Articles 14 and 15 untouched. We agree with the position, except that the reference to Article 318 of the Civil Code under Article 14 must be struck out since the provisions of Article 318 have been repealed by the Revised Family Code. Likewise the reference to Article 121 of the Code made in Article 15 of the Revised Draft Version should be made open to accommodate changes in the forthcoming Code or any other future law.

10. The provisions of Articles 16-21 deal with the carrying on of trade activities by a married person, the objections to be made by the other spouse and the recovery of the debt of the trading spouse by a third party creditor. The Code authorizes the carrying on of trade by a married person as though he/she was unmarried but imposes a limitation based on the provisions of the Civil Code. Those provisions of the Civil Code justifying the limitation have now been abrogated by the Revised Family Code and Regional Family Codes.

The challenge by one spouse against the recovery of debts contracted by the other spouse has traditionally been the source of controversies and abuses. Hence, any piece of legislation dealing

\[\text{Article 55 (2) 4 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia provides that the power to enact a commercial code shall reside with the House of People’s Representatives of the Federal Government.}\]
with the subject matter contemplated by the provisions of Articles 16 to 21 must strike a balance between the interests of the family and that of third party creditors. Since Article 66(1) of the Revised Family Code empowers the spouses to jointly administer their common property contrary to what was previously prescribed by the Civil Code, the law should give preference to the interests of creditors in order to ensure security in business transactions. We are, therefore, of the opinion that the subject matter covered by Chapter 4 of the Code (Articles 16 to 20) be amended so as to read as follows:

**Articles 16 – 22 Carrying on a Trade by Married Persons**

**Article 16** - A married person may carry on any trade activity as though he or she were unmarried unless an objection has been entered in the commercial register by the other spouse.

**Article 17** - Where no objection has been registered, debts contracted by the trading spouse shall be deemed to be the debts of the marriage and can be recovered from common property and the personal property of each spouse.

**Article 18** - An objection by the other spouse shall not affect third parties, unless such objection has been entered in the Commercial Register before the date of conclusion of the transaction between the trading spouse and the third party.

**Article 19** - Where an objection has been registered under sub-article (2) above, debts contracted by the trading spouse may be recovered only from his or her personal property.

11. Articles 22 to 27 of the Code deal with the right of a person to carry on trade activities. The revised draft version makes some changes by leaving out certain words or by striking out entire provisions of certain sub-Articles. Although it is slightly altered, we have no objection to the revised draft version of Article 22 since it conveys the same concept. The revised draft version has struck out the list of requirements i.e., age, qualifications, sex, nationality or license that are considered as grounds for the imposition of prohibitions or restrictions on the carrying on of particular trade activities prescribed by Article 23(2). We recommend that the provisions of sub-Article 2 of Article 23 be kept untouched since the factors listed therein will serve as guidelines for administrative authorities and judicial bodies and will, thus, help avoid arbitrariness. The provisions of Article 24 have been inserted under Article 23 as sub-Article 3 in the revised draft version. Except for the drafting style, the change does not substantially affect the contents of the Article.

12. The revised draft version does not make any changes to the contents of Articles 25 and 26. Article 25 prohibits the carrying on of trade activities by associations. The prohibition is in line with the objective for which an association may be established by virtue of the relevant provisions of the Civil Code. However, since we have made exceptions in respect of religious institutions, we are of the opinion that the same privilege be extended to associations as well. Associations must be permitted to engage in very limited trade activities without ever being considered as traders in order to enable them to generate some income to cover the costs of their non-profit goals. Hence we propose that sub-Article 1 of Article 25 be amended to read as follows:

**Article 25 - Associations**

Associations may not be deemed to be traders even where they carry out activities that may fall within the purview of Article 5 of this Code provided that such activities are authorized by special law.

13. The revised draft version has not amended or altered the provisions of Article 26 and we agree. The same is substantially true as regards the provisions of Article 27, except for the fact that
“religious institutions” have been left out from the list. If the reason advanced above is acceptable, the phrase, “religious institutions”, must also be retained under Article 27. Further, in line with our recommendation above, associations must also be included in the provisions of Article 27 of the Code. We, therefore, suggest that the provisions of Article 27 be amended to read as follows:

**Article 27 - Bodies Corporate**

*The cases where a trade activity may be carried out by administrative or religious institutions, associations or other public undertakings and the conditions and effect of such trade shall be prescribed by law.*

14. The provisions of Articles 28 to 32 of the Code deal with commercial agents. No fundamental changes have been made on these provisions by the revised draft version, save for a few typographical errors. The word “trader” in Article 28(1) has been transliterated as “tender” in the revised draft version and, hence, must be corrected. Similarly, the expression “non-manual” in the Code has, we feel, been incorrectly reproduced as “manual” in the revised draft version in Article 28 sub-Article 2. One crucial word which changes the import of an entire sub-Article has also been added. Whereas the provisions of sub-Article 2 of Article 30 are stipulated positively, they have been made to appear as prohibitive in the revised draft version. The word “not” has been unjustifiably, but probably inadvertently, included after the word “may” thereby changing the entire meaning of the provisions. Hence, the provisions of Article 28 must be left untouched or unaltered. As there is a plan to revise the current Civil Code, all references to its provisions need to be left open or replaced by expressions such as “the relevant provisions of the Code” in order to do away with any future discrepancy in the application of these laws.

15. Articles 33 to 36 deal with the definition and scope of the powers of a manager. No substantial changes have been introduced to these provisions by the revised draft version. However, we have one important suggestion to make. The phrase “acts of management” which appears in the provisions of Article 33(1) dealing with the definition of a manager and again in the provisions of Article 35(1) dealing with the scope of powers of a manager has remained largely undefined. The provisions of Article 35 do, of course, give us some clue as to what may constitute an act of management. The clues are not, however, sufficiently clear enough to help us determine the scope of acts that are or may be exercised by a manager. It is, thus, necessary to define the phrase, at least, in general terms and, if possible, enumerate certain legal acts which shall be regarded as acts of management in order to avoid any controversy arising in the course of dealings to be concluded by a manager with third parties. In so doing regard needs to be had to the definition made under Article 2204 of the Civil Code. We recommend that the following provisions be included as sub-Articles 2 and 3 of Article 33.

**Article 33 - Powers of a Manager**

*Without prejudice to what may be specifically provided by a letter of appointment or the memorandum or articles of association, an act of management is the power of a manager to plan, direct and supervise the operations of the business; represent the trader in all dealings and conclude any transaction with third persons; sign contracts and negotiable instruments and perform all such other acts as are customary or may be necessary for the protection of the interests of the trader.*

*Unless otherwise authorized in writing or delegated by the memorandum or articles of association, a manager may neither alienate or mortgage an immovable property, nor sell, hire or pledge the business.*

The provisions of Article 35 dealing with the powers of a manager must be struck out since the powers and duties of a manager are already specified under Article 33 above.
16. Articles 37 to 43 of the Code deal with commercial travellers and representatives and no substantial changes have been introduced to the provisions of Articles 37, 38, 39 and 40 by the revised draft version. The drafters have, however, altered the provisions of sub-Article 1 of Article 41. The existing provisions of Article 41(1) provide that “commercial travellers and representatives shall be paid [by] salary or commission or both.” The revised draft version provides that “the remuneration of commercial travellers shall be determined in accordance with their agreement”. Further, whereas the Chapter is intended to deal with both commercial travellers and representatives, the revised draft version has unjustifiably but, perhaps inadvertently, left out commercial representatives. Moreover, the existing version of sub-Article 1 of Article 41 prescribes that commercial travellers and representatives must be paid salary or commission or both. According to the existing scheme, a commercial traveller or a commercial representative is entitled to the payment of salary or commission or both even in the circumstances where there is no agreement on the amount of remuneration so long as the commercial traveller or representative has rendered the required services. The revised draft version has, however, left the question of salary and/or commission to the agreement of the parties. We, therefore, recommend that the provisions of sub-Article 1 of Article 41 be retained.

17. Articles 44 to 55 of the Code deal with commercial agents. The revised draft version does not introduce any significant changes to the provisions of Articles 44, 45 and 46. The existing version of Article 46(1) stipulates in general terms the duties expected of a commercial agent and lists specified duties under the provisions of sub-Article 2. The revised draft version has combined the provisions of sub-Article 2 with that of sub-Article 1 and the listed duties of the commercial agent are represented not as primary but as additional obligations. We recommend that Article 46 be retained or remain as it is. We have also noted that the phrase “… and carrying out independent activities” appearing after “… a contract of employment” under sub-Article 1 of Article 44 has been left out but the change introduced does not affect the substance of the Article.

The draft version has introduced a new provision under Article 48 which appears as 48(B). The added provision is, however, irrelevant and unnecessary. The revised draft version has slightly altered the provisions of sub-Article 1(b) of Article 52 and the change has distorted the contents of the provisions. We recommend that the sub-Article be rephrased and inserted as follows:

“b. where the agent, being a natural person, dies or is incapacitated or is declared bankrupt”.

The revised draft version has also changed the provisions of sub-Article 2 of Article 52 by replacing “good cause” by force majeure and serious cause as a justification for dispensing with the requirement of notice. We recommend that the existing version of the sub-Article which uses the test of good cause be retained. The same should also hold true for the provisions of Article 53. The revised draft version has left the provisions of Articles 54 and 55 unaltered and we agree.

18. Articles 56 to 59 deal with commercial brokers. The revised version has left out the qualifying word “commercial” and makes reference only to brokers. We are of the opinion that the qualification is legally very significant and crucial and should, therefore, be retained. Moreover, the draft revised version has mixed up the contents of sub-Articles 1 and 2 of Article 56. Since the existing version of the Commercial Code is the most logical, it should be retained as it is. Likewise, the revised draft version has combined the two sub-Articles of Article 57 for no justifiable reason. The provisions should be retained as they are. No change has been introduced to Article 58. The provisions of sub-Articles 1 and 2 of Article 59 have been unjustifiably changed by the revised draft version. Under the existing provisions of sub-Article 1 of Article 59, a commercial broker is entitled to
remuneration when the contract for which he acted as an intermediary is entered into. The revised draft version has unjustifiably left out this important requirement for the payment or settlement of the remuneration. Under the existing provisions of sub-Article 2 of Article 59, the remuneration to which the commercial broker is entitled is to be borne by the party who required his/its services unless otherwise provided by custom or the agreement of the parties. The draft revised version provides that the remuneration shall be borne equally by both parties. We fail to see any meaningful reason for adopting such legal prescription. The revised draft version has left out that part of the provisions of sub-Article 3 of Article 59 which empower the court to reduce the agreed remuneration in the event where the remuneration appears excessive or disproportionate to the services rendered by the commercial broker. We believe that this is a very important provision for mitigating onerous or vexatious claims and should, therefore, be retained.

19. The provisions of Articles 60 to 62 deal with commission agents. The revised draft version has left out the phrase “…professionally and for gain” from the text of sub-Article 1 of Article 60. Although we do not see any logic for taking this phrase out of sub-Article 1 of Article 60, since a commission agent is regarded as a trader, leaving out the qualifying phrase does not affect the essence of the definition given to a commission agent under sub-Article 1 of Article 60. Article 61 has been left unchanged and we have no comment. In view of the intended revision of the Civil Code we also propose that Article 61 of the revised draft version read as follows:

Art. 61 - Civil Codes Applicable

The relevant provisions of the Civil Code on Commission Agency shall apply to such contracts where appropriate.

The revised draft version has combined the provisions of the two sub-Articles appearing under Article 62. The revised version is acceptable since the amalgamation does not affect the substance of the Article.

20. Articles 63 to 85 deal with books of accounts. The revised draft version has made some changes to the provisions of Articles 63 to 72 and has deleted Articles 73 to 85. Our overall observation is that most of the existing provisions of the Code governing books of account must, as a matter of principle, be retained subject to certain amendments. The deletion of Articles 73 to 85 is not justified by any convincing reason. We believe that these are important provisions which will serve as guidelines and should be retained as they are. Our opinion notwithstanding, we also believe that the considered views of the Accounting, Auditing and Management sub-committee of this task force be taken into account when coming up with the final draft.*

21. Articles 86 to 123 of the Code deal with the Commercial Register (Articles 86 -93), Entries in the Commercial Register (Articles 94-114) and Sanctions to be imposed on the failure to register (Articles 115-123). The provisions of the Commercial Code dealing with the Commercial Register must be read in conjunction with the Commercial Registration and Business Licensing Proclamation (Proclamation No.67 of 1977) and the Regulations (Regulations No. 13 of 1997) issued pursuant to Article 47 of the Proclamation.

The most important policy issue that must be resolved is whether the Proclamation and the Regulations dealing with commercial registration and business license are intended to override or to complement the existing provisions of the Commercial Code. Article 2(2) of Proclamation 67 of 1997 defines a "business person" as “any person who, professionally and for gain carries on any of those activities specified under Article 5 of the Commercial Code, or who dispenses services, or who

* For the recommendations of the Accounting, Auditing and Management Expert Team, see Part VI.
carries on those commercial activities designated as such by Regulations issued by the Government". It appears from the definition of “businessperson” that the Proclamation and the Regulations issued pursuant to the Proclamation are intended not to replace the relevant provisions of the Commercial Code but to complement them. However, a comparison of the provisions of the Commercial Code and the Proclamation together with the Regulations issued pursuant to the Proclamation shows substantial overlapping.

We are of the opinion that the general rules governing commercial registry should be codified and not prescribed by an individual piece of legislation. On the other hand, the conditions and requirements for the issuance of trade licenses may change from time to time and it may be expedient to regulate them by another piece of legislation as has been done by Proclamation No. 67 of 1997.

In view of the above, we recommend that the provisions of the Commercial Code relating to the commercial registry be retained by making the necessary changes regarding the organs of registry in line with the current federal structure of the country. Hence, we recommend that part of Proclamation No. 67 of 1997 dealing with registration be abrogated and the rules of registration prescribed by the Code retained. To do so requires further scrutiny of the individual provisions of Articles 86 to 123 of the Code and those of Proclamation No. 67 of 1997 as well as Regulations No. 13 of 1997. The clarity of the provisions of the revised draft version is also an area of concern that warrants substantial editorial attendance.

22. Articles 124 to 209 of the Code deal with the definition of a business, elements of a business, goodwill and unfair competition, trade name, distinguishing marks, right to lease the premises of a business, sale of a business, mortgage of a business, hire of a business and contribution of a business to a business organization.

The revised draft version has left the provisions of Articles 124 to 128 intact. As these provisions involve highly technical, legal and economic concepts, it is better that they be left as they are. The revised draft version has changed the title of Article 129 from “assets and liabilities” to “credit and debts”. There is no good reason conceivable for changing the title. Sub-Article 2 of Article 129 wrongly makes reference to Article 156 instead of Article 159 and, thus, the wrong reference has to be corrected. The revised draft version has kept the provisions of Article 130 to 131 unchanged but has made some changes to Articles 132 to 139 dealing with unfair competition and trade name. The revised draft version has also deleted Articles 140 to 141 dealing with distinguishing marks. Articles 132 to 141 must be read in conjunction with Trade Practice Proclamation No. 329/2003 and Trade Mark Protection Proclamation No. 501/2006.

We are, therefore, of the opinion that the Code should restrict itself to laying down the general principles with regard to unfair competition, trade name and distinguishing marks and leave the prescription of detailed rules to be regulated by the pieces of legislation cited above.

Articles 142 to 147 deal with the right to lease the premises of a business. The revised draft version has introduced no changes to the provisions contained under these Articles. Articles 148 to 149 of the Code deal with Patents and Literary or Artistic Copyright. Save for the reference to specific articles of the Civil Code under Article 149(2), the revised draft version has not altered the contents of Articles 148 and 149. The general reference to the provisions of the Civil Code and other laws introduced under sub-Article 2 of Article 149 is quite acceptable.

Articles 150 to 170 of the Code deal with sale of a business. The drafters of the revised version have made some minor changes on the provisions of these Articles. Our recommendation is that the
provisions of those Articles be kept untouched. Articles 171 to Article 193 of the Code deal with mortgage of a business. The drafters of the revised version have made a few changes here and there. Our recommendation in this respect is that the provisions of these Articles be left unchanged. In view of the increasing use of the power of sale foreclosure laws by the banking sector, however, we suggest that sub-Article 3 of Article 189 of the revised version be rewritten as follows:

_The provisions of sub-articles 1 and 2 hereof shall, however, be subject to the relevant laws on the right of power of sale foreclosure specified in favour of special class of creditors._

Articles 194 to 206 deal with the hire of a business and no substantial change that may affect the basic tenets of the provisions of those Articles has been introduced. The same holds true for Articles 206 to 209 which deal with the contribution of a business to a business organization.

2.1 Title I: General Provisions

1. It has been pointed out whether there could be a paradigm shift to be made regarding the organization, form and type of business organizations to be recognized in the Code taking into account the variety of organizational forms introduced in other jurisdictions in addition to the changes and modifications made on the existing ones. In this connection, it is suggested that a one-member company should be introduced and the following justifications are forwarded:

(a) It is not logical to force an investor to look for another person usually a straw man to form a company;
(b) It gives investors the opportunity to separate property allocated for business and their personal property; and
(c) In modern business, capital is more important than the individual.

However, it has been stressed that protection of creditors and the separation of management and membership must be given due attention. We have also learnt that the French Commercial Code provides for a single member company as do the laws of other countries (e.g., U.S and countries in the OHADA legal system). Thus it is recommended that the institution of a single member company be included in the revised code based on a thorough research on its ramification.

2. The significance of classifying business organizations as commercial and non-commercial needs further study. Under the French Commercial Code (Article L210-1) the commercial nature of a company (a business organization) depends on its form or object. Irrespective of their objects, general partnerships, limited partnerships, limited liability companies and joint-stock companies are commercial companies by virtue of their form. The question whether it is proper to deal with non-commercial (civil) business organizations in the Commercial Code has been raised. The consensus of the business community is to exclude non-commercial business organizations from the Commercial Code as it is not the purpose of a commercial code to treat non-commercial entities.

3. Under Article 211, the Draft, like the Code, indicates that beneath every business organization lays a partnership agreement. A partnership agreement is a contract which requires two persons for its existence. This seems to negate the idea of a single-member private limited company which is hinted in sub-Article (2) of Article 510 of the Draft. If this idea of a single member company is introduced in the revised code as recommended, the provisions of Article 211 will have to be made compatible with the same idea. If the phrase “subject to the provisions relating to a single member
private limited company” is to be retained, which is a new concept to the Code, the Draft should have provisions on what a single member company is and how it operates in a like manner as it does to other forms of business organization.

4. Sub-Article (2) of Article 218 of the Code gives illustration for “good cause” as a ground of dissolution for a business organization. But this rather useful provision is deleted in the same Article of the Draft. We believe that it is better to retain the provision because it helps judges to interpret “good cause” for which there is only a mere reference in the Draft.

5. Article 219 of the Draft, like the Code, provides for publication of a notice in the Official Commercial Gazette as one of the methods of publicity when a business organization is formed. But the Commercial Registration and Business Licensing (Amendment) Proclamation No. 376/2003, has clearly abolished the publication requirement. Thus, it is not clear why the Draft insists on that requirement in contradiction with the Proclamation, which shows a clear policy of the Government.

Before the issuance of the Proclamation, the publication requirement was one of the prerequisites for the acquisition of legal personality. The issuance of Proclamation No. 376/2003 brought about a total shift and dispensed with the requirement of publication.

One should inquire whether the reason for the abolition of the publication requirement is justified by a reason which supersedes the benefit that publication gives to the public. It can be said that considering the cost of publication and the time it takes to comply with that formality, the abolition is of practical significance. Yet, the purpose of publication is divulgation with a view to protect third parties. Thus, we are of the opinion that the interest of the public and commercial security outweighs expediency of incorporation for the abolition of the publication requirement. Hence it is essential to establish and institutionalize the commercial gazette for the purpose. So we recommend the publishing of a notice in the Commercial Gazette within a certain period following registration, and that if this requirement is not complied with the Company will have to be regarded as inexistent abinitio.

2.2 Title II: Ordinary Partnership

6. The Draft has deleted all the provisions on ordinary partnership. By so doing it has reduced the number of business organizations in the Code from six to five. In the eyes of the team members this type of organization has features peculiar to it particularly as regards the liability of members. The concept of benefit of discussion that members have for the debts of the organization is but a case in point. It could be said that having such a business organization offers a choice to the public, although the query whether it has been put to use so far may be posed. Nevertheless, a consensus is reached to reserve the application of the Commercial Code to commercial business organizations as indicated above. Ordinary partnership is non-commercial all the time. Thus it is consistent with the above conclusion to exclude ordinary partnership from the Draft. The provisions in the Title that have been cross referred by the subsequent titles relating to other forms of business organization need, however, be retained and, to this end, a careful examination and incorporation of those provisions into the relevant parts should earnestly be made when the final draft is drawn up.
2.3 Title III: Joint Venture

7. Article 274 (both of the Draft and the Code) states that a joint venture cannot issue negotiable securities. Does this a contrario imply that a general partnership and a limited partnership or even a private limited company can issue negotiable securities? It is recommended that similar provisions in the three forms of business organization be included to obviate the confusion.

8. Article 272(2) makes it clear that unlike the other forms of business organization, a joint venture agreement need not be in writing. This is a source of dispute as there will be no written evidence as to the terms of the agreement. Further, Article 278(1) (a) seems to suggest that there is a memorandum of association. It is thus important to clarify this matter and make it mandatory that a joint venture agreement be in writing. In this regard the conclusion begs the question whether the agreement should be attested by two witnesses who will be repugnant to the secret nature of the agreement or organization. The ripple effects of the change to be made would need to be examined carefully.

The fact that the joint venture agreement is in writing may, of course, compromise the secret nature of the joint venture but does not cause it to be so much public as it would be, were it to be registered as required by Article 219 of the Code. As such, the Ethiopian joint venture would be likened to what is called “Société en participation” under the Organization for the Harmonization of Business Law in Africa (OHADA) law, which is not secret like our joint venture, but has almost the same characteristics as ours.

2.4 Title IV: General Partnership

9. Regarding the liability of members of General Partnerships and general members of Limited partnerships, the Code says under Articles 280 and 296 that they are “...fully, personally, jointly and severally liable”. Does this in any way differ from the notion of “joint and several liability” in the Civil Code? Note also that the same terminology has been used under Article 308(1) regarding the liability of the founders of a share company. It is hereby recommended that consistency should be maintained and the term “joint and several” be used instead.

10. Article 288 provides for plurality of management. This is contrary to the unity of command principle and also a source of confusion for third parties and employees as to who is in charge. It is also true that efficient management of partnership requires division of labour/functions among partners. Thus, it is recommended that one manager be appointed by partners from among themselves or from outside the partnership.

On the issue of removal of a statutory manager, Article 293(1) of the Code provides that such a manager may only be dismissed by the court for good cause, while the same Article of the Draft provides the manager may be dismissed by the unanimous decision of partners. Considering the fact that it may be difficult to arrive at a consensus, it is recommended that the provisions of the Code should be left as they are.

11. Regarding substitution of a partner by another, both the Code and the Draft are lacking important rules. How are the rights of a partner leaving the partnership determined exactly? Article 294 (h) of the Draft is less than clear on this. We therefore propose that a provision similar to that of Article 262 be included.
2.5 Title V: Limited Partnership

12. One issue that the Code and the Draft do not address is whether contribution of skill is possible in a share company, a private limited company and by a limited partner in a limited partnership. One view regarding this matter is that contribution of a partner or shareholder with the benefit of limited liability should be something to which creditors can have effective recourse. In other words, the contribution of such a person takes the place of his personal liability. Hence, it is maintained that service/skill is not a valid contribution as that will not be of any use to the creditors. On the other hand, it is contended that as long as there is sufficient regulation, no harm is caused to creditors. We are of the view that the Draft should obviate confusion surrounding this issue by providing clear provisions regulating the manner in which skill is to be contributed. The experience of other countries shows, skill may not be contributed to the capital of limited liability companies (e.g. French law).

13. In Article 302 transfer of shares is made subject to the agreement of managers and a majority of the limited partners. In addition to the confusion caused by the reference made to Article 282 in Article 303, no interest is protected by making transfer of shares subject to the agreement of managers who are not necessarily members (Article 303 cum 287(1)). Therefore, the following amendment is recommended:

*Shares may not be transferred outside a limited partnership except with the approval of all general partners and a majority of limited partners.*

2.6 Title VI: Companies Limited by Shares

14. Articles 304 of the Code and the Draft define a share company in terms of “capital” and “assets”. Yet, the Draft on Book I did away with the provisions that define the two concepts. The concepts of “capital” and “asset” are very critical in understanding not only the meaning of a share company but also other provisions like the ones on accounts of companies. Given the critical nature of these concepts to the proper understanding of company law and given the limited knowledge of the legal community, including judges, in matters of accounting, it would be wise to include some kind of definition for the two terms in the part on company law or retain the existing ones in Book I of the Code.

15. With respect to the issue of increasing the minimum capital requirement we propose that the amount of minimum capital be increased taking into account the changes in the economy.

A related issue concerning the increase of the par value of each share was discussed and finally it was agreed that the existing provisions should be retained as they are.

16. Article 304(2) conveys a message not intended by the legislator by suggesting that a shareholder could be liable to the extent of his share-holding even after he has fully paid what he has subscribed to. It should be redrafted to make it clearer. We suggest that the existing provisions of Article 304(2) be maintained as they are.

17. Why do Articles 307(3) of the Code and the Draft consider a person who makes contributions in kind as a founder as a result of the type of contribution alone? In what respects is such person materially different from a person who contributes in cash that he should be regarded as a founder while the latter is not? It is suggested that the term “founder” be reserved for a person who plays a role in setting up a company. Or at least no distinction should be made among shareholders on the basis of the kind of contribution. So those who have paid fully in cash should also be considered as founders so that the discrimination could be avoided.
18. Article 312(1) (b) of the Draft does not use the term “in the name and to the account”. We do not think this is prudent. How will banks open an account for a company under formation if it does not have even a provisional name? So, why not retain the provision of the Code on the matter?

19. In addition, in the same sub-Article, the Amharic version provides the term “cash shares”. Why is it that the term “cash shares” or its equivalent has not been used in the English version of this Article to correspond to the Amharic? It is suggested that the term “cash shares” be included in the English version.

Article 312(3) talks about a period of one-year running from the date on which “the money was deposited in a bank”. But it is a fact that subscribers of cash shares do not pay the required 25 percent of the par-value of their shares on one and the same day. In other words, different people subscribe on different dates and hence pay on different dates. So, as of when does this one-year period begin to run? This needs clarification. We suggest that the beginning date be the date stated in Article 318(1) (d). But this suggestion is impugned as the provision deals only with closing date of subscription. Thus it is recommended that “the closing date for bank deposit” should be the point of reckoning.

20. Proclamation No. 376/2003, Article 5 (11), has amended Article 315(1) of the Code. The Proclamation leaves valuation of contributions in kind to shareholders themselves abandoning valuation by an expert from the Ministry of Trade and Industry envisaged under the Code. The Code provision was intended to prevent overvaluation and the resultant exaggeration of capital. Of course, this is very important, as capital is the only security for creditors of a share company. So, to safeguard the interest of creditors something along the lines of Article 519 of the Code in the context of a private limited company must be provided. As one notes, in private limited companies valuation of contributions in kind is not done by experts from the Ministry of Trade and Industry. Shareholders themselves do it. To prevent abuse the law imposes joint and several liabilities on all shareholders present in the event of overvaluation. So, if we are to change Article 315(1) of the Code as done by Proclamation No. 376/2003 we must provide a similar safeguard for creditors and others who will rely on the capital of the company in their dealings with it.

And yet it has been contended that the reason for allowing shareholders to value contribution in kind should be impugned. It would be more appropriate if independent appraisers are empowered to do the job and if they are made professionally liable for any damage caused to third parties.

The latter solution is recommended.

21. Article 321(5) of the Draft is unnecessary as its subject matter has already been dealt within sub-Article 2 of the same Article.

22. Wrong cross-references have been made under Articles 319 and 322 of the draft. Article 319(2) makes cross-references to Article 316(1) where it should have made the reference to Article 315(1). Similarly, Article 322(5) makes cross-reference to Article 316(4) where it should have made the reference to Article 315(4).

23. Article 329(2) deals with a situation where a share has been pledged or given in usufruct. Particularly, it attempts to regulate the issue of new shares in such circumstance and provides that the company may sell the new shares for the benefit of the shareholder pursuant to Article 342. But Article 342 deals with calls on shares not subscription of new shares. What is more, the company should not act as an agent of individual shareholders to sell new shares on their behalf. Thus, Article 329 should be amended to make it clear and meaningful. The easiest way of accomplishing this is to make Article 472 applicable to the circumstances.
24. Article 332(4) of the Code seems to make cross-reference to sub (1) of the same Article, as sub (2) and (3) cannot be relevant to the pledging of shares.

We think that even sub-Article (1) has confusing provisions under (1) (b). So this Article needs further study to avoid the confusion.

25. Provisions of Article 333(2) are clearer in the Code than in the Draft. Thus it is recommended that the old language be retained.

26. Article 336(1) seems to suggest preference can be created among shareholders on future issues of shares. In other words, it seems this provision is indicating a possibility of some shareholders buying new shares while other shareholders are not entitled to buy. This, it seems, is contrary to the notion of preferred right of subscription that shareholders have to buy new shares in proportion to their previous holding (Articles 470 to 479). Particularly, Article 475 seems to rule out the possibility of issuing documents (shares) conferring preference in this regard. Therefore, Article 336(1) should be amended to avoid the conflict between the provisions mentioned above.

One possible solution suggested is to insert the clause “Subject to the Provisions of Article 336” in Article 475.

27. One problematic area that the team identified pertains to “statutory interest” raised in relation to Article 337. The Code did not have provisions that could explain the meaning of this term sufficiently. The only provision that arguably dealt with the issue was Article 457. That provision was less than clear to say the least. To make matters worse, it has been expressly repealed in the Draft. In such situation, what does one make of this concept of statutory interest? We believe that Article 457 should be reinstated and the issue of statutory interest be studied further and regulated in detail.

28. Linguistic problems are observed in relation to Articles 339(1) and 342(6) of the Code and the Draft. We particularly recommend that Article 339(1) be corrected to read “shares representing contributions in kind shall be fully paid at the latest on the day of registration of the company.” The second sentence should be omitted, as this is not its right place. The purpose sub-Article 2 aims at can be served if the provision provides for the prohibition of handing over of the share certificate. It is recommended that sub-Article 2 be amended to this end.

29. “Joint holdings” has been under-regulated in the Code. In fact, it is only Article 344 that deals with the matter. Affiliation between companies assuming such designations as business groups, conglomerates, consortiums and cartels, of which joint holding is but one may have serious repercussions on the rights of creditors as well as minority shareholders. In view of this, we have identified this as an area of major importance that needs to be further studied and regulated.

30. Regarding the weight to be accorded to the vote of a share, the law is not clear. This issue is important as shares may be of different par values. This law attempts to address the matter under Article 407 when it provides the weight to be given to the vote of “an ordinary share or dividend shares” shall be in proportion to the capital held. Why single out the two types of shares? Does this imply that preference is possible in matters of voting? If so, wouldn't that be contrary to Article 336(2)? This confusion may be avoided by including preference shares in Article 407.

It is also important to explain the basis of computing the vote to be attached to shares. Perplexity exists whether one should be allowed to vote on the basis of the prescribed or the paid up capital. It is recommended that the vote to be made be based on the paid up amount.
31. In relation to Article 346 we have observed that the provision imposes liability on founders for fault in the implementation of the entire “Chapter” i.e., Articles 325 to 346. The chapter does, however, contain several provisions that are meant to govern the affairs of the company long after its formation. What sense does it make to hold founders responsible for acts and omissions which are in no way related to the formation of the company? We believe that founders should not be liable for the deeds of others. Thus we propose that the last part of the provision be amended as “… the observance of the relevant provisions of this Chapter”.

32. The title of Chapter 4 is “Directors, auditors and shareholders’ Meetings”. The query whether this title should be maintained was raised. The business community recommended the change of the title to “Company Governance”.

33. The discussion on Article 347 unravelled the following views regarding the role and rights of shareholders in managing companies:

- Minority shareholders should be allowed to have a representative in the board.
- A share company is an association of capital. Thus there is no consideration other than the amount of capital one holds in the decision making process.
- The interests of minority shareholders should be given due attention but it is better to use corporate governance mechanisms rather than interfering in the operation of companies.

The last suggestion has been accepted and recommended noting that the manner of giving legal backing and its practical application need to be studied.

34. A provision dealing with the powers of the manager of a share company need to be included. Even if Article 348 (3) makes cross-reference to other provisions of the Code related to the manager's powers, it is not clear as to which interest the law gives priority, i.e., the interest of third parties or that of the company? It is imperative to point out to third parties as to what they could expect or they could check out to ascertain the powers of the manager. One possibility is to introduce a provision similar to Article 528 of the Code in the context of share companies as well. This facilitates transaction relieving third parties to check everything in the commercial register until the date of the transaction, to be on the safe side. On the other hand, it is evident that the management of a company is vested in the board of directors and failure on the part of the directors to discharge their responsibilities entails liability. In this context one may question the fairness of such liability if wider power is to be given to the general manager.

It is, therefore, recommended that a provision to the effect that the powers of the manager shall be as determined in the memorandum and articles of association be included.

35. Article 348(4) of the English version is ambiguous, as it seems to state that a director cannot be a manager while it should read at the end “need not be a director”. And yet the wisdom of allowing the manager to be a director has been challenged. It is argued that permitting the manager to have two capacities results in conflict of interests in addition to the special leverage it offers to the manager over the board, particularly when the directors are less knowledgeable. On the other hand, it is contended that the manager would be forced to implement a decision, which he has no or little knowledge about if he is not allowed to participate in the boardroom.

It has been resolved that the law should be amended in such a way that a manager cannot be a director and vice versa. But to allow the manager to be part of the decision making process he should be able to take part in meetings of the board unless the agenda to be discussed is about him.
Further, in the Draft we have a new sentence in Article 348(4) talking about auditors being managers. We think that the modification is out of place, as it is not the right place to talk about the competence of auditors.

36. It has been recommended that following Article 348 new provisions dealing with the following subject matter be included:

**Article XX Auditor**

1. An auditor is a person qualified, appointed, licensed, and authorized by the appropriate government authority to examine accounts and accounting records, compare the charges with the vouchers & revenues, verify financial statements, and state the results of the state of affairs of a company.

2. Unless otherwise indicated in this Code, the term “auditor” means an external or an independent auditor.

3. An audit firm is a firm consisting of auditors as defined in sub-article (1) of this article.

4. The required qualification for an auditor shall be as prescribed by regulations.

37. We propose another alternative to Article 351(5) of the Code and the Draft. As a better alternative, the auditors may be empowered to appoint three interim directors (taking the legal minimum) from among the shareholders. This, it is believed, would do away with the possibility that the auditors could audit their own acts. Another alternative is to introduce the appointment of alternate directors. It is also possible that the acts of auditors during their period of management should be audited by other auditors, for example by alternate auditors. The appointment of alternate auditors and conferring on them the power to audit the acts of the auditors during the interim period is also acceptable.

38. In cases where a public authority has to be assigned with a certain function as in Article 353(7) and other provisions as well, it is necessary to designate such authority in general terms in order to accommodate the relevant federal and state agencies. Thus we suggest the use of the phrase “the organ which registered and licensed the company,” instead of “the Ministry of Trade and Industry” at the beginning of Article 353(7).

39. If sub-Article 3 of Article 419 of the Draft is to be incorporated, the following phrase should be inserted at the end of Article 362(c): “…and special management report on holding companies, if any.”

40. Section 2 of Chapter 4, Title VI, Book II, simply mentions auditors. It is necessary that it clearly indicates the section which deals with independent/external auditors.

41. In Article 368(1) of the Draft the term “alternate auditors” is made to replace the words “assistant auditors” of the Code in imperative terms. The whole idea appears to be ensuring the permanent nature of the office of auditors. In fact, as far as we know no assistant auditors have ever been appointed in practice. It is underscored that the appointment of alternate auditors is essential and the law should make it compulsory.

42. Sub-Article (2) of Article 370 of the Code is taken out from that Article to make it Article 353(B) in the Draft. We recommend that sub-Article (2) of Article 370 be reinstated in its original place in the same article.

43. The duty of professional secrecy under Article 373 should be extended to the auditors’ subordinates, as well, because they deal with the same documents or information as the auditors they work with.
44. As one of the permanent organs of a share company, the auditors are supposed to ensure that the company complies with standard accounting operations. So this should be included as one of their duties under Article 374. Further the following change need to be made under Article 374(2) (a) and (b):

(a) To audit the books and accounts of the company;
(b) To verify the correctness and accuracy of the financial statements of the company.

45. Article 375 should be amended so that it reflects the idea that auditors shall submit audit report to the general meeting. In particular sub-Article 2 requires to be rewritten as it sounds unclear.

46. There is discrepancy between the Amharic and English versions of Article 378(1) of the Code. The provisions in the Amharic version should be adopted in the Draft. The draft simply reproduces the Code's English version.

47. We question the rationale of restricting Article 379 to holding companies, particularly where the audit of subsidiaries is not contemplated together with the holding company. To begin with the Code gives some idea as to holding companies, but not as to subsidiary companies. What is more, the financial status of a subsidiary is more important to a holding company than that of its own. This matter should further be investigated in the light of suggestions made by the accounting, auditing and management experts (see Part VI).

48. Sub-Article 4 of Article 388 is an addition to the Draft and the following points should be considered before incorporating it:

(a) It is not applicable to all companies as it is inoperative where members are numerous.
(b) How is unanimity to be proved so that the draft resolution to be signed can be circulated?
(c) Companies may issue bearer shares, in which case it is difficult to reach the holders of such shares.
(d) The company's shares may be traded in the stock market and hence the owners of traded shares may not be available for endorsing the draft resolution as in (c) above.

49. Article 390 (4) of the Draft does not solve any problem. If by the term “jointly” it is intended to mean they will be conducted at the same time, then it is not possible as the agenda to be discussed and the quorum required are different. Otherwise the practice is that when companies call ordinary and extraordinary meetings at the same time the meetings are held consecutively. Thus, save the reservation stated above, the provision gives effect to the practice.

50. Article 397(1) (b) of the Draft paves the way for shareholders to have their say in the items to be included in the agenda of a general meeting. The Code is clear in this regard as it limits this power only to the directors unless the subject matter involves the appointment of directors. But shareholders have the opportunity to actively participate in the affairs of the company. This makes it imperative that there should be a room for them to have a role in designing the agenda. However the new provision in the Draft should be redrafted and the following provision included as sub-

Article 2 of the same Article:

2. Shareholders representing 10% of the capital may require by a notice sent to the person calling the meeting before the publication of the notice to include in the agenda additional matters which they propose.

51. Article 397(4) of the Draft should be omitted since it states the obvious.
52. In Article 403(2) of the Code and the Draft the term “bureau of the meeting” should be defined. We propose the following definition to be inserted as sub-Article 3 of the same Article.

3. “Bureau” means the chairperson of the general meeting, the tellers and the secretary.

3. The purpose of defining the term “bureau” is to avoid the confusion arising during the authentication of amendments to the memorandum and articles of association of companies. As the minutes of meetings are required to be signed only by members of the bureau, a notary public cannot require the physical appearance of all shareholders to sign the minutes. Yet, members of the bureau should be made responsible for any addition or omission from the minutes or the presence of shareholders constituting the quorum.

53. We recommend the examination of the additional items in Article 406(1) (a) and (b) of the Draft, i.e. “inventory” and “consolidated account”, respectively, by those members of the committee who are experts in accounting, auditing and management. But there are also other additions which do not seem to have justification for their inclusion. In Article 406 (1) (f) some documents are mentioned but their purpose and practicability are not clear. Article 406 (1) (g) is already taken care of in Articles 359 and 360. Article 406 (1) (h) implies that the nomination of directors takes place days before the election which is not the case in practice at least officially. Further, who has the power to prepare the list of candidates? Article 406 (1) (i) and (j) do not seem to serve any purpose.

54. Article 418 (2) of the Draft incorporates judicial extension of the time of calling of ordinary general meetings. We cannot figure out why a shareholder or the directors or any other interested party go to court to request the extension of the time of calling of the meeting, while the essential objective is to call ordinary general meetings. Therefore the words “…or by the decision of the court” at the end of Article 418(2) of the Draft should be deleted.

55. There is no acceptable reason justifying the changes introduced in Article 463 (1) and (4) of the Draft. Hence the original Article of the Code should be retained as it is.

56. Article 470 carries new additions to what is stated by the Code under sub-Articles 4 and 5. As they relate to preferred right of subscription of treasury shares that are held by the Company itself, we think the second sentence in sub-Article 4 and the whole of sub-Article 5 are redundant.

57. Even if the alteration made to Article 475 of the Draft is one of form rather than substance, we question its compatibility with Article 336 which contemplates that one of the preferences to be conferred on preferred shareholders is priority in future issue of shares. It is therefore suggested that a phrase like “…Without prejudice to Article 336…” should be included so as to avoid the conflict between the two Articles.

58. The amendment made to Article 481(1) of the Draft is not correct. The spirit of the provision is the payment of current liquid debt with new cash shares, which is altered in the Draft. It is therefore necessary to retain the original text of the Code.

59. It is better to leave Article 492 as it is, rather than making it sub-Article (2) of Article 484. It is also agreed to retain the Code’s expression of Article 484 as it is.

60. Five important grounds enumerated under Article 495 (1) of the Code (i.e. a - e.) have been omitted in the draft for no apparent reason. However, these grounds have been spelt out under Article 217 of the Code by way of general provisions that apply to all forms of business organizations. Under Article 495-A of the Draft a new provision is introduced which requires the publication of notice of dissolution of a company. The benefit of such publication is that creditors will be aware of the
status of the debtor company and third parties will take notice and not deal with the company. Whether the shift in policy which dispensed with publication upon formation, could be set aside in the case of dissolution, needs further scrutiny.

61. Another new provision is inserted as Article 495-B in the Draft. Its sub-Article (1) (a) is wrong because the effects of dissolution are provided in different provisions of the chapter. As the Article does not serve any purpose we think it should be deleted.

62. In Article 496 (2) of the Draft, creditors are allowed to apply for the appointment of liquidators. Creditors should also have the right to apply for removal of liquidators under sub-Article (3) of the same Article when the need arises. It is obvious that creditors like shareholders have an interest at stake in the winding up of a company. It is, therefore, necessary to allow creditors to apply to the court if their interest so requires.

63. A new Article is introduced as Article 496-A in the Draft. It is important to provide for the resignation of liquidators but the body to which the notice of resignation is to be given needs to be reconsidered. Particularly, if the appointing body is the general meeting, then, it is not possible to serve the notice to it. It is therefore recommended that the notice in such a case be given to the Board of Directors. Amendment should be made to this effect on the Article. Further the resignation should not be done abruptly and therefore, the exercise of the right must be made subject to the discharge of duties without compromising the integrity of the asset and the interests of stakeholders. It is thus recommended that the clause “Without prejudice to the provisions of Article 499 (1)” be inserted in this Article.

64. Another new Article in this connection is Article 496-B of the Draft on the qualification of liquidators. It is important to empower the Ministry of Trade and Industry to issue directives concerning the qualification and disqualification of liquidators.

65. It is essential that the issue of remuneration due to a liquidator be provided for. Therefore, Article 496-C of the Draft should read as follows:

*The remuneration of the liquidator shall be fixed by the organ appointing him.*

66. Article 506 of the Draft talks about the fate of the uncollected amount. Assuming that what is known as “escrow account” will be introduced in Title III of Book IV of the Revised Code, such amount should be deposited in one of the commercial banks in the name of the shareholders.

2.7 Title VII: Private Limited Companies

67. By way of general observation, concern was voiced over the adequacy of the provisions of the Code and those of the Draft to regulate the current practice in the incorporation and conduct of private limited companies. Questions like: How different should a private limited company be from that of a share company in terms of corporate governance, capital base, transferability of shares, membership structure, maintenance of accounts and audit were raised. In view of the rate of growth and increasing importance of these companies in the economic life of the nation, it was held that further study on revision of the Code’s provisions is a must before any meaningful undertaking to come up with an amended law is to be embarked upon.

68. Article 510 of the Draft stipulates that there can be a single-member private limited company. But no additional rules are provided as to how the concept can be integrated in this part of the Code. Based on a study on the ramifications and implications of introducing such a company, additional rules need to be incorporated.
69. Article 511 provides for the rule applicable to reduction of number of members below the legal minimum. Similar rule should be included concerning the number of members exceeding the legal maximum (for example because of the joining of heirs of a deceased member).

70. Regarding the amount of capital, the points raised above are relevant here also. The need to increase the minimum capital cannot be overstated.

71. Article 516 of the Draft should be made to be in congruence with the requirement of publicity under the rules of the Code applicable to all business organizations. By the application of this provision, a private limited company acquires legal personality simply by the authenticity of its memorandum and Articles of association. This is contrary to Article 223 of the Code. For this reason and for the reason that the formation of a private limited company has to be further regulated in line with the requirements set for the formation of a share company, Article 516, should be redrafted as follows:

**Article 516 Formation**

1. The memorandum of association setting up a private limited company and the articles of association, if any, shall be signed by all the members and be authenticated.

   A private limited company shall not be formed until the capital is fully paid up and all cash contributions are deposited in the name and to the account of the company in a bank.

   Sums deposited under sub-Art. (2) shall not be paid to the legal representative of the company until registration in the commercial register has been effected.

   When registration is not effected within one year from deposit in a bank, the sum shall be repaid to the respective depositors. Property contributed to the company shall be returned to the person who made the contribution.

The new provisions proposed above are intended to ensure that a private limited company has the capital it claims to have. Further it eliminates the disputes among shareholders on the payment of capital long after the formation of the company, particularly at the time when the company suffers from lack of capital. It is also important to protect the interests of creditors who look to the capital of the company as their general security.

72. Neither the Code nor the Draft contemplates skill as one form of contribution. So the draft should be amended to reflect the idea that there will be contribution of skill in a private limited company.

73. The title of Chapter 3 should be “Company Governance”.

74. Article 525 stipulates plurality of managers. It has been enunciated that plurality of managers is not recommended while it is also stated that the removal of the idea should be carefully decided on the basis of further study as it is still effective in other countries, for e.g. in France. The need to do further research is urged before adopting any of the options.

75. Articles 522 and 523 should be retained as they are in the Code. Even if the titles of the Articles seem to suggest that the two provisions deal with the same subject matter, which is not the case. Article 522 is concerned with the form of transfer of shares, while Article 523 is devoted to the assignment of shares between members and outside the company.
76. We believe that private limited companies would be in a better position than they are now if their activities are audited by an external auditor and their performance monitored by a more formal general meeting of the owners.

Therefore, it is recommended that a private limited company must always have an auditor and an annual general meeting and that the existing provisions of Article 525 be deleted and replaced by new provisions reflecting this recommendation.

77. Article 527 of the Draft provides for dismissal of managers, it is also logical to provide for resignation as does Article 527-A of the Draft. But the team proposes the following improved version for the same Article.

**Article 527A - Resignation**

A manager may resign by giving prior notice to the company. A manager resigning before the expiry of the notice period or without giving notice shall be liable for the damage resulting therefrom.

The relevant provisions of the Civil Code shall apply to the manner and period of notice.

78. In sub-Article 3 of Article 530 of the Draft, the period of limitation of action should be extended, as the period of three months is very short. Moreover, the time as of when the period commences to run should be indicated. It is proposed to amend the provisions so that the company should take action within two years as of the time it knew or should have known the damage but in no case after three years as of the date of occurrence of the damage.

79. The general meeting of a private limited company is the supreme organ of that company. This organ should be able to function at least once in a year irrespective of the number of members. Thus, Article 532 should make it mandatory for any company to hold its general meeting every year. But the compulsory nature of the meeting should not be extended to the manner of holding the meeting and the modality should include information and means of communication such as telephone, video and on-line conference.

80. Sub-Article 2 of Article 532 of the Draft should be redrafted so that it can simply indicate that representation by a duly authorized third party in the meetings of a company is possible without going into the list of those who could be representatives.

81. In Article 536 (1) of the Draft we find a list of matters requiring unanimity of decision by the members. It is not reasonable to demand, for instance, the unanimous consent of all the members to borrow money. Borrowing money could be a day-to-day activity in some businesses and it is a means of financing the business in almost all types of business. So it is not a sound idea to require the approval of all the members to borrow money. It is suggested that the provisions of the same Article of the Code be retained.

82. It is not consistent with the approach suggested here to differentiate between companies with more than and those with less than twenty members. Article 537 needs to be corrected accordingly. The company should be relieved from the duty to send the documents mentioned in sub-Article 3 of Article 537 of the Draft because of the cost implication it may have on it. It suffices if those documents are available for inspection at the head office of the company. However, this right ought to be available to members at any time. Members should also have the right to have a copy of the audited financial statement of the company 15 days before the meeting.
83. In Article 538, it should be made clear that every private limited company shall have an auditor. Members of a private limited company enjoy limited liability and creditors can rely on the capital. Creditors or third parties could not know the financial position of the company unless investigation is carried out at a certain interval by an independent professional auditor. We, therefore, strongly recommend that any private limited company be required to have auditors as one of its organs. Hence, Sub-Article 1 of that Article should read as follows:

\[
\text{A company shall have an auditor.}
\]

The term of the auditor is proposed to be three years. In addition, it is suggested that the auditor may not be removed without good cause before the expiry of his term.

84. Even if the Code dedicates a chapter to dissolution of a private limited company, there are no provisions dealing with the winding-up process. Therefore we recommend that chapter 5 be entitled “Dissolution and Winding up” and that the manner as to how the provisions of Articles 496-509 of the Code could be made applicable to the winding up of private limited companies be studied.

2.8 Title VIII: Conversion and Amalgamation

85. The concept of “division” of business organizations is introduced in this title of the Draft. We appreciate the need for such concept which is now missing in the Code and recommends that further study be made on the matter and that the necessary provisions be included to regulate conversion, amalgamation and division under Title VIII of Book II. The extension of the application of these provisions to public enterprises and cooperative societies should also be examined.

2.9 Title IX: Business Organizations Incorporated Abroad

86. The Draft uses the term “companies” instead of “firms”. We recommend that the term “firms” be maintained as it is in the Code, because the term “firms” is wider than “companies”.

83.

In Article 538, it should be made clear that every private limited company shall have an auditor. Members of a private limited company enjoy limited liability and creditors can rely on the capital. Creditors or third parties could not know the financial position of the company unless investigation is carried out at a certain interval by an independent professional auditor. We, therefore, strongly recommend that any private limited company be required to have auditors as one of its organs. Hence, Sub-Article 1 of that Article should read as follows:

\[
\text{A company shall have an auditor.}
\]

The term of the auditor is proposed to be three years. In addition, it is suggested that the auditor may not be removed without good cause before the expiry of his term.

84. Even if the Code dedicates a chapter to dissolution of a private limited company, there are no provisions dealing with the winding-up process. Therefore we recommend that chapter 5 be entitled “Dissolution and Winding up” and that the manner as to how the provisions of Articles 496-509 of the Code could be made applicable to the winding up of private limited companies be studied.

2.8 Title VIII: Conversion and Amalgamation

85. The concept of “division” of business organizations is introduced in this title of the Draft. We appreciate the need for such concept which is now missing in the Code and recommends that further study be made on the matter and that the necessary provisions be included to regulate conversion, amalgamation and division under Title VIII of Book II. The extension of the application of these provisions to public enterprises and cooperative societies should also be examined.

2.9 Title IX: Business Organizations Incorporated Abroad

86. The Draft uses the term “companies” instead of “firms”. We recommend that the term “firms” be maintained as it is in the Code, because the term “firms” is wider than “companies”.
PART III


There are very few changes in Draft Revised Version on Book Three of the Commercial Code of Ethiopia (hereafter “the Code”) prepared by the Ministry of Justice (MoJ). Those very few changes are found in the Code's Book on the Law of Carriage and Insurance. Mostly, the changes introduced in the draft relate to editorial matters and wording of the existing provisions and some additions thereto by way of sub-Articles here and there.

3.1 Carriage Law

1. The Law on Carriage in the Code is made up of two titles; one on Carriage by Land and the other on Carriage by Air. In a very much similar fashion, both titles begin with chapters on General Provisions and then proceed to chapters on Transport Titles and on Rights and Duties of parties to a Contract of Carriage and the regulation of the consequences thereof. Where the two titles differ is in their last part. The most important difference between the title on Land Transport and the one on Air Transport is that the latter covers consequences arising from multiple transports, i.e., the combined air and/or surface carriage in which air transport is involved. The report on Carriage Law, therefore, is not going to be as detailed as the one on Insurance Law since, as pointed out above, this part of the Code has not seen much of a change although, for reasons not known to us, seven Articles have been deleted in the draft.

As far as the law on Carriage is concerned, any attempt at revision or amendment of the law, should take into account current realities at global level, which is not the case in the Draft. In view of the changes that have taken place at the international plane over the last few decades in all areas of transport law, i.e., land, air, marine and multimodal, a new paradigm shift in our approach to the law governing this area of our economic life, that needs to address local, federal and transport operations, is on the order of the day.

On air transport, for example, the Warsaw Convention, that was taken as the basis for the provisions of the Code has, from to time to time, been supplemented or amended by subsequent protocols to which Ethiopia is not yet a party. The Warsaw Convention and the amendments thereto have now been replaced in full by the Montreal Convention of 1999, which is rather a consolidation of the many international agreements on air transport. We are of the opinion that, sooner or later, the country will face circumstances that will certainly draw it towards these international schemes and rules of transport. It thus becomes imperative that any serious exercise at revising the law should stem from this reality. We do not think that the present work, evidenced by mere deletion of few articles, has reckoned this fact. The suggestion, therefore, is that these modern developments be thoroughly studied before embarking on revision work.
Furthermore, the part dealing with land transport is also an area that deserves further study before an attempt at revising it is made. The study must be such that it particularly takes into account the realities on the ground, regulatory concerns and interests of all stakeholders.

### 3.2 Insurance Law

2. It is our firm belief that the insurance law contained in Title III of Book III of the Code is a law that is still very much suitable to the economic system that this nation is geared to achieve. All the major principles of an insurance law that operates within such an economic system are already conveniently placed in our Code. In this regard mention should also be made of the fact that the law in the Code is after all enacted at a time when the nation was following a similar free-market based economic system. From experience we hold that the insurance section does not need a major revision, or the kind that brings a major shift in approach. Therefore it is perhaps better if the law is maintained as it is now, and that only some amendments introduced to it. Consequently, the report will focus on those specific areas that need to be revised and amended.

### Comments on the General Classification of the Title

3. We are in favour of maintaining the old classification of the chapters of this title in the Code, since it logically starts with issues of a general nature and then goes on to deal with specific types of insurance. Moreover, it has not so far been proven to bring any problem. The classification incorporated in the insurance law is based on the nature of the sum insured that is to be paid out to the insured. Thus, there are two types of insurance, namely insurance of objects and of liability, on the one hand, and life insurance and accident insurance on the other. The first category is regulated in chapter three of the title on insurance law, and the sum-insured payable is an amount destined to indemnify loss; chapter four regulates the second category in which the sum-insured payable is not destined to indemnify.

4. The indemnity insurance types are known in the parlance of the Code as “insurance against damages” while non-indemnity types are known as “insurance of persons”. Even though using these terminologies does not have any substantive problem in terms of defining the nature of the insurance types falling under them, we are however of the opinion that these two chapters, in the interest of clearer use of terms, utilize terms which accurately describe their true nature. Thus, it is recommended that chapter three be entitled “indemnity insurance” and Chapter four “non-indemnity insurance”. Having suggested this slight terminological change related to the broad classification, we also recommend that the classification at the next level be maintained; i.e., the sub-classification into objects and liability insurance of indemnity insurance, and, into life and accident insurance of non-indemnity insurance.

5. Two chapters precede the regulation of these two broad types of insurance. The first, which is Chapter one, deals with general provisions related to defining the scope of application of the whole title in the Code on insurance law, and the second one, which is chapter two and which is further made up of two sub-sections, provides for rules of general nature that are applicable to both indemnity and non-indemnity types of insurance policies. Except for the amendments we are going to recommend in each of the chapters and sections, we are also in favour of maintaining this approach to drafting the insurance law. The new MoJ draft has maintained the old classification and approach.

### Chapter 1: General Provisions

6. The problem in the old as well as the new MoJ draft relates to how we should understand and define insurance relationship itself. This concerns the very first chapter of the title on insurance,
which is made up of Articles 654 up to 656. The overall purpose of this part is to define the area of insurance law regulation. Of what nature is the relationship governed under this part of the Code? This report will first assess whether this chapter has succeeded in doing just that. Indeed, the old Article 654, which renders a definition of insurance, and the remaining articles in this chapter are retained in the MoJ draft, albeit an inconspicuous change in sub-Article 3 of Article 654. (This change will be dealt with after the broader issue of the definition of insurance.)

7. It is well known among scholars and practitioners of Ethiopian insurance law that the definition, as it appears now in Article 654, is not as good and comprehensive as one might wish it to be. Nonetheless, the MoJ draft has chosen to retain it as it is. Definition of what kind of activity falls under the umbrella term “insurance” is indeed a difficult task, as has been reckoned by eminent writers as well. One of the reasons behind the need to furnish a definition is to guard off some insurance-appearing activities which must however be discouraged, such as betting and wagering, since they have the potential to threaten the very delicate balance on which insurance as an economic activity rests. But, the requirement that an insurance contract be based on the existence of insurable interest, which, as we shall explain later, should be enhanced in our law through some additional provisions, is designed to tackle such a kind of eventuality. On the other hand, having a clearly delineated boundary of activities that can be carried out as insurance activities has a public purpose behind it. Needless to say, insurance is business activity carried out by closely regulated financial institutions, since it has the potential to pool and hold a huge amount of the nation's money. The government is therefore keen on, inter alia, identifying the kind of activities that would count as insurance activities and also those that would not count as such. Finally, it is also indispensable to resolve the possible conflict between the insurance law regime in the Code with some other competing areas of the law, such as for instance the Civil Code section dealing with suretyship, when the question of applicable law arises.

8. At present, the pertinent rules in Ethiopia resolving these legal questions appear to be Articles 654 and 656 of the Code and Articles 2 (4) and 2 (12) of Proclamation No. 86/1994, the law on supervision of insurance business. Article 654(1) defines insurance in so broad a manner that it could hardly be said to have achieved any solution in terms of tackling the fears that necessitated a definition in the first place. On top of possibly including wagering contracts in its ambit, this definition does not in any way exclude an association of individuals such as idir in which disbursements would be made in the event of the occurrence of some specified risks to members who have paid their periodic dues. Furthermore, it also leaves open a wide room to include within its ambit a suretyship that has been made for consideration. Indeed, one might validly argue that sub-Articles 2 and 3 of the same Article have conveniently dealt with the problem associated with wagering since they have clearly provided that the contract must specify the sum insured to be payable only when the specified risk has caused harm either to property, life or body of a person or when the risk involved is being civilly liable to another. Furthermore, Article 656 has provided that the possibility of rendering insurance as a business, possibly recognizing the sensitiveness of the nature of the business, is to be regulated by another law, presumably a public law, thus hinting that the likes of idir may be excluded from the domain of insurance. Closely viewed consequently, the so-called definitional provision in Article 654 is devoid of any practically useful definitional ingredient that the reader who wants to find out how insurance is defined under Ethiopian law would not be told the whole of the essential truth about insurance by Article 654. One must therefore read some more provisions in order to be able to define insurance under Ethiopian law. Accordingly, one may be left wondering if there is anything practical this Article has achieved.

9. The other point that makes the definition appear too general is because it has attempted to lump together two essentially different types of insurance policies under one definition, and this has
been done under Article 654 for no apparent practical reason, other than perhaps an academic one. These two types of insurance are indemnity and non-indemnity insurance contracts, which are founded on fundamentally different principles (except very few ones) and that consequently cannot practically be brought under one definition. In other words there seems to be no practical necessity to come up with a definition of insurance that brings both types in one definition.

10. Now, let us turn to the approach adopted by Supervision of Insurance Business Proclamation No. 85/96. The Proclamation renders a definition of the terms “class of insurance” and also the term “insurance policy”. According to Article 2(4), classes of insurance are to be determined and their meanings prescribed by the National Bank of Ethiopia. On the other hand, Article 4 (1) (d) and 6 (1) of the Proclamation make it a requirement that any company desiring to carry out insurance as a business obtain license from the Bank. Consequently, under the Proclamation insurance is an activity deemed so by the National Bank and which the Bank permits to be carried out as such. In other words, it is for the Bank to define and determine what is and what is not insurance, which we expect the Bank to do by having regard to the prevailing insurance market situations. The National Bank has not as yet issued a definition or even a listing of classes of insurance activities. This approach of listing insurance activities is not at all unusual. In Germany, for instance, the law governing the licensing of insurance business has listed down types of insurance activities. Furthermore, it must also be remarked that under the present Ethiopian law, the business can only be carried out by one particular type of business organization, namely a share company. Taking these points into account, insurance under the present Ethiopian law would acquire the following meaning: it is an activity licensed and defined by the National Bank as an insurance activity and that can only be carried out by a share company.

11. If what is insurance is what the Bank deems as insurance, then one may say that the definition of the Commercial Code term insurance may not anymore have any use other than academic. And this is probably rightly so in the face of the inherent difficulty in trying to define the term insurance. Therefore, we would perhaps be better off without a definition of insurance in the Code than with it. What the Code should rather be concerned with is that all the fundamental principles of insurance law, such as insurable interest and utmost good faith, are properly provided for in the law. But there must be in the Code a provision that reflects the scheme in the Proclamation. We suggest therefore that there be a provision in the Code that states insurance is an activity that the appropriate administrative body would deem as an insurance activity. This would in addition call for the removal of Article 2(12) from the Proclamation since it refers us back to Article 654 of the Code for the definition of insurance. If we say a definition is unnecessary, then we do not anymore require this reference. Finally, we strongly recommend that the National Bank perform its statutory duty of issuing a directive specifying the classes of insurance activities.

Chapter 2: Provisions Applicable to all forms of Insurance

12. This Chapter is made up of two sections. The first section deals with general provisions relating to the insurance document called policy, while the second section has provisions of a general nature dealing with the basic nature of the relationship between the parties that bring into existence the insurance policy or parties to the insurance contract.

Section 1

13. This section has provisions governing how the policy should look like, and some other formal issues related to the policy. Article 657 requires that the policy, as well as variations to the policy should be in writing. Furthermore, Article 659 of the Code provides that the policy shall come into force, unless otherwise expressly specified, on the day it is signed. One of the most outstandingly controversial issues related to the formality of insurance policies has been whether or not they
have to be attested by witnesses pursuant to the rule in Article 1727 (2) of the Civil Code relating to contracts in general.

14. To some people, there seems to be no doubt that the plain reading of the rules as well as the relations between the two Codes as espoused in Article 1 of the Code should suggest this conclusion, whereas, still others are of the opinion that the requirement of witnesses under Article 1727(2) of the Civil Code is expressly superseded by Article 659 of the Code.

But requiring attestation for insurance contracts is a bad idea for the following reasons:

(a) Historically this has not been required for insurance;
(b) It invites delays that might frustrate the business;
(c) Insurance is run by big and highly regulated companies, and the officially known printed forms of policies they use make witnesses unnecessary; and
(d) The possibility of using advanced technology that helps customers buy policies from machines makes witnesses wholly unnecessary.

Our suggestion in this regard is to write a provision in Article 657 that states the requirement for witnesses under the Civil Code does not apply for insurance.

15. We also have a recommendation in relation to Article 658, which is an Article that lists down the elements that must be indicated in a policy. The MoJ draft has retained the old Article 658 as it is. We however suggest that the wording under sub-Article “e” be changed to read “the sum insured” instead of “the amount of guarantee”. For one, the jurisprudence of insurance law prefers the term “sum insured”, and secondly and more importantly, the term “amount of guarantee” might possibly, but quite mistakenly, refer to indemnity. As we know, for purposes of Article 658, the term we must come up with must be a term that conveniently applies to both indemnity and non-indemnity insurance types. So, we prefer the term “sum insured”.

16. The third and the last point we would make is related to Article 660, dealing with transferable policies. Transfer of policies through assignment or endorsement is a practice common to life insurance policies. As it is well known in the insurance business as well as the law, the requirement of insurable interest might prevent the transferability of the policies of property or even liability insurance.∗ We therefore suggest that the whole provision be moved to the chapter dealing with life insurance.

Section 2

17. Some little changes have been introduced to few of the provisions found in this section. One witnesses the first change in sub-Article 3 of Article 663, which however we are not sure whether it was made intentionally or it simply is a typographical error. We think it is the latter since the sentence is not in the first place a complete one. Nonetheless, we suggest the wording in the Code be retained since it does not have any problem. Moreover, the case of faults committed by a person for whom the beneficiary is responsible is taken care of by the subsequent article. The other change, which appears to be deliberate, is found in Article 665. Sub-Article 2 of this Article is deleted for no apparent reason. One may say that it is redundant since there is an indication in 665(1) that the insurer shall pay the agreed sum.

18. Article 666 is left untouched. But we are of the opinion that this article needs to be revised. Some earlier case law had evidenced that there was some misunderstanding relating to the application of this article in property insurance contracts made for a limited period of time. When renewal of such policies through payment of the premium is possible, the problem specifically was whether

∗ By transferability, we mean through either assignment or negotiation, and takes place before the occurrence of the specified risk.
or not an insurer which had sent out to its customer a notice to pay the subsequent premium when a given insurance duration is about to lapse is entitled to the termination of the insurance contract without being obliged by the rules under sub-Articles 2 and 3 of this Article. It had quite correctly been observed that the issue was rather erroneous, and that the duration of non-life limited-period insurance is not affected by the rules of Article 666 when the agreed-upon duration lapses even though a renewal notice has been sent to the customer. Other than this issue, however, there are some more problems we observe if this Article is to be left as it is. The MoJ draft has opted to leave this part untouched. But, we think that is not correct. The principle states that when the insured defaults paying premium at the agreed time, the insurer may demand that the premium be paid but cannot terminate the contract on grounds of non-payment of the premium even when such right had been stipulated in the policy in favour of the insurer. The law in Article 666 further states that the policy shall remain in force for an entire one month after such a demand has been made. But once this period lapses, the policy would enter into a ‘suspended’ mode, during which mode sub-Article 4 states that the insurer “…may claim payment of premium or require the termination of the policy.” As can be read from sub-Article 5, the policy shall re-enter into force on the day the premium is paid. This non-life insurance law solution to the problem of non-payment of premium leaves several questions unanswered. The following are the issues we have identified and need to be addressed by the law-revision committee.

19. Can the insured pay the premium and get the policy restarted at the time the policy is in suspension mode? The answer to this question is not clear in this article. Sub-Article 4 states that the insurer “…may claim payment of the premium or require termination…”, thus making it appear that it is for the insurer to decide on the fate of the suspended policy. But, on the other hand when one pays attention to sub-Article 5, which starts with the clause “Where the premium is paid, …” it appears to suggest, albeit it being a rather weak suggestion, that it is also possible for the insured to pay the premium and cause the policy to re-enter into force. Our contention is that this point must be made clear through the revision process; but again, we must take into account policy considerations in adopting either of the alternative solutions.

20. Should the insurer bring an action praying for either claiming payment or requiring termination? It is evident that if what the insurer chooses is specific performance (which in this case is demanding payment of the premium), then it has to bring an action to that effect. But the specific question hereunder is whether or not the insurer needs to bring an action if it chooses to “require” termination. The term “require” seems to suggest that the insurer has to go to court seeking termination. But, on the other hand, one may find it a bit awkward to force an insurer to go to court even after having waited for one month to get paid the premium. The policy reason behind such a requirement, if there is any, must be revisited since it may have undue repercussion on the insurance industry.

21. The fate of the suspension mode if the insurer hasn’t chosen either of the options it can pursue. The question here is: how long would the “suspended policy” last being suspended? The suspension mode cannot indeed be thought of lasting indefinitely, since the policy will come to an end when the period of the policy lapses. The question is: how long should the suspension mode stay till the end of the duration of the policy. One may say that a period of limitation may not at all be necessary, since if the insurer wants to terminate the policy, then it can do so at any time till the end of the duration of the policy, whereas on the other hand, if the insurer opts to bring an action to demand payment, then the general period of limitation under Article 674 can operate. The policy’s duration may be a convenient time limiting the insurer’s right to terminate the policy. But, the two-year limitation under Article 674 might not be a convenient limitative period for cases in which the insurer demands the payment of the premium, since there is the possibility that the
policy might lapse way before the right to claim premium ends, which is an end result that is not compatible with the fact that the contemplated action in this regard is one of specific performance. It is illogical to think of a right to demand a specific action to subsist long after the end of the contract itself. On the other hand, one may hold the view that logic demands the right to bring action should subsist only so long as the policy exists, which is a solution not at all different from the case of the insurer’s right to terminate.

Another question in relation to the above is how much of the premium should the insurer be allowed to demand. Specifically, the question is whether or not the portion of the premium for the time the policy stays suspended shouldn’t be subtracted from the whole sum.

22. Should the insured go free without paying any premium if the policy gets terminated? Suppose the policy is terminated by the insurer, or the policy lapses. It is obvious that the insurer would have been liable to pay the sum-insured if the loss had occurred at any time before the policy was terminated or suspended even if the premium was not paid. The question is: shouldn’t the insured pay for the insurance coverage he gets? It is very clear that the insurer will have the right to claim payment of the premium if a specified risk had occurred and had to pay the sum-insured. How about if the risk and loss had not occurred? We hold the opinion that the insured must pay a proportional sum for the insurance coverage he gets even if the specified loss did not occur. We say this by taking into account the aleatory nature of insurance relationships. That is to mean any one of the parties must be losing from the venture since the relationship depends on a purely fortuitous event. Since the action the insurer would bring in this case is to demand payment of premium in respect of an already terminated contract, the general limitation rule under Article 674 can apply.

23. Finally, we should also consider those cases in which the insured has paid part of the required premium, and the question in such cases would be whether or not Article 666 would nonetheless apply.

The question is: What part of the premium must have been unpaid in order to trigger the application of Article 666? One may simply say that if any part is unpaid then the rules in Article 666 should apply. Whereas on the other hand, one may hold the view that the effects envisaged under Article 666 must apply by having regard to the insured value proportional to the premiums unpaid. Or, it may also be possible to think of some other solutions. The problem is that our law does not seem to have thought of this eventuality in the first place. And thus, we indeed need an urgent solution in this regard.

24. In response to some of the questions we posed above with regard to Article 666, here is what we suggest. We do not think the insured should have the right to pay the premium and get the policy restarted if the policy has already entered into a suspended mode. This is so because the insured had already had his chance during the one month he was notified to pay the premium, and hence fairness demands that the option must now be the insurer’s on either to accept the premium or cause the termination of the policy.

As far as the second question is concerned, it seems to be so unfair to force the insurer to go to court if what it chooses is the termination of the policy. It must be allowed to call the policy off upon giving notice to the insured. We must recall that the insurer at this juncture is a person who has waited for one month, and in line with the general principle of contract law as espoused in Articles 1774 and 1787, the party who has given default notice must be allowed to terminate the contract upon the expiry of the period of notice. What is more, the nature of the business, we argue, also dictates that we adopt such a solution. Since insurance as a business is carried out by
big firms with thousands of clients, it would indeed be burdensome to such firms if they are to be required to go to court and argue for termination of the policy. The third question is rather a complex one and may need further consideration. To recall, it addresses the issues of limitation to bring action and how this could be considered in relation to the general period of limitation under Article 674, as well as the issue of the extent of the insurer’s right to the premium. In the previous paragraphs, we had argued that the insurer should be entitled to a proportional amount of the premium that should have been paid if the insurer decides to terminate the policy, irrespective of whether or not the risk has materialized. We had also mentioned that general period of limitation under Article 674 will suitably apply limiting the insurer’s right to bring the action. But, we would also like to note a certain problem in the understanding of the principal rule in this Article; i.e., sub-Article 1. The problem relates to understanding the kinds of claims encompassed by the phrase “any claim arising out of a contract of insurance…” found in sub-Article 1. Some people argue that the limitation in this Article is only when the insured brings an action to claim the sum-insured, and also that it does not apply when the insurer brings an action claiming premiums. We think this is wrong; and thus our stand in this regard is that the term ‘claims’ must be understood as possibly coming from any of the two sides.

25. The other area that falls under this section is the duty of utmost good faith. It is to be known that insurance contracts, contradistinguished from other contracts, require utmost good faith as an ad validitatem element. The purpose of Articles 668 and 669 is to regulate the issue of the duty of utmost good faith. The new MoJ draft has by and large retained the rules in these Articles. Our comment is both on the existing rules and on the newly introduced provisions.

26. One of the problems in Article 668 is related to proof. The law says that intentional non-disclosure or misrepresentation nullifies the contract, while if the non-disclosure or misrepresentation was non-intentional then the policy could be terminated or its premium increased, whichever the insurer chooses to pursue. However, the problem here is to prove whether the non-disclosure or misrepresentation was an intentional or negligent one. Since this is an allegation we expect to come from the insurer, the general rules of evidence would bind the insurer to prove the state of mind of the insured at the time of conclusion of the policy, which is probably virtually impossible for the insurer to do. This in our opinion has been creating an ample chance for the deceitful party to get away with his/her deceitful practices for the simple reason that the insurer fails to prove that the act was an intentional one, thereby eroding the purposes behind this requirement of strictest good faith. Our suggestion in this regard is to throw the burden on the insured party to prove that he/she did the non-disclosure or misrepresentation innocently, and presume the act to have been carried out intentionally if the insured fails to prove this.

27. The other point we would like to raise relates to the distribution of this duty. As one can observe, the duty of strict good faith is, under Ethiopian law, imposed on the insured both upon the conclusion of the contract (Article 668) and even then after (Article 669). The insurer, as can plainly be read from the way the law has been written, is not burdened with this duty. The reason is too obvious to need an explanation; but we feel that this is not as good a reason to impose as it might appear at first glance. There might be another aspect of the relationship in which insurers might unduly jeopardize the interest of their customers. One such aspect, drawing from our experience in this field, is related to the time when the sum insured must be paid due to the occurrence of the loss. It is not uncommon to come across customers who suffer a lot due to insurance companies’ undue tendencies not to get ready to pay the sum insured even to the party who is rightfully entitled. We observe several companies improperly rejecting or delaying payment, to such an extent that one can rightly speak of such tendencies as instances of lack of good faith on the part of these insurance companies. Some countries that faced similar problems provided in their laws that the insurer is as much duty bound by the requirements of strict good faith at the time of paying the
sum insured to the party which is rightly entitled. Proof of any improper tendency to delay, or even reject payment, exposes the insurer to the threat of an action for damages. We table this issue for further consideration.

28. The rules in the Commercial law as well as the new MoJ draft have in them a distinction made between deliberate and non-deliberate acts of either misrepresentation (false statement) or non-disclosure (concealment). But, the question we would like to pose is whether or not there could be a case of non-deliberate concealment. We think not. In order to avoid such questions, and in the interest of care we must take in the choice of our terms, we suggest that Article 668 rather use a generic phrase that refers to both cases of concealment and misrepresentation. The phrase we suggest is, flowing from the fact that the provision in Article 668 is a sequel to Article 667, is the following: “failure to discharge the duty under Article 667...”

29. Our final comment on the existing law on strict duty of good faith relates to the standard the law seems to have adopted in gauging whether or not the fact concealed or misrepresented is a material fact. The MoJ draft has simply retained the same standard that is adopted in the Code, which appears to be somewhat subjective. They both state that a fact concealed or misrepresented would be held to be material if it causes “…the insurer to wrongly appreciate the risks to be insured that, had he been aware of the truth, the insurer would not have entered into the policy or would have imposed terms less favorable to the insured.” The language used in this sentence unambiguously appears to tell us that the person whose appreciation of the situation we must employ is that of the particular insurer who was deceived into entering into the policy. But, we hold that this is wrong. The insurer that the judge must take into account in measuring whether or not a certain fact is material must as far as possible be an objectively verifiable insurer. The term “prudent insurer”, we think, is good enough to objectify the insurer.

30. The new MoJ draft has introduced new rules into Article 668. The first one is the last sentence in sub-Article 1 while the second one is the newly inserted sub-Article 2. We support the writing of the new sub-Article 2 since it will serve the purpose of clarifying things; nonetheless, it must be understood that it is not an entirely new rule. On the other hand, the rule in the last sentence of sub-Article 1 is entirely new and we failed to understand the merits of this new rule. The still unanswered question is the reason why the premiums paid by the dishonest purchaser of a life insurance should be refunded while they will not be refunded to dishonest buyers of other types of policies.

The other related issue is the duration the duty of good faith must subsist. Our law has made the duty of strict good faith a continuous duty; a duty the insured must continue to fulfill so long as the policy exists. Article 669 provides the details of how this duty should be discharged and what the effect of non-discharge would be. Our contention in this regard is that the merits of this rule must be reviewed again. We therefore ask: Is it not an unnecessary burden on the insured person to require him/her to at all time follow up on the interest he/she has insured and inform any change in its status that might increase the risk? Is it something that we must require the insured to carry out? Experience tells us that insurance companies in our country have not been adhering to this rule, and had not developed mechanisms that help the carrying out of this duty. What we found more practical is to leave this issue to the agreement of the parties themselves; and hence, to delete it from the law.

31. The next Article into which some changes have been introduced is Article 670. The insured person is generally bound to notify the insurer the occurrence of a risk specified in the policy. The period of time specified by law to discharge this obligation is only five days both in the Code and the

* There is indeed a typographical error in sub-Article 1 of the MoJ draft. There seems to be no doubt that the Code’s sub-Article 1 is intended to be retained as it in the MoJ’s draft.
MoJ draft. The question that has always perplexed insurance lawyers has however been what the consequence will be if the insured failed to discharge this obligation. The new MoJ draft has taken up this issue and stated that the purchaser of a non-life insurance policy will lose his/her rights in the policy in toto if he/she fails to inform the insurer of the occurrence of the loss within five days. Nevertheless, the question we all must ponder on is whether or not this solution is a little bit harsh on the insured. Is it really fair to deny the insured the benefits for the simple reason that he/she failed to inform the insurer within mere five days? Our suggestion in this regard is that the insured must be made liable for the damages that ensue from failing to discharge this obligation, instead of forfeiture of the right. Moreover, we also suggest that the language adopted in the MoJ draft be revisited. Sub-Article 1 of the MoJ draft appears to have made knowledge of the insured irrelevant, while indeed it is highly relevant. Thus, the insured must only be expected to discharge this duty if he himself knew of the occurrence, and the period must also be calculated from the day he knew of the occurrence.

Section 3

32. This is a new section introduced by the MoJ draft. The one in the Code only has one Article on “limitation” whereas the Draft includes Articles 671 to 674 of the Code that provide rules on bankruptcy, on death of beneficiary and on limitation of actions while inadvertently, it seems, omitting the provision of Article 673 on assignment of object insured. We therefore propose an amendment of the newly adopted arrangement. Of those matters covered in these Articles the one addressed by Article 673 is, properly speaking, a matter that can arise in relation to property insurance only. Therefore, even though it might be possible to maintain the newly introduced arrangement we suggest that it is better to take Article 673 to the property insurance section of the law (i.e., Section 1 of Chapter 3).

33. Articles 671-673 of the Code are also noted to have left some very important points unregulated. The present law revision program is a convenient platform to fill the gaps found in these provisions. What is noteworthy about these provisions is that they all provide for rules on how the insured could be substituted by another interested party whenever there is an occurrence or an event that prevents the insured from becoming the beneficiary of the insurance. These events are either the bankruptcy or death of the insured and also the transfer of the object insured to another person. The rules in these Articles have provided for a mechanism of substitution of another interested party and also about maintenance of insurance between the insurer and the new beneficiary. Nonetheless, they have left some key questions unanswered.

34. The first and the most important of these is how the insurer could come to know of the occurrence of the event. Unless there are some means through which the insurer may come to know of the occurrence of such events is provided, then it would nearly be impossible for the insurer to exercise its right of terminating the policy after the three-month period provided in these Articles. It won’t at all be difficult to picture how the problem would be compounded to the extent of possibly being totally unmanageable, if we recall that insurance is carried out as a business by large companies with thousands of clients. We suggest that there ought to be a rule which provides that the soon-to-be-substituted beneficiary should notify the insurer about the occurrence of the event under the pain of losing the benefit. And we also need a period of time during which this duty must be exercised. We suggest that this period should be just few days after this soon-to-be substituted party knew of the occurrence of the event that necessitates his substitution. It is only after these considerations have been met that we can think of another period of time to allow the concerned parties, namely the insurer and the newly substituted party, to ponder on whether or not they would prefer to continue the relationship. The principle is that none of the parties must be forced to stay bound to another which they do not know, or which they did not choose. We should recall that insurance is an extremely personal business in that either party must justifiably be allowed to choose the other. In line with this thinking, we also feel that the three-month grace
period provided for in the law to allow both parties to terminate the contract is rather too long. We suggest that this be reduced to just one month calculated from the day of the occurrence that necessitated the substitution.

35. The rules in Articles 671 up to 673 have also left one other question unanswered. What would be the fate of the unused premiums if the parties decide to terminate the contract? We suggest that there be a provision that obliges the insurer to return unused premiums.

36. The other area into which some change has been introduced is the rule of limitation of actions. The change consists of two newly added sub-Articles and the deletion of one sub-Article in the Code. Even though we are not clear as to what the new sub-Article 3 has added to what is already provided in sub-Article 1, we are however of the opinion that it may be maintained for purposes of enhancing the understanding of the operation of the rule in sub-Article 1 for cases of liability insurance. However, we failed to fully grasp the new rule in sub-Article 4 since, on the one hand, it is incomplete, and, on the other, we are not provided with the rationale for the deviation from the general rule for cases of life insurance. Furthermore, we are not so clear as to why sub-Article 3 of the Code is deleted in the new draft. We are thus of the opinion that the additions in this Article be further investigated.

Chapter 3: Insurance against Damages

37. This chapter is made up of two sections; namely insurance of objects and insurance of liability for damages. The MoJ draft has coined the first section as “property insurance”, rightly so in our opinion. In addition to this change, we also suggest that the whole chapter be renamed as “indemnity insurance”. We are, however, of the opinion that we need to have one more section generally introducing the two types of indemnity insurance. This section needs to address the issue of insurable interest. The law must clearly provide that a person desirous of buying any of these types of insurance must be a person having an insurable interest. Such a provision is important in order to caution that the requirement of insurable interest works in both types of insurance. Furthermore, it is also advisable if the law was to provide the effect of lack of insurable interest. In many countries’ insurance laws, proof of the existence of insurable interest is so essential element of the policy that lack of it normally leads towards the nullity of the contract. Purchase of a policy by a person who lacks a legal interest in the thing or interest insured is perilous to the healthy maintenance of the insurance system. We should perhaps provide a similar solution for this problem. Together with this, the other area of query is the fate of the premiums paid in virtue of a policy without an insurable interest. Should the premiums be retained by the insurer or paid back to the insured? We will turn to this issue later. If the scheme suggested above is to be adopted, then we would not anymore need Article 675 as the first Article of what we suggest to be the second section, i.e., a section on property insurance. This is so because Article 675 provides for insurable interest, which should be undertaken by what we have suggested above to be the introductory section of chapter three. Consequently, according to our recommendation, the second section (which in the Code is now section 1) could begin with Article 676.

38. Apart from Article 677 into which a new sub-Article is introduced, there is not much of a change introduced in the rest of the Articles ranging from Articles 676 to 680, except some minor changes. We have observed that the term “object” has been replaced by the term “property” which we fully support, and we have also observed that “shall not” has been replaced by “may not”, which, in our opinion, does not bring any substantive change. The new sub-Article introduced in Article 677 makes a good sense even though it has not been written quite correctly. If the property insured is lost to an unspecified risk, then the policy need not exist anymore. But, the question, which the Code did not have an answer to, and to which the MoJ draft attempts to give an answer, is whether or not part of the premium paid by the insured proportional to the remaining period (i.e., the
period that would have left had the policy remained in force) should be reimbursed to the insured. The new sub-Article 2 of 677 in the MoJ draft seems to provide so, even though the rule has not been clearly written.

39. We also observe a slight change in the wording of sub-Article 3 of Article 680, which change evidently is one of phraseology than anything else. But it appears that the newly rephrased rule is much better than the one in the Code.

The next Article in line is Article 681, which deals with the issue of cumulative insurance. The MoJ draft has introduced a new sub-Article binding the insured to inform all the insurers, from whom he/she bought insurance in respect of the same property, about the cumulative insurance. We do support the import of this new rule since each insurer is finally liable to pay part of the compensation proportional to the sum insured by it and there is practically very little way the insurer would know about the cumulative insurance unless notified by the insured. However, the Draft still remains unclear as to the legal effect of failure to notify.

40. In relation to Article 681, the group does also have two further points of suggestion. The first one relates to the use of the term “good faith” in sub-Article 2. It is only fraud on the part of the insured that may render the insurance policies defective. It must be proven that the insured sought to gain more than indemnity through the loss of the object. However, it should not be understood as a requirement that the insured should be in good faith at the time of concluding the cumulative policies. Otherwise, we fear the term good faith might appear to denote nothing more than a nebulous concept. It is plainly clear that all that the law would be interested in is that the insured did not seek to gain an undue advantage. We thus propose that the phrase in sub-Article 2 “where the insured is in good faith...” be changed in to “where the insured is not proven to have committed fraud...”

41. The second area of query is related to the rights the innocent insurer may have against the other insurers if this insurer had paid out the whole sum to the insured. As it appears in the Code as well as the draft, such an insurer does not have this right. But, our contention is: shouldn't this insurer be allowed to make a claim against the other insurers for the sum it paid in excess? We think we must seriously consider this possibility. One may argue that such a scenario will not anymore occur since the new draft has incorporated a rule that the insured is now made duty-bound to inform all of his insurers about the cumulative insurance. But the draft law has not provided any solution in case the insured fails to do this. A possible solution is forfeiture of the rights in the policy, which we reckon, will be a rather harsh outcome, particularly in the face of the fact that there may be good faith purchasers of the policies. On the other hand, it will perhaps prove difficult to come up with any other solution for this problem. So, perhaps it is better to leave out this requirement introduced in sub-Article 3 of the new draft.

42. The next Article in which we observe an amendment is Article 682. The MoJ draft has introduced an additional sub-Article. But, the question we would like to ask is whether or not such a provision is in the first place necessary in the face of the requirement of insurable interest. A person who has already lost his property at the time of purchasing a policy is one who, in the eyes of insurance law, does not anymore have an insurable interest in the property. Consequently, it could be argued that such a purchaser has not purchased a valid policy (if our argument in the previous pages relating to the effect of lack of insurable interest is accepted.) It is therefore plausible to argue that if the Code is to have a general provision demanding the existence of insurable interest in indemnity insurance types, which is what we have suggested, then the first sentence of sub-Article 1 is simply redundant. The second sentence in this Article further provides the premiums paid in virtue of such a policy to be refunded to the insured. This stance of the law to refund premiums in respect of policies concluded without insurable interest is a very interesting one to note since it
gives us a clue to the question we raised in the previous pages relating to the issue. However, quite deservingly, the party who in bad faith had contributed towards the creation of such a policy is made to pay damages to the other party in a new sub-Article 2 of the MoJ draft. We fully support this conclusion since it conveniently balances the interests at stake in insurance relationships. On the one hand, it no doubt punishes the insured that, with the view to unduly gain an advantage and in a manner that could be regarded as pure wagering, set out to buy a policy without any insurable interest. On the other, it entitles the insured, who innocently bought a policy without however having an interest to the reimbursement of the premiums he had paid. But, our contention is that this should be the general solution that should be applied to all cases of insurable-interest-lacking policies; and not just to the purely redundant case foreseen in the first sentence of Article 682(1). Accordingly, we suggest the rule in the second sentence of Article 682 (1) and the whole of Article 682 (2) to be pulled up to their proper place in Article 675 (recall what was suggested to what Article 675 should look like) since that is the Article suggested to address the issue of insurable interest as applied to all indemnity insurance policies.

43. The next Article, Article 683, deals with the issue of subrogation. The new MoJ draft has fully retained the rules in the Code, but has further added a sub-Article 4. Indeed, one may note a change of the term “beneficiary” in the Code into the term “insured” in the draft, which is not that much of a substantive difference. Our attention rather went to the rule under sub-Article 3 of both the Code and the draft. Subrogation, this rule states, will not work if the tortfeasor was either an ascendant, descendant, agent, employee or a person living with the insured unless such persons have acted maliciously. The question here is whether or not the group of persons freed from subrogation is a bit large. The terms “agents”, “employees” and “persons living with the insured” are terms that possibly could capture lots of people. The more people are captured by these terms, the less the chances for the insurer to get its money back from the tortfeasor, unless these people caused the damage intentionally, which might be a point very difficult for the distanced insurer to prove. Not only should we burden the ultimate responsibility on the wrongdoer, but furthermore, it must also be one of our targets not to cause an undue depletion of the insurance funds. Further suggestion is that the addition of the spouse in this list must be considered. The new sub-Article added in the MoJ draft entitles the insurer to take possession of the salvaged property, which we think is a good addition. However, it is not clear to us why it had to come under the Article addressing the issue of subrogation. We think this must be an Article in its own right since salvaging the property has barely anything to do with subrogation. Moreover, it must also be written as a law in this Article that the insurer’s right to take the salvaged property arises only when the insurer has paid the sum-insured.

44. The second section in this chapter, which we suggest to be the third section in line with our earlier suggestion, deals with liability insurance. The MoJ draft has not brought any substantive change in the provisions of this section. Nonetheless, there are two important problems to be considered in this regard. The first one is related to what is provided under Article 687 dealing with direction of civil cases. One of the least noticed points about this rule is that it provides for the possibility of the insurer gaining a contractual right to “direct civil suits” whatever that means. Now therefore, we must be thinking of a right to “direct a civil suit” emanating from a contractual stipulation, which necessarily implies that had it not been for such a stipulation, it would have been impossible for the insurer to direct the suit. The question often asked is what we mean by a “right to direct a civil suit”, which we must think of as a contractual right? Some people think of some of the procedures made available in the Civil Procedure Code as instances of such a right. These are the right to intervene as provided under Article 41 and the procedure of third party defendant under Article 43 of the same Code. It must however be noted that these are rights conferred by the law, and which, therefore, need not be created by a contract. As noted above, the types of actions that
the insurer might be enabled to take by virtue of a contractual stipulation must be actions that it is not entitled to take by virtue of the law. English practice of insurance law, for instance, suggests such actions as assigning a barrister to the liking of the insurer on behalf of the insured, and other similar actions. We are of the opinion that the law clearly intended such “behind the curtain” ways of directing the suit, however much it is misunderstood in this country. The problem is not in the law however; unless we choose to make it more specifically clear by inserting examples of direction of civil suits.

45. The second area of query relates to Article 688. The idea is not to pay to the insured before he pays to the third party insured. But, the question is whether or not this idea is properly conveyed. We recommend for this issue to be further studied when work on the draft is to be finalized.

Chapter 4

46. This is the last chapter headed “Insurance of Persons”, which deals with non-indemnity types of insurance policies. This chapter has got three sections, and our remarks are on each one of them.

Section 1

47. This section has got two Articles that aim at defining the fundamental characteristics of non-indemnity insurance. The first one is that they are non-indemnity insurance policies, which is as a rule taken care of by Article 689; while the second one, deriving from the first characteristics, is that there would not be subrogation in the case of such insurance types, a rule taken care of by Article 690. The MoJ draft has however added a sub-Article under Article 690, which clearly carves out an exception to the rule under sub-Article 1, thereby making it possible for subrogation to take place in some limited cases. The cases mentioned are “…cases of contracts for the indemnification of prejudices resulting from bodily injury…”, in which case the insurer who has paid out to the beneficiary can demand reimbursement from the third party liable for the prejudices. However, such a subrogation would be possible only if the policy had stipulated so. In the face of the fact that Article 689 has rightly made it possible for the sum-insured to be freely fixed, we failed to understand the rationale behind or the policy reason necessitating this exception.

Section 2

48. Section two is about life insurance. Except very few changes, the existing Code’s scheme as well as language has been retained as it is. We will however give our opinions both on the existing Code as well as the little changes that have been introduced.

49. The first Article we look into in this regard is Article 692 (2), which entitles the sum-insured “…to those having rights from the insured person or to the beneficiary named in the policy” in the case of life policies payable in the event of the death of the insured person. The wording within the quotation, we think, may not at all be found as entirely clear as one would desire. The problem is in understanding who those persons having rights from the insured might be, and also in understanding what kind of rights the law is envisaging under this article. As anyone who has knowledge of Ethiopian insurance law may easily understand it, the sum payable in such kinds of policies goes to named beneficiaries; and, in the absence of such beneficiaries, the sum payable would fall in the estate of the deceased subscriber of the policy according to Article 705 of the Code. We suggest that Article 692 (2) be worded to clearly reflect this rule. Here follows a wording we suggest:

*The insurer who enters into insurance for the event of death undertakes to pay, on the death of the insured person a specified capital or life interest to the named beneficiary. In the absence of a named beneficiary, Article 705 of this Code shall apply.*

50. Close observers of Ethiopian insurance law have not at all been at ease with Article 693. It has got three sentences each one raising its own question. The first sentence clearly talks about a third party
buying an insurance policy for the event of death. According to the terminology adopted in our insurance law, the purchaser of a policy is referred to as the subscriber. Therefore, the third party mentioned here must necessarily be the subscriber. One may simply think of such a subscriber who makes himself a beneficiary of a policy in which somebody else's life is insured, which is a known practice in many countries even though it evidently raises the question of the existence of insurable interest. But, one may ask whether or not the wording as well allows the possibility of the subscriber buying a policy in respect of somebody else's life in which another third party will be a beneficiary. This point must be clarified through the present reform. The second sentence rules that the person whose life is insured by the subscriber must in writing consent to the purchase of insurance on his life. This person must also indicate the value of the policy. The non-fulfillment of these mandatory requirements nullifies the whole policy. What we must note is that nowhere in the whole corpus of our insurance law do we find insurable interest required for cases of non-indemnity insurance types including life insurance. One of the arguments we often hear is that the existence of insurable interest as well as the rationale behind this prerequisite is secured in Ethiopian law through the requirement that the insured consent to the purchase of the life policy on his life. The argument goes on to state that a person, generally speaking, may not allow a third party to purchase a life policy on his life unless he recognizes the existence of an interest on his life in favor of the third party. Whereas, other observers argue that such a scheme is not enough and that, in line with the overridingly important requirement of insurable interest in respect of all types of insurance, the existence of such an interest in favor of the third party must be proven to exist in spite of the fact that the person whose life is insured has consented to the purchase of the policy. Proponents of this latter argument are quick to admit that our insurance law is still inadequate in terms of lacking a clear provision to this effect. If the latter view is to be upheld, then the present reform project must incorporate a clear rule demanding the existence of insurable interest in respect of non-indemnity policies, which will end up being comparable to that of Article 675 of property insurance. If such be the solution, then policies lacking insurable interest will run the risk of nullity despite the fact that the insured person has in writing consented to the purchase of the policy. The third sentence in Article 693 requires that the spouse of the person whose life is insured by a third party must also consent to the purchase of the policy. The problem with this provision is that it has not clearly indicated as to what the consequence will be if this requirement is not met. The revised Code should have a provision to address the issue.

One of the highly controversial areas in our life insurance law is related to the case of beneficiaries, which controversy starts at how we must understand Article 695 (b). It provides that the policy must show “the name and surname of the beneficiary, if he is known.” Further, Article 701(1) provides that “an insurance policy for the event of death may be made to the benefit of specified beneficiaries.” On the other hand sub-Article 2 of the same provides that the subscriber’s spouse and children shall be deemed to be specified beneficiaries even though they are not mentioned by name in the policy. One line of interpretation of these provisions claims that the spouse and children are made beneficiaries at all times in life policies purchased by the deceased subscriber in respect of his own life. On the other hand, the other line asserts that while as a matter of rule anyone can be made a beneficiary by clearly writing his/her name in the policy, which is what is referred to as “specification” under Article 701(1), it is however possible to mention the spouse or the children through generic reference without any need to write their names. There have been relatively speaking several writings on the topic as has just been court rulings. We do not think it to be necessary to forward the arguments in support of either of these lines. But, we are of the opinion that the correct understanding, based on policy reasons as well as the plain reading of the rules, is the second line of argument. If, however, it still remains to be plagued with controversy, we think it to be proper that the controversy must once and for all be laid to rest in this reform project through clearer writing of the provisions. In this regard, we propose the following suggestion to
make things clear. Firstly, we propose that Article 695 (b) include an indication that it might be excepted by the rule in Article 701 (2). So, it can be rewritten as follows:

\[(b) \text{ The name and surname of the beneficiary, if the policy has a beneficiary, except as provided under Article 701(2).}\]

52. It is to be noted that we have changed the wording in the Code (and the draft too), which says “...the beneficiary, if he is known.” The point that makes the difference is not whether or not the beneficiary is known; but rather whether or not the policy is intended to have a beneficiary. So, if the policy is to have a beneficiary, then the name of the beneficiary must be mentioned as per Article 695 (b), unless they are the spouse and/or children of the subscriber. To make things even clearer, we also suggest that mention be made in Article 701 (1) that the specification of the beneficiary is by name. So, it could as well be rewritten as follows:

\[\text{An insurance policy for the event of death may be made to the benefit of any person specified by name in the policy as per Article 695 (b).}\]

There is however one question we need to ponder on. What policy reason might there be disallowing generic specification, as opposed to specification by name, except for the case of spouse and children? What if a person who has got only one sister mentions in the policy that the benefit goes to his sister without mentioning her by name as demanded in Articles 695 (b) and 701 (1)? Wouldn’t it be better to relax the rule a little bit and allow the generically mentioned beneficiary to take the benefit if and when he/she can prove that he/she was the only beneficiary intended to take the benefit? We need to think about cases like that.

53. The next point we look into is what has been introduced as Article 695 (e) in the draft. It is completely unnecessary or even wrong in our opinion. It is wrong as a matter of drafting technique. If the lawmaker intends to make that a rule, it could simply write in the law that it is a rule instead of binding parties to stipulate it in their contract. It is perhaps unnecessary as well since Article 697 has taken care of the issue quite in a satisfactory manner, and thus all that the insurer must verify is whether or not the pledge has been carried out in accordance with this provision.

54. The next change we see is in Article 699 of the draft, but which is a change in the wording and not in substance. We think the wording in the draft is better than in the Code.

55. There is no change at all in the rest of the Articles in this section as well as the next section (i.e., section three of the Code and the draft). However, we would like to comment on two Articles (both in the Code and the draft), which we think have some redundancy. These are Articles 703 (2) and 707. To start with the first, it appears that sub-Article 2 has provided for a rule which is already unequivocally implied in sub-article 1; and this holding, we think, is further reinforced when viewed from the perspective of a similar contract law principle found in Article 1961(1) of the Civil Code. In like manner, one may find it a bit beyond comprehension why we need Article 707 when we already have Article 706(2).

**Title Four**

56. On top of delineating a sharp line between insurance and wagering, this title makes wagering unacceptable under Ethiopian law. A claim for payment in virtue of an agreement in the nature of wagering is unenforceable. The rules in the Code have been retained as they are without any change, albeit a change of form introduced in Article 714. We think that the drafting technique employed by the Code is better than that of the Draft.
PART IV


4.1 Negotiable Instruments

4.1.1 Background

In the Background Document to the 1960 Commercial Code of Ethiopia, translated and edited by Mr. Peter Winship, it is stated that the Titles of the Ethiopian Commercial Code, hereafter “the Code”, dealing with Negotiable Instruments were primarily based on the 1930/31 Geneva Conventions on Bills of Exchange and Promissory Notes. The background document also makes it clear that efforts were made by the expert draftsperson to borrow some aspects of the Anglo-Saxon system, which was then based on the 1882 English Bills of Exchange Act.

4.1.2 Evaluation of the Application of Provisions of the Commercial Code on Negotiable Instruments in the Last 47 years

Nearly fifty years after the promulgation of the Code it may be worthwhile to ask: how far has the Code been put into application? This query cannot, promptly and automatically, be answered in a manner that the Code has been fully put into application. As has already been noted in discussions conducted on other areas of the Code provisions (like the provisions on Carriage and Bankruptcy and Schemes of Arrangements) some of the areas of the Code have not, for all practical purposes, been put into application. One such area of the Code that is not put into application to its full extent is the law on Negotiable Instruments. Although people witness that the provisions of the Code on Promissory Notes were put into application before the outbreak of the 1974 Ethiopian Revolution, in post-1974 many of us have not seen them being applied even by the mere fact of Promissory Notes being in circulation. The only provisions of the Code on Negotiable Instruments that may be said to have been in application are those governing cheques. One may still argue that very little of the provisions relating to cheques have been put into application. However, it may be at least agreed that cheques have been and still are in circulation though not very widely.

4.1.3 Comments and Recommendations

1. The MOJ has introduced negligible changes to the provisions of the Code dealing with negotiable instruments. Mr. Ponsot’s’ stand is, in a way similar, in that, he wrote that the provisions of Book IV of the Code on Negotiable Instruments remain as they are except

---

for the little changes he tried to introduce. A look at the Negotiable Instruments Section of the French Commercial Code** also reveals that the Ethiopian Code is more or less similar to theirs and that both codes are based on the 1930/31 Geneva Conventions. With this general note are made the following general recommendations.

2. It may be worthwhile to consider including a glossary of definitions, or alternatively consider including a definition Article of technical terms of art pertaining to negotiable instruments in Title I of Book IV.

3. Transferable Securities and Documents of Title to Goods are recognized as other two categories of negotiable instruments in addition to Commercial negotiable instruments. The Code extensively deals with Commercial negotiable instruments particularly with Bills of Exchange and Checks. After Article 715, it is only at few places that the Code dealt with Transferable Securities. Documents of Title to Goods are not treated by the Code except indirectly in the section that deals with Documentary Credits. It is therefore recommended that Transferable Securities and Documents of Title to Goods be accorded better treatment though not as exhaustively as bills of exchange.

4. Without prejudice to the recommendation under item (2) above, we are of the opinion that negotiable instruments are not only those that may come under the three broad categories given recognition by Article 715(2) of the Code. Now that the revision of the Code is being considered nearly fifty years after its promulgation, we feel that other instruments regarded as negotiable the world over, like CPOs and credit and debit cards, be included with sufficient number of provisions to elucidate them and govern their operation. Incidentally, Article 715 (2) of the Code hints that the mentioning of the three categories is a matter of giving particular recognition and that there are other negotiable instruments.

5. Mr. Ponsot noted that there are repetitions and redundancies in the Code and that such redundancies and repetitions be dealt with, where appropriate. We endorse his recommendation and have reproduced his notation verbatim here below:

Furthermore, we can notice that, there are some provisions of this Title which are redundant with provisions laid down elsewhere by the Code: compare, for example, Articles 325 and 720; Articles 340 and 721; Articles 341 and 723. Others are even duplications of one another: compare again Article 725 (1) & (2) and Article 748; Article 725 (3), (4) & (5) and 747; Articles 726 and 749; 728 and 753.

6. Even if this we didn't make comments and/or recommendations on many of the provisions in the MoJ draft on Negotiable Instruments, we, however, would like to bring it to the attention of the draftspersons that there would be lots of serious editorial works that deserve to be carried out. We would like to remind the draftspersons that consistency is very important in drafting legal instruments.

** The French Commercial Code used for purposes of this report is the English version (as updated in 2006) with the participation of Louis Vogel, professor at the University of Paris II and professor Francoise Perrochon, professor at the University of Montpellier.
(1) Title I: (General Provisions) Articles 715-731

7. Article 715 - Definitions

No change is introduced in to the MOJ draft.

(1) Although defining negotiable instruments is difficult, but yet very important, we doubt if the definition in sub-Article (1) of Article 715 is a good one. Thus we suggest that a better definition be adopted.

(2) It must have been by oversight that the conjunction “and” is left out from the sub-Article.

8. We recommend that Articles L-228.6 of the French Commercial Code be consulted.

Article 716 - Rights and Obligations arising out of negotiable instruments

The MoJ draft has added the word “Rights” to the title of the Article and the new title in the draft reads: “Rights and Obligations arising out of negotiable instruments.” We endorse the alteration.

When it comes to the content of the Article in the draft, there is no material alteration introduced except that the definite article “the” is inserted before the word “condition” in sub-Article (1). We feel that the addition/insertion is not necessary.

We suggest that the phrase that runs: “…the holder of the right” at the end of sub-Article (3) be altered to read as follows: “the rightful claimant of the right embodied in the instrument”.

Article 716 has the effect of compromising the swift negotiability of instruments. The cause of worry here is about the phrase that runs: “on condition that he establishes that he is a lawful possessor.” In this case holders or endorsees of cheques will have trouble in proving to drawee banks that they are rightful holders or claimants of the entitlement expressed in the instrument. It is therefore suggested that this aspect of the provision be given a serious consideration.

9. Article 717 - Defenses

The draft of the MoJ has the phrase “material changes” inserted in the sub-Article, which doesn’t exist in the Code. We agree in principle to the addition, except that the word “changes” is replaced by “alterations”. This is the term that goes consistently with the term used in Articles 816, 879 and 880 of the Code.

The newly added rather long sub-Article (2) in the draft should be deleted and may be considered to be utilized under the Articles mentioned above that deal with alterations.

As a matter of simplicity, the team recommends that sub-Article (3) of the draft be replaced by the existing sub-Article (2) of the Code. On the other hand, we would like to strongly recommend that matters relating to defence be given better consideration. Especially, since matters relating to defences based on personal relations are giving rise to serious controversies, Article 717 should be revisited. Article 28 of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes, 1988 (hereafter “UNCITRAL Convention” may give insight to the point under consideration.

Sub-Article (4) of the draft is the same with sub-Article (3) of the Code. However, we recommend that Article 28 of the UNCITRAL Convention may also be of help in respect to the points under the sub-Article.
10. Article 718 - Holder in due course

The draft of the MoJ made no change to the existing provisions of the Code. On the other hand, it is believed that "holder in due course" is an important concept in the law, literature and operations of negotiable instruments. We, therefore, feel that Article 718 should be revisited with the view to making this important concept clearer in the Code. In this respect, are of the opinion that Articles 29 and 32 of the UNCITRAL Convention may give better insight to the point under consideration.

11. Article 719 - Forms of transfer

The MoJ draft has made minor syntactic change to the content of the Article. In the Code, forms of transfer are put in the order: “… to bearer, in a specified name or to order”. The draft puts the order as follows: “… to bearer, or to order or in a specified name”. The syntactic modification, it seems, doesn't have any effect on the application of the Provisions of the Article. Content wise, we suggest that the following alternative formulations be considered for the Article.

(1) Negotiable instruments may be made payable to bearer, in the name of a specified person or to order
(2) The forms of their transfer shall be as provided by law.

12. Article 724 - Instruments to order. Transfer and establishment of right by holder

We suggest that sub-Article (1) be amended to read: "Instrument to order may be transferred by endorsement followed by delivery of the instrument to the endorsee.”

As regards the formulation of sub-Article (2) of Article 724 we recommend that Article 15(2) of the UNCITRAL Convention be considered with Article 724(2) of the Code.

13. Article 725 - Forms of endorsement

No change is introduced in the title, but few changes are introduced to the contents of the Article in the MoJ draft.

Except for the change of the word “an” to “on”, we endorse the change introduced to sub-Article (1).

We recommend the retention of the provisions of the Code, save the removal of the phrase “on a slip affixed thereto (allonge)”.

An endorsement is “specified” or “special” where the name of the endorsee is written accompanying the signature of the endorser.

Though incorporating the suggested change might make endorsement transactions a little difficult, it is however good to consider the suggestions in the light of Article 14(2) of the UNCITRAL Convention.

An endorsement not containing the name of the endorsee, or in blank, shall be valid.

We agree to retain the provision of the Code as it is.

In the case of an endorsement in sub-Article (2) above, the endorsement shall only be valid if made on the back of the instrument.

An endorsement “to bearer” shall be valid as an endorsement in blank.

The draft’s sub-Articles (4) and (5) become sub-Articles (6) (7) respectively.
14. Article 727 - Obligations of endorser
No change is introduced in the title or contents of the Article in the MoJ draft.

One cannot help wondering as to the purpose of this Article in the face of the provisions in Articles 750 and 846 of the Code. We, however, are of the opinion that it may be desirable to retain the Article despite the fact that it may look redundant. As a general provision, and in principle, Article 727 relieves an endorser from being held liable to a holder if and when the person that issued the instrument in question fails to carry out his obligations. By virtue of Article 727, an endorser shall be held liable to a holder when there is an otherwise provision of the law or there is stipulation making an endorser liable. Hence there is no harm in retaining the Article since Articles 750 and 846 may be taken as otherwise provisions of the law in the face of the general provisions of Article 727.

15. Article 728 - Endorsement for collection or by attorney
No change is introduced in the title or contents of the Article in the MoJ draft.

We suggest that the provisions of the Article be considered in the light of the provisions of Articles 21 and 26 of the UNCITRAL Convention and Article L-511-13 of the French Commercial Code. Moreover, the provisions of the Article should be broken into two considering endorsement by the endorser or by agent. We further suggest that sub-Article (2) be taken out and sub-Article (3) re-written.

16. Article 729 - Endorsement in pledge
No change is introduced in the title or contents of the Article in the MoJ draft.

As regards the contents, we suggest that Article 22 of the UNCITRAL Convention and Article L-511-13 of the French Commercial Code be consulted and the Article in the draft retained.

17. Article 730 - Assignment of instruments to order
Having noted how important the provisions of this Article are, especially for interpretation, we agree on retaining the Code’s MoJ draft provisions as they are.

18. Article 731 - Negotiable instruments damaged, destroyed, lost or stolen
No change is introduced in the title but changes have been introduced into the contents of the Article in the MoJ draft.

We would like to express our appreciation to the authors of the new draft provisions of Article 731. However, we have come up with a proposed draft of the Article. Accordingly, as one alternative, we have copied Articles 78-83 of the UNCITRAL Convention and the relevant provisions of the French Commercial Code, and Articles 256, 281 and 286 of the Civil Procedure Code as well as the idea that the entitlements embodied in an instrument cannot be transferred in separation from the instrument to be considered by the MoJ. We have also added another alternative draft as contained under Articles 78 to 83 of the UNCITRAL Convention reproduced below.

Chapter VII - Lost Instruments

Article 78

1. If an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions of paragraph 2 of this Article, the same right to payment which he would have had if he had been in possession of the instrument. The party from whom payment is claimed cannot set up as a defense against liability on the instrument the fact that the person claiming payment is not in possession of the instrument.
2. (a) The person claiming payment of a lost instrument shall state in writing the party from whom he claims payment:
   (i) The elements of the lost instrument pertaining to the requirements set forth in paragraph 1 or paragraph 2 of articles 1, 2 and 3; for this purpose the person claiming payment of the lost instrument may present to that party a copy of that instrument;
   (ii) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;
   (iii) The facts which prevent production of the instrument.

(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the court may determine whether security is called for and, if so, the nature of the security and its terms.

(d) If the security cannot be given, the court may order the party from whom payment is claimed to deposit the sum of the lost instrument, and any interest and expenses which may be claimed under Article 70 or Article 71, with the court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.

Article 79

1. A party who has paid a lost instrument and to whom the instrument is subsequently presented for payment by another person must give notice of such presentment to the person whom he paid.

2. Such notice must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

3. Failure to give notice renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in Article 70 or Article 71.

4. Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, notice must be given with reasonable diligence.

5. Notice is dispensed with when the cause of delay in giving notice continues to operate beyond thirty days after the last day on which it should have been given.

Article 80

1. A party who has paid a lost instrument in accordance with the provisions of Article 78 and who is subsequently required to, and does, pay the instrument, or who, by reason of the loss of the instrument, then loses his right to recover from any party liable to him, has the right:
(a) If security was given, to realize the security; or
(b) If an amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.

2. The person who has given security in accordance with the provisions of paragraph 2(b) of article 78 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

Article 81
For the purpose of making protest for dishonor by non-payment, a person claiming payment of a lost instrument may use a written statement that satisfies the requirements of paragraph 2(a) of article 78.

Article 82
A person receiving payment of a lost instrument in accordance with article 78 must deliver to the party paying the written statement required under paragraph 2(a) of article 78, receipted by him, and any protest and a receipted account.

Article 83
1. A party who pays a lost instrument in accordance with article 78 has the same rights which he would have had if he had been in possession of the instrument.
2. Such party may exercise his rights only if he is in possession of the receipted written statement referred to in article 82.

The following may be considered as an alternative draft.

(2) Title II: Commercial Instruments

Chapter 1 - General Provisions

19. Article 732 - Definitions
No change is introduced in the title but changes have been introduced into the contents of the Article in the MoJ draft.

(a) We agree to leave the MoJ draft as it is.
(b) The MoJ draft has left out “warehouse goods deposit certificates”. The reason why the MoJ draft left the latter instruments out may be because they don't, as such, carry unconditional order or promise to pay a sum certain in money. However, the French Commercial Code retains warehouse goods deposit certificates under the general title of “commercial papers” though by the designation: “Deposits in bonded warehouses”. Moreover the importance of warehouse deposit certificates has already been felt in Ethiopia and a Proclamation has been promulgated in 2003 and has been put into application (See Proclamation No.372/2003). We, therefore, recommend that warehouse deposit certificates be included in the list in sub-Article (2) of Article 732.

20. Article 733 - Legal capacity
The MoJ draft jumps over to Article 734 from Article 732. We endorse the approach and agree that Article 733 may be left out as matters relating to capacity are regulated in the Civil Code.
21. Article 734 - Signature

(1) No change is introduced into the contents of the sub-Article in the MoJ draft. We feel that retaining sub-Article (1) as it is would be correct.

(2) Changes have been introduced into the contents of the sub-Article in the MoJ draft. The changes, however, do not seem to clarify things, though they may have been made with that intention. We, therefore, suggest that the following be considered for sub-Article (2):

Signature may be apposed by simply writing one's own name by hand, by any other handwritten mark, a thumb mark, electronically or by a mechanical process such as a stamp.

We further suggest that Article 5(k) of the UNCITRAL Convention be also consulted.

Chapter 2 - Bills of Exchange

Section 1 - Establishment and form of bills of exchange

We propose “Creation and form of bills of exchange” as title of the section, following the French Commercial Code.

22. Articles 735 and 736

No change is introduced in the title or contents of the Article in the MoJ draft. We however recommend that place of drawing and place of payment be included in the formality requirements of Articles 735 and 736.

23. Article 737 - Special cases

No change is introduced in the title but style change has been introduced into the contents of the Article in the MoJ draft. We are of the opinion that sub-Articles (a) and (b) are retained but sub-Article (c) amended to read as follows, following the third paragraph of Article L-511-2 of the French Commercial Code:

They may be drawn on behalf of a third party.

We further recommend that Article 738 be done away with following the style of the fourth paragraph of Article L-511-2 of the French Commercial Code by adding sub-Article (d) reading:

They may be payable at the domicile of a third party, either in the locality where the drawee has his domicile or in another locality to Article 737.

Subsequently Article 738 will be deleted.

24. Article 739 - Stipulation as to interest

No change is introduced in the title or contents of the Article in the MoJ draft.

Sub-Articles (1) and (2) of the MoJ draft may be retained. We recommend that sub-Article (3) be amended to read as follows: “where a bill of exchange states that the sum is to be paid with interest, without specifying the date from which interest is to run, interest shall run from the date written on the face of the bill.”

However we recommend further exploration before the proposed amendment is incorporated.

25. Article 740 - Discrepancy in the sum payable

No change is introduced in the title or contents of the Article in the MoJ draft.
We recommend that Sub-Articles 1-3 of Article 8 of the UNCITRAL Convention be considered as contents of Article 740 *mutatis mutandis* and the provisions of the Article be seen together with that of Article 777.

26. **Article 742 - Signature without power to act**

   No change is introduced in the title but changes have been introduced into the contents of the Article in the MoJ draft. Sub-Article (1) of the draft is the same with the content of the existing Commercial Code's Article 742. Sub-Articles (2) and (3) are newly added.

   We appreciate the endeavour made by the drafters to clarify the contents of the Article by adding more sub-Articles. Yet we recommend that the last paragraph of Article L-511-5 of the French Commercial Code and Article 36 of the UNCITRAL Convention be considered as contents of Article 742 *mutatis mutandis*.

27. **Article 743 - Liability of drawer**

   No change is introduced in the title or contents of the Article in the MoJ draft.

   The draft may be retained. However, we would like to recommend that Article 38 of the UNCITRAL Convention be considered as contents of Article 743 *mutatis mutandis*.

   We agree by the plenary that the effect of acceptance or non-acceptance on the liability of the drawer should be carefully considered without prejudice to looking into the provisions of UNCITRAL mentioned by the team.

28. **Article 744 - Bill of exchange in blank**

   No change is introduced in the title or contents of the Article in the MoJ draft.

   We would like to suggest that the title be amended to read as “Bill of exchange incomplete at issue”. The content may be fine. However, we suggest that it be reconsidered in the light of Article 12 of the UNCITRAL Convention as well as Article 718 of the draft that is supposed to deal with “holder in due course”.

Section 2 - Negotiability of bills of exchange

29. **Article 746 - Negotiability**

   No change is introduced in the title or contents of the Article in the MoJ draft. But we would like to bring to the attention of the drafters Articles 17 and 23 of the UNCITRAL Convention and Article L-511-8 of the French Commercial Code.

   Besides we recommend the phrase: “the instrument may be transferred in the form of an ordinary assignment” in sub-Article (2). Furthermore, we recommended that the employment of the phrase: “transfer according to the form and with the effect…” be reconsidered. Moreover, sub-Articles (3) and (4) may be considered to be merged.

30. **Articles 747- 749 — Elements, forms and effects of endorsement**

   No change is introduced in the titles or contents of the Articles in the MoJ draft.

   The contents of the Articles have no problems. However, we would like to bring to the attention of the drafters the suggestions made by Ponsot as stated under item 4 in General Comments above as well as the recommendations forwarded for Articles 724-726. Further we suggest that Articles 14, 16, 18 & 19 of the UNCITRAL Convention and Articles L-511-8 & 9 of the French Commercial Code are consulted to better clarify matters under Articles 747-749.

31. **Article 750 - Guarantee**

   No change is introduced in the title or contents of the Article in the MoJ draft.

   Despite the recommendations forwarded for Article 727 above, we recommend the retention
of the Article as in the draft. The drafters may, however, consult Article L-511-10 of the French Commercial Code and Article 44 of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes 1988.

32. Article 751 - Establishment of title by holder

No change is introduced in the title or contents of the Article in the MoJ draft.

We would like to bring the comments and recommendations forwarded earlier as regards endorsements and especially on Article 724 to the attention of the drafters.

The provisions of sub-Article (2) are important in that they give better protection to a holder in good faith relative to the person dispossessed of the bill of exchange for any reason whatsoever. We suggest the following as a better rendering formulation of the sub-Article:

Where a person has been dispossessed of a bill of exchange for any reason or in any manner whatsoever, the holder that establishes his rightful possession in the manner provided for in sub-article (1) of this Article may not be compelled to relinquish the bill unless he acquired the bill in bad faith or in acquiring it, he committed a fault.

We also recommend that sub-Article (1) be considered in the light of Article 724.

33. Article 752 - Defences

No change is introduced in the title or contents of the Article in the MoJ draft.

We suggest that the title be amended to read: “Defences based on personal relations”. Hoping that defences based on personal relations are going to be given better treatment under general provision Article 717, we recommend the draft be retained, except the word “cannot” be replaced by “may not”.

34. Articles 753 and 754  Endorsement by attorney and endorsement in pledge

No change is introduced in the title or contents of the Article in the MoJ draft.

See the comments and recommendations forwarded on Articles 728 and 729 above and Mr. Ponsot’s suggestions under item 4 under general comments and recommendations.

35. Article 755 – Endorsement after maturity or after protest

No change is introduced in the title but substantial changes have been introduced into the contents of the Article in the MoJ draft. Moreover, sub-Articles (2) and (3) have been done away within the draft. The importance of the provisions of the Article cannot, however, be overemphasized as they deal with matters that may potentially be sources of confusion and controversy. For the contents of the Article, we suggest that the drafting team consult paragraphs 1 and 2 of Article L-511-14 of the French Commercial Code and retain sub-Article (3) of the Code as it is.

36. Article 756 – Presumption as to place of endorsement

No change is introduced in the title or contents of the Article in the MoJ draft.

We recommend that the following be considered for the Article:

An endorsement shall show the place of endorsement.

Where the place of endorsement is not indicated, the place written next to the date of endorsement shall be taken as the place of endorsement.
Where no place is indicated next to the date of endorsement, the place of the domicile of the concerned endorser shall be taken as the place of endorsement.

**Section 3 – Acceptance**

Generally, we would like to suggest that the drafting team considers the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes 1988 for new ideas especially the ones espoused under Article 52 of the Convention and Articles L-511-15-20 of the French Commercial Code.

37. **Article 757 and 758 — Presentment for acceptance and order or prohibition as to presentment**

No change is introduced in the title but little change has been introduced into the contents of the Articles in the MoJ draft and “domicile” has been changed to “principal residence”. Consistently, the drafting group has made it a point to change “domicile to “principal residence”. But it might be difficult and unfair to the drafting group to either endorse or disapprove the change without knowing the reason why they made the changes. We would like to call the attention of the drafting group to Article L-511-15 of the French Commercial Code (the French Code uses domicile) and Articles 40 of the UNCITRAL Convention.

Furthermore, we recommend that in the interest of facilitating acceptance, it may be better to consider “any place where the drawee may be found” or alternatively “the place of business of the drawee.”

38. **Article 763 – Domiciliation and place of payment**

The contents of Article 763 have been made sub-articles (3) and (4) of Article 762 in the MoJ draft. We think that the drafting team may have thought that domiciliation of place of payment by the drawer and the drawee’s naming a third party at whose address payment is to be made by acceptance is an aspect of “restrictive acceptance”. Though this may be correct, we feel that it would be better to have Article 763 independently as written in the Code. Thus, better retain the provisions of the Code and take a careful look at the French Commercial Code provisions referred to above.

39. **Article 765 – Cancelled acceptance**

(1) The second sentence in sub-Article (1) of the Code has been done away in the MoJ draft. But we are of the opinion that the omitted second sentence is important and has to be written back. We would, incidentally, like to also bring Article L-511-20 of the French Commercial Code to the attention of the drafting team and recommend the writing back of the second sentence in sub-Article (1) of the Article.

**Section 4 - Acceptance for honour**

40. The business community would like to bring Article L-511-65-66 of the French Commercial Code as updated on 03/20/2006 and Articles 46 and 47 of the UNCITRAL Convention to the attention of the drafting team.

**Section 5 – Maturity**

41. **Article 769 – Categories of maturities**

We suggest that the title be amended to read as “Categories of maturity”. Furthermore, we suggest that sub-Article (2) be reconsidered in the light of the provisions of Article 9 (3) (c) and (d) of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes 1988 which provide for the possibility of bills of exchange being drawn payable by installments. We would also like to bring Article L-511-22 of the French Commercial Code.
Commercial Code to the attention of the drafting team. It would also be important to look into the merits of drawing bills payable by installments.

42. **Article 770 – Bills of exchange payable at sight**
   (1) The word “reasonably” has been added to sub-Article (1) at the end of the third sentence. We are of the opinion that the added word should be taken away. This is suggested because it would be difficult to determine the reasonableness of the time to be extended by the drawer. Adding the word into the sub-Article would certainly beg the question how reasonable is “reasonable”. Moreover neither the 1930 Geneva Convention nor the French Code embodies the controversial word.

43. **Article 771 – Bills of exchange payable at a fixed period after sight**
   We suggest to the drafting team to consider Article 5(9) of the UNCITRAL Convention.

   **Section 6 – Payment**

44. We suggest to the drafting team to consider Articles 55, 73, 75 and 76, of the UNCITRAL Convention and Articles L-511-26-37 of the French Commercial Code.

45. **Article 774 – Presentment for payment**
   Sub-Article (2) of Article 774 may be confusing and difficult to put into application. We would, therefore, like to recommend that either the approach of Article L-511-26 of the French Commercial Code or the one under Article (55) (d) of the UNCITRAL Convention be considered.

   The time stated under sub-Article (1) may be too short given the reality in Ethiopia. The difficulty and confusion surrounding the applicability of sub-Article (2) of the Article should also be noted. Without closing the door to possible amendments after having carefully looked at the suggested provisions above, we opt to retain the provisions of sub-Article (1).

46. **Article 775 – Partial payment or payment in whole**
   There is change in the title though the content remains the same.

   The provisions of the Article focus on surrendering of a bill, partial payment and receipt for partial payment. We, therefore, would like to decline from accepting the amendment made to the title and instead suggest that the title be amended to read: “Surrender of bill, partial payment and receipt”.

47. **Article 776 – Payment in advance and payment at maturity**
   A minor change to Sub-Article (3) of the MoJ draft has been introduced by inserting “a grave” before the word “fault”. On the one hand, it may be said that the insertion may be all right. On the other, proving the gravity of fault may make the application of the Article difficult. Anyways, we suggest that the language of Article L-511-28 of the French Commercial Code be also considered.

48. **Article 777 – Payment in foreign currency**
   We would like to bring Article L-511-29 of the French Commercial Code and Articles 75 and 76(2) of the UNCITRAL Convention to the attention of the drafting team for language clarity.

49. **Article 778 – Deposit**
   We propose that provisions of Article 778, be carefully looked at by the drafting team. We in particular want to draw the attention of the draftspersons to the phrase that goes: “any debtor is authorized to deposit...” Phrases like: “any debtor may...” or “any debtor may if s/he wishes...” could be considered instead.
50. Article 779 – Opposition to payment
   We suggest that the language of Article L-511-31 of the French Commercial Code be considered for clarity purposes.

Section 7 - Recourse for non-acceptance or non-payment

51. We suggest to the drafting team to consider Articles 59 and the following of the Convention and Articles L-511-38-60 of the French Commercial Code.

52. Article 781 – Protests, conditions and periods
   (1) The MoJ draft has made substantial changes to sub-Article (1) of the Article. On top of changing “public officer” to “public notary” which may be correct, the draft has newly added the following into the sub-Article: “or by a person whose principal residence is established and in the presence of at least two witnesses”. Though it is not clear as to why the drafting team made that change, we doubt the necessity of the addition in the face of the remedial provision of sub-Article (2).
   (2) There should be consistency in employing the phrase “public notary” and “public officer”. Moreover, we feel that it must be by mistake that the word “deed” is replaced by “debts” in the sub-Article.

53. Article 782 – Responsible public officer
   The simplification is all right, but there should be consistency in using “notary public”.

54. Article 783 – Place of drawing up of the protest
   We would like to caution on the use of the descriptive phrase “principal residence” and the term “domicile”.

55. Article 784 – Requirements
   We would like to raise the question: from where would a notary public drawing up a protest get the power to summon those parties against whom a protest is being drawn? This needs deliberation and some kind of policy decision.

   Some additional questions are: who makes the summons envisaged, how would the summons be made? What should be the relationship between Article 782 and the one being considered?

56. Article 785 – Form of the protest
   We suggest that the phrase “without prejudice to Article 781(2)” be inserted in sub-Article (1). For sub-Article (2), we recommend the retention of MoJ’s draft.

57. Article 787 – Copy of the protest
   There are changes introduced in the MoJ draft. We recommend that reference be made to Article 782 according to which a protest shall have to be drawn by a notary public and no other person. Moreover, we would like to bring the comment forwarded on Article 781 to the attention of the drafting team.

58. Article 788 – Notice of dishonor
   There is change introduced to the title of the Article. We suggest that the title of the Code be
59. Article 790 - Joint and several guarantee-of-persons bound by bill
Sub-Article (3) of the Code is lumped into sub-Article (2) in the draft and sub-Article (4) is made sub-Article (3). We feel that retaining what is in the Code would be better.

60. Articles 791 and 792
We recommend that sub-Article (1) (d) of Article 791 and sub-Article (d) of Article 792 be changed to three per mille and two per mille respectively.

61. Article 793 - Right to surrender of the bill, the protest and a receipted account
We suggest the following as a better formulation of the title: “Right to surrender of the bill, the protest and a receipt”.

62. Article 794 – Right of recourse after partial acceptance
(2) The sub-Article is changed. We are, however, in favor of the one in the Code which better clarifies matters.

63. Article 797 – Force majeure
(1) The sub-Article is changed. We, however, favor the existing one.

64. Article 798 – Sequestration of movable property of parties bound by bill
We suggest that the title of the Article be reduced to “Sequestration”. As to the contents, we propose that the following be considered: “Apart from the conditions prescribed for the bringing of proceedings for guarantee, the holder of a bill of exchange who has protested for non-payment may apply to, and move the court, have the properties of the drawers, acceptors and endorsers attached”.

Section 8 - Intervention for honour

65. We recommend that the drafting team consider Articles L-511-67-71 of the French Commercial Code.

66. Article 802 – General provisions
We suggest the consideration of Articles L-511-67-71 of the French Commercial Code.
67. **Article 803 – Acceptance by intervention. Conditions. Position of the holder**
   We recommend that the provisions of the Code be retained.

68. **Article 805 – Obligations of the acceptor. Position as to right of recourse**
   (2) The cross-referred Article in the Code is Article 792 and not 789. We, therefore, recommend that the provisions of the Code be retained.

**Section 9 - Parts of a set and copies**

69. We suggest to the drafting team to consider Articles L-511-72-76 of the French Commercial Code.

70. **Article 811 – Relation between Parts of a set**
   The draft has introduced substantial change into sub-Article (1). But we generally recommend that the provisions of the Code for Section 9- Articles 811-815 be retained.

**Section 10 – Alterations**

71. We suggest to the drafting team to consider Articles L-511-77 of the French Commercial Code.

**Section 11 - Limitation of actions**

We suggest to the drafting team to consider Articles L-511-78 of the French Commercial Code and Article 84 of the UNCITRAL Convention. We also suggest that the name of the title be changed to read as “Limitation of Actions and Computation of Time” Under this title sections 11 and 12 of chapter 2 (Articles 817-822) can be merged.

72. **Articles 819-822**
   We suggest to the drafting team to consider Articles L-511-79-81 of the French Commercial Code.

**Chapter 3 - Promissory Notes**

73. We propose to the drafting team to consider Articles L-512-1-8 of the French Commercial Code and the UNCITRAL Convention, especially Articles 3(2) and 39.

   The business community would also like to bring to the attention of the drafting team the argument raised under Article 735 as to the place of drawing when it deals with the formal requirements of a promissory note.

**Chapter 4 – Cheques**

**Some General Remarks**

74. Except for some peculiarities of their own, cheques are bills of exchange. In Anglo-American Acts, a cheque is defined as “a bill of exchange drawn on a banker and payable on demand”. [Harvard Law Review, Vol. 45, No. 4 (1932) p.674] The mentionable special characteristics of cheques are that:

   - They are only payable at sight and no other category of maturity may be employed for drawing them (Article 854);
   - It is only a bank or an institution or establishment regarded by law as a banker that may act as a drawee in relation to them (Article 829);
   - There should be a previous cover held by the drawee and there is either an express or tacit agreement between the drawer and the drawee pursuant to which, the drawer has the right to dispose of the deposited funds by cheque, though these are not validity requirements(Article 830); and
Cheques may not be presented for acceptance and that any statement written on them that they shall have to be presented for acceptance shall simply be regarded as not written. A bill may be presented for acceptance whereas a cheque may be presented for certification. It may, therefore, be said that as acceptance is for bills of exchange, certification is for cheques (Articles 831 and 832).

Save the above-mentioned special features, there are no differences between cheques and bills of exchange. Otherwise, they are one and the same. It is against this backdrop that we are going to consider the draft prepared by the Ministry of Justice.

Section 1 - Drawing and form of a cheque

75. Articles 827 and 828 - Requirements
No substantive change is introduced in the title or contents of the Articles except that the MoJ draft embodies a new sub-Article (3).

Though the contents may be all right, it may, however, be useful to bear in mind that the fact that cheques in Ethiopia do not carry place of issue or of drawing has resulted in some court cases being decided that the instrument that gave rise to the case is not a cheque because of not fulfilling the law-prescribed formal requirements. The importance of the place of issue seems to be addressing the issue of local jurisdiction because when the place of issue or of drawing is indicated on the face of a cheque, the residence or domicile of the drawer would be known and since that would be taken as his place for the purposes of determining which local court has jurisdiction as well as for serving summons on the defendant who is the debtor in the absence of the involvement of other middle parties. We are therefore of the opinion that amending sub-Article (d) of Article 827 to read: “the date when the cheque is drawn” would solve the problem. In fact it is said that in American and British Acts, indicating the date and place of drawing is not required [Harvard Law Review, Vol. 45, No. 4 (1932) pp.674-675].

The Geneva Convention requires that the term “cheque” be inserted in the instrument and expressed in the language employed in drawing the instrument. May be following the stand of the Convention, Mr. Ponsot recommended the insertion of the term “cheque” as a formal validity requirement. Neither the Code nor the draft embodied this as a requirement.

We also think that the newly added sub-Article (c) to Article 828 is fine and may be retained with the word “at” being changed to “on”.

76. Article 836 – Cheque payable at a principal residence or another place
Change has been introduced into the title as well as contents of the Article in the MoJ draft.

The title has been amended to read as above-stated whereas in the Code it reads: “Place of payment and domiciled cheque” As noted earlier on for bills of exchange, the drafting team has changed domicile to principal residence. When it comes to the content of the Article being considered, the shift made by the drafting team from domicile to residence even more becomes ridiculous since the envisaged third party is a banker and it is a domicile that one can imagine for a juridical person like a banker. Thus we recommend that the original formulation of the Code be followed. This formulation, which happens to be missing from some copies of the Code, runs as follows:

A cheque may be payable at the domicile of a third party in the locality where the drawee has his domicile or in another locality provided that such third party is a banker.

That means the business community recommends that the phrase: “principal residence” in the title is changed to “domicile” and that the missing provisions be added.
77. Article 837 – Discrepancy in the sum payable
We recommend that sub-Articles 1-3 of Article 8 of the UNCITRAL Convention be considered as contents of Article 837 [Latin: mutatis mutandis].

78. Article 838 – Signature of persons incapable of binding themselves
We suggest that the following be considered as title of the Article: “Persons not bound by their signatures”.

79. Article 840 – Responsibility of the Drawer
The draft version may be retained. However, we would like to recommend that Article 38 of the UNCITRAL Convention be considered as contents of Article 840 [Latin: mutatis mutandis].

80. Article 841 – Cheque incomplete at issue
We suggest that the contents of the Article be reconsidered in the light of Article 12 of the UNCITRAL Convention as well as Article 718 of the draft that is supposed to deal with “holder in due course”.

81. Article 843 – Elements of endorsements
We recommend that sub-Article (3) be amended to read as “an endorsement to bearer shall be valid as an endorsement in blank”.

The other thing we would like to raise is a point relating to the word “establishment” in sub-article (4). The team would like to pose a question: what if the word “establishment” is replaced by the word “branch” The team feels that employing the latter word may make better sense.

82. Article 844 – Forms
(2) We would like the second sentence of the sub-Article to be replaced by:

_In the latter case, the endorsement shall not be valid unless written on the back of the cheque._

83. Article 844(A) – Cheque payable to more than one person in the alternative
This is a newly added Article by the MoJ. We believe that this newly added provision would serve a very good purpose. Yet we believe that the title should read: “A cheque payable to several persons in the alternative and that the content should accordingly be amended to read as follows:

.Where a cheque is made payable to several persons in the alternative, either one of them may present it and demand payment and may endorse it to another person.

Before leaving Article 844(A), we feel that if designation of named payees in the alternative is addressed, the cumulative designation of named payees need also be addressed. Accordingly, the following may be considered:

84. Article 844(B)? – We propose the title reads “A cheque payable to several persons jointly”. As regards the content, we suggest the following:

Where a cheque is made payable to several persons jointly, it can only be presented for payment jointly by all of them and its endorsement may only be valid if made jointly by all of them.

85. Article 846 – Guarantee
No change is introduced in the title but some change has been introduced to the contents of
sub-Article (2). The following is added: “… by writing on the cheque or on an allonge attached thereto”. We think that what is added is not necessary because it is understood that it is through his restrictive or qualified endorsement that an endorser may prohibit ‘any further endorsement’. Hence we recommend that the provisions of the Code be retained.

86. Article 847 - Establishment of title by the holder
No change is introduced in the title or contents of the Article in the MoJ draft.

Following the formulation suggested in Article 724, however, we suggest the following to be the content of the Article:

_The holder of an endorsable cheque shall be deemed to be a lawful possessor where he can prove his right by an interrupted series of endorsements even if the last endorsement is in blank. Cancelled or deleted endorsements shall be deemed not to be written. If an endorsement in blank is followed by another endorsement, the person who signed this last endorsement shall be deemed to be an endorsee by the endorsement in blank._

87. Article 849 - Dispossession
No change is introduced in the title or contents of the Article in the MoJ draft.

The word “dispossessed” is, however, erroneously written as “dispossed” both in the Code and the draft. We would like to bring this to the attention of the drafting team.

88. Article 850 - Defences
We suggest that the title be amended to read as “Defences based on personal relations”. Hoping that defences based on personal relations are going to be given better treatment under general provision Article 717, we propose that the draft be retained as it is, but for the word “cannot” changed to the phrase “may not”.

89. Article 851 - Endorsement by attorney
See the comments and recommendations forwarded on Article 728 above and Mr. Ponsot’s suggestions under item 4 under general comments and recommendations.

90. Article 852 – Endorsement after maturity or after protest
As notable from its title, the Article is supposed to deal with two different situations of endorsements, i.e., “endorsement after maturity and endorsement after protest”. On the other hand, a cheque is payable at sight and no other category of maturity may be used to draw it. A cheque is presumed to be mature from its date of drawing. Therefore, one has to challenge the correctness of the part of the title of the Article that runs “endorsement after maturity”. The title of the Article has to, therefore, be corrected to read as “Endorsement after protest”. The content of the MoJ draft may be retained as it conforms to that of the Code.

Section 3 - Acceptance for Honour (Aval)

91. Article 853 – General provisions applicable
No change is introduced in the title or contents of the Article in the MoJ draft.

Since Articles 766-768 are not “general provisions”, we are of the opinion that the title of the Article be amended to read as “Applicable provisions”. When it comes to the contents of the Article, the team suggests the following formulation: “The provisions of Articles 766-768 of this Code relating to acceptance for honour shall, _mutatis mutandis_, apply to cheques.” It is good to note that there are opinions that “avals” has little practical consequence in regard to cheques.
because of their short period of circulation; and in those countries where cover must exist at the
time of issue it would be superfluous” [Harvard Law Review, Vol. 45, No. 4 (1932) p.682].

**Section 4 - Presentment and payment**

92. **Articles 854 and 855 – Maturity and Presentment for payment**

Change is introduced in the contents of Article 854, but no change is made to Article 855 of the
MoJ draft.

We are of the opinion that the change made to Article 854 by adding a second sentence reading:
“Any contrary stipulation shall be disregarded” is acceptable. However, the team feels that it might
be better if the added sentence reads: “Any stipulation otherwise shall be disregarded”.

It is also useful to add the following as sub-Article (2) of Article 855: “A postdated cheque shall
be paid at the time of presentment.”

93. **Article 857 – Stopping payment of cheque**

No change is introduced in the title but substantial change has been introduced in the contents
of Article 857, in the MoJ draft. We believe adequate discussion should be made on all the three
sub-Articles of the draft and the following points incorporated.

- A stop payment order may be notified to the drawee bank through any means;
- An oral notification of stop payment order should necessarily be followed by a written
confirmation;
- The experience of other countries is considered as regards the issue of whether or not the
payment of a certified cheque may be stopped;
- Consider the issue of whether or not an endorser or a former holder can place a valid stop
payment order; and
- That the newly added provision of sub-Article (2) in the MoJ draft cannot be taken as
appropriate.

94. **Article 859 – Receipts, partial payment**

No change is introduced in the title or contents of the Article in the MoJ draft.

Yet we would like to suggest that the title be amended to read as “Partial payment, receipt and
surrender of cheque”. We further propose that sub-Article (3) be amended to read as:

*Where the cover is less than the amount of cheque, the holder may require payment up
to that amount of the cover and the drawee shall be obliged to pay the amount available
where the holder so requires.*

And sub-Article (5) is amended to read as:

*Partial payments made on a cheque shall discharge the drawer the endorsers and
acceptors for honour up to the amount paid.*

Finally we would also like to bring Article 73 of the UNCITRAL Convention to the attention of
the drafting team to be considered *mutatis mutandis* to draft Article 859 in detail.

95. **Article 860 – Verification of endorsements**

We believe that the verification envisaged under the Article should be accorded better treatment.
Verification requirements should in particular be written as explicitly as possible. The community
recommends that the provisions of Article 966 be consulted to be used to formulate Article 860 mutatis mutandis.

96. Article 862 – Payment in a foreign currency
No change is introduced in the title but there is a noticeable change in the contents of the Article in the MoJ draft.

Sub-Article (1) is not correctly copied from the Code. Moreover, the drafting team has left out sub-Article (4) of the Article. It is suspected that sub-Article (4) may have been left out intentionally because the draftspersons felt that it would not have any application in Ethiopia. By the way, the provisions of sub-Article (4) may be applied in situations where a cheque is, for instance, issued in America and is to be paid in Canada where the denomination is the same i.e., “Dollar” but there is difference in value in the two countries. The same may be true of “Shilling” in the U.K and “Shilling” in Kenya. So we feel that despite the doubt as to its coming into application in Ethiopia, it might still be good to retain sub-Article (4).

Finally we do recommend that the provisions of the Code be retained.

Section 5 - Crossed cheques and cheques payable in account

97. Article 863 – Crossed cheque. Definition
No change is introduced in the title or contents of the Article in the MoJ draft.

We recommend that the title be amended to read as “crossed cheque.”

98. Article 864 – Effects
No change is introduced in the title or contents of the Article in the MoJ draft.

Yet we suggest that for clarity purposes the word “customer(s)” in all sub-Articles of the Article be written, “account-holder customer(s)”.

99. Article 865 – Crossed cheque bearing the words “not negotiable”
No change is introduced in the title or contents of the Article in the MoJ draft.

But with regard to sub-Article (2) we would like it to be amended as:

*The transfer of a crossed cheque bearing words “not negotiable” shall only have the effects of ordinary assignment.*

100. Article 866 – Liability of the banker
No change is introduced in the title or contents of the Article in the MoJ draft.

We suggest again for the purpose of consistency, that the phrase “the true owner of the cheque” at the end of sub-Article (2) be amended to read: “the lawful possessor of the cheque”.

We also are worried about the phrase at the end of sub-Article (3) that reads as “right is subject to a disability” and would like it to be replaced by: “…right is subject to restriction”.

101. Article 867 – Cheque payable in account
No change is introduced in the title but there is a noticeable change in the contents of the Article in the MoJ draft.

We however recommend that the provisions of the Code be retained.
Section 6 - Recourse for non-payment

102. Article 868 – Rights of the holder
No change is introduced in the title or contents of the Article in the MoJ draft.

Following the suggestions already made for Article 774(2), we would like to recommend that sub-Article (c) be amended to read:

By a dated declaration made by a cheque clearing house that the cheque has been presented in due time and has not been paid.

103. Article 869 – Protest. Periods of time
No change is introduced in the title but there is a noticeable change in the contents of the Article in the MoJ draft. The draftspersons have added a new sub-Article (3) to the Article. Though there is no harm in doing so, the drafters, however, seem to have been confused in that they used “acceptance” in the sub-Article, which doesn’t actually apply to cheques. Therefore we suggest the following as contents of sub-Article (4):

Where the drawee or the drawer is declared bankrupt, the production of the judgment in bankruptcy shall be sufficient to enable the holder to exercise his right of recourse.

104. Article 871 – Provision “sans protet”
No change is introduced in the title or contents of the Article in the MoJ draft.

Sub-Article (2) seems to have some problems not only in the draft but also in the Code. Following the formulation used in the Geneva Convention, we suggest the following amendment to be made to the sub-Article:

This stipulation does not release the holder from presenting the cheque within the prescribed limit of time or from giving the requisite notices. The burden of proving the non-observance of the limit of time lies on the person who seeks to set it up on the holder.

105. Article 872 – Joint guarantee of persons bound by cheque
No change is introduced in the title or contents of the Article in the MoJ draft except that the draftspersons lumped together the provisions of sub-Article (3) to sub-Article (2).

We believe that the Article should be reconsidered in the light of Article 790.

106. Article 873 – Extent of the right of recourse
We suggest that sub-Article (d) be reconsidered. Shouldn’t commission be uniformly “two per mille”?

107. Article 874 – Extent of the right of recourse of a party who takes up and pays
No change is introduced in the title but there is change in the contents of the Article in the MoJ draft. Sub-Article (d) of the MoJ draft has been amended to read: “a commission not exceeding two per cent” whereas in the Code commission is two per mille. The amendment brings about a big difference. We think that the amount stated in the Code should be retained.

108. Article 875 – Right to surrender of cheque, protest and receipt account
No change is introduced in the title or contents of the Article in the MoJ draft.
We suggest the following as a better formulation of the title: “Right to surrender of the cheque, the protest and a receipt”.

We would also like to suggest the following formulation for the sub-Article (1): **Any party against whom a right of recourse is being exercised or may be exercised may require the surrendering of the cheque and the protest against payment and a receipt for the payment.**

109. **Article 876 – Force majeure**

No change is introduced in the title but there is change in the contents of the Article in the MoJ draft. Firstly, the indication in parenthesis in sub-Article (1) of cases of force majeure has been done away with. Secondly, in the MoJ draft sub-Article (5) is done away with for no apparent reason. We thus feel that retaining the deleted sub-Article does no harm despite the fact that cases of force majeure are treated in the Civil Code and not in the Commercial Code.

Generally we recommend that the provisions of the Code be retained.

110. **Article 876(A) – Loss of right of recourse**

This is a newly added provision following, presumably, similar provisions in Article 796 for bills of exchange. The idea is good, but we suggest the following to be its content:

\[ \text{After the expiry of the limit of time fixed for presentment for payment or for drawing up the protest for non payment of a cheque, the holder loses his right of recourse against the drawer, endorsers or acceptors for honour.} \]

The provisions of Article 876(A) should also be put before Article 875 -- the provisions on force majeure.

Section 7 - Parts of a set

111. The MoJ draft didn't enter into this section but simply went along dealing with details about parts of a set. Although the provisions of this section have never been put into practice, it would still be desirable to have the provisions instead of having them scrapped off.

112. **Article 878 – Relation between parts of a set**

No change is introduced in the title but there is change in the contents of the Article in the MoJ draft.

The draft has introduced change into sub-Article (1) by doing away with the part of the provisions of the sub-Article reading: “Notwithstanding that there is no provision that such payment shall render the other parts of no effect.” We believe that retaining this latter part of the provisions is desirable.

We recommend that the part of the provision that was done away with by the draftspersons be written back and retain the draft with that amendment.

Section 9 - Limitation of actions

113. We recommend that the title of the Section be corrected to read: “Computation of time and Limitation”. Furthermore Article 881(4) and (5) should be considered carefully especially from the point of view of their practical application. We also suggest the merger of sections 9 and 10 of
Chapter 3 on “limitation of actions” and “general provisions” (Articles 881 and 882 and 883-886 respectively) under one section that goes by the title “Limitation of Actions and Computation of Time”.

**Chapter 6 - Publicity of protest**

114. **Article 891 - Duty to send list of protests**

No change is introduced in the title but there is change in the contents of the Article in the MoJ draft.

We agree with the changing of the designation “public officials” to “Public notaries” in the draft. However, in the Code, it is “the registrar of the court” that was envisaged as entitled to get the list relating to protests. In the draft, the entitled recipient has been changed and put as: “a body authorized to receive them…” We thus doubt as to the correctness of this statement. It may be better to list those deserving to get the list instead of putting the way the draft does. From among those entitled to receive the list would, for instance, be the Police, and the Public Prosecutor. On the other hand, the draftspersons in the next Article go back to using “registrar”.

**4.2 Banking Transactions**

**4.2.1 Introduction**

115. Title III of Book IV of the Code deals with rules on banking transactions. Even though the history of banking in the country dates much older than that of the adoption of the Code in 1960, these rules constitute the first ever attempt to come up with a comprehensive law on the core areas of banking business. Even then, of the 72 Articles contained in the Code, practice tells us that hardly half of them have been put into use by the banking sector. The reasons for such gross unfamiliarity of the law and the practice stem from, among others, the incongruence of the law with the application, i.e. the practice being geared towards the Common Law model while the law is based on the Civilian legal tradition; unavailability of market institutions that facilitate the business of banking such as stock exchanges and rules that direct their operations; and some conceptual (terminological) incoherence between the law and the practice. This was also stated by the expert draftsperson of the Code. In view of this scenario, we may thus ask: Is the difference that significant to the law revision process? Is it necessary to still stick to that tradition? If the answer is negative, who should make that decision? Is it a matter of policy or that of expertise?

116. In relation to banking operations, the draftsperson mentions three basic laws, i.e. the law regulating banking principles (covered by Articles 896-967 of the Code), the law regulating the status of banking (currently taken care of by the Monetary and Banking Proclamation No. 83/94∗, and the law on stock exchanges (not yet enacted). He states that the then draft on banking transactions was entirely new representing a refined text produced by a commission composed of French experts. As there was no other better formula, the body of the said text was fully adopted.

117. The title enumerates the subject matter of banking transactions in the following order.

(a) Bank deposits
   i. Deposit of funds
   ii. Deposit of securities
   iii. Bank transfer
(b) Hiring of safes
(c) Contract of current accounts

*This Proclamation has since been replaced by Proclamations No. 591/2008 (Reestablishment of the National Bank of Ethiopia) and 592/2008 (Banking Business Proclamation).*
(d) Discount
(e) Credit transactions
   i. Open credits
   ii. Advance on securities
   iii. Pledge on securities
   iv. Documentary credits

118. Studies on present banking activities reveal that the rules on deposit of securities (Articles 912-918), on contracts of current account (Articles 925-940) and on discount (Articles 941-944) are not currently in use in Ethiopia. As a result, transferable securities, recognized under Article 715 of the Code, have not been fully utilized mainly due to the virtual absence of primary and secondary markets whereby they can be transacted. This also holds true for provisions on advance on securities (Articles 947-949) and on pledge of securities (Articles 950-958). Likewise, the rules on documentary credit (Articles 959-957) have lagged behind modern developments in the area in many respects in view, among others, of the latest versions of the Uniform Customs and Practice for Documentary Credits, alias, UCP.

119. Another important area of concern is the discrepancy between the law and the practice regarding current accounts. In reality, the understanding of Ethiopian banks of the concept of current accounts is no different from what in many countries are known by the expression “checking accounts”. On the other hand, the definition attached to the concept of current account in the Code (Articles 925-940) is at variance with the practice. As a result, these rules of the Code have remained dead letters as they have never been put into use in the business of banking. D. Ponsot shares this view and says that the idea conveyed by Article 925 of the Code and the meaning given to the expression “current account” in French law is different from the understanding of current account in the realm of banking in Ethiopia. According to French law, he goes on, “a current account is a convention between two persons to enter into an account all the transactions effected between them so that their mutual debts are settled by way of successive off-setting and a balance is received only at the time of the closure of the account.”

4.2.2 Changes made on the provision of Banking Transactions

120. No major change of form or substance is proposed by the new draft. The minor changes that are made are without any basic difference with the previous text of the Code. No reason or justification is also made for the changes. However, the following little changes have been noticed.

- Article 898(2) added “…a fixed date”.
- Article 898(3) – It is a newly entered provision.
- Article 901; “drawing” is replaced by “withdrawal”.
- Article 903 (2) – Incorrectly written with wrong additions and omissions of phrases and a sentence.
- Article 903(4) is a newly entered provision.
- Article 904 added the phrase “… or at different branches of different banks”.
- Article 906(1) is cancelled “… debits the account of the person who orders transfer” and replaced by “credits his account”.
- Article 906(2) carries newly entered words “… altered, suspended …”
- Articles 910 and 911 are omitted without replacement.
- Article 914(1) cancelled “…soon as…”
- Article 922 is split into two sub- Articles.
- Article 923(2) – The expression “… key giving the combination, the said safe shall be forced in the …” is omitted.
• Article 924 is omitted and not replaced by another provision.
• Article 941 – The term “commercial” is replaced by “negotiable” and “other negotiable securities” is cancelled.
• Article 955 – The phrase “… and obligations of holder of securities” is cancelled.
• “…Articles 897-900” are also cancelled and replaced by “… Art. 912 and the following”.

4.2.3 Observations and Recommendations

121. Chapter I of Title III in Book IV of the Code is captioned: “Bank Deposits”. But the Title needs to be changed to reflect the rules in its Section II on Bank Transfers (Articles 903-909) which are not the same as those in section I on Deposit of funds (Articles 896-902).

122. Article 896 - Nature of the Contract
No change is proposed by the draft of MoJ.

The French expert D. Ponsot suggested that Articles 896 and 897 exchange places with minor changes in both Articles and a third sub-Article be included under the current Article 897; and that Article 896 be split into two sub-Articles. The proposal for change of places is one of form rather than substance. Article 897 more or less defines the process of deposit accounts, while Article 896 states the effect of such contract vis-à-vis the bank. The drafting team has proposed to maintain the Article without change. But we prefer to split the Article into two sub-Articles.

Deposits are of several kinds. Deposit accounts may assume savings, checking or time deposit accounts opened with a bank or a similar other institution. Included in this category are escrow, blocked, trust, frozen, mutual or current accounts. Incidentally kinds of deposits come under Article 897 rather than 896. The Code defines deposit under Article 896 in terms of the right of withdrawal, i.e., at sight or after the expiry of a fixed date. Whether all kinds of deposits should be incorporated into the Code or should be left to other soft legislations requires further study.

Thus Article 896 is split into two sub-Articles as follows:

Article 896 - Nature of the contract

1. The contract of deposit of funds renders the bank owner of the funds deposited irrespective of the mode of deposit. The bank may dispose of these funds in respect of its professional activity, subject to their repayment under the conditions provided in the contract.

2. The above notwithstanding, the bank shall not acquire title to or the right to dispose of coins or other individual monetary tokens or other valuables in respect of which there is a provision that they shall be returned in kind.

123. Article 897 - Deposit Account [No comment by MoJ]

Article 897 lays the major principle (confirmed by Article 2782 of the Civil Code) that makes the bank an owner of the money that it receives for deposit. As a result, its duty to the depositor is that of a borrower and not that of a custodian/bailee. That means the provisions of the Criminal Code relating to breach of trust shall not apply to a bank in case of default in payments, nor would the bank become liable under Article 2791 of the Civil Code. See also Articles 2471-2489 of the Civil Code. As a borrower, the bank cannot invoke defences available to a bailee in the event of loss of the money without the fault or in spite of the best effort of the bank. Ponsot proposes a third sub-Article which reads as follows:
When opening a deposit account the bank shall supply to its customer the necessary information as to the conditions and charges applying to the banking services so provided. Any change to those conditions and charges shall give rise to proper notice to the customer.

The import of Article 897 is to enable the customer to be duly informed about his relations with his bank both at the time of opening an account and subsequently. The duty to supply information and notice to the customers in whatever manner is important and should be included in the Code.

124. Article 898 - Form of Deposit
The phrase “a fixed date” at the end of sub-Article 2 and a third sub-Article is included by MoJ. A fixed date added by MoJ flows out of “the fixed period” already in the Code. The third sub-Article proposed by MOJ relates to a situation where payment is effected by way of penalty out of the account by order of an authorized body. Such a body acquires authority by another law and therefore such sub-Article is totally unnecessary to justify the act. It is thus recommended to cancel it. At the discussion by the group of experts the discrepancy between the Amharic and the English versions of the Code was taken note of. Another important issue was the wisdom of sticking to the rule on withdrawal at sight in view of current developments in banking business.

125. Article 899 - No overdraft
No change by MoJ. Ponsot suggests the inclusion of a statement missing in the Code but present in the French version. The excluded part in the French version gives the impression that the contract of deposit per se could sometimes give rise to overdrawal. It, therefore, is felt that there is no need to include it. Compare Articles 905, 908 and 945 of the Code.

The issue of changing “overdraft” to “overdrawal” then becomes one of terminology. While overdraft and overdrawal have certain common points, they are essentially different both in form and duration. An overdraft, normally referred to as OD, is a form of finance by which a customer is allowed by the bank to draw money beyond his Current Account deposit. The latest Commercial Bank of Ethiopia’s (CBE) OD financing policy and procedure manual (1999) defines it as follows:

An overdraft is a sort of bridging finance for a limited duration, normally for six months and exceptionally for one year and the granting of such finance must be backed by a genuine and viable ongoing business operation.

The same manual describes overdrawal in terms of overdrawing on overdrafts. The subtitle reads “overdrawal on overdrafts”. The manual extends this period to a maximum of 60 days while limiting the amount that could be overdrawn to a maximum of 25 percent of the OD facility. It also describes overdrawal as:

A temporary approval to allow a customer to draw a specified amount of funds over and above the overdraft limit approved in order to meet a temporary cash shortage.

126. Article 900 - Statement of Account.
No change by MoJ. Ponsot proposes the addition of a missing sub-Article 2 in the French version of the Code laying absolute and relative prescriptions on rights. In view of the lack of awareness currently prevailing in the country, it may be good to ease the restrictions on customers. The issuance of the statement of account is to be based on agreement or custom as indicated in the Article. As a result, there seems to be no need to state that its application is limited solely to current account. We suggest that the term “deductions to/from the account” be included in the draft statements of account and the new version of Art. 900 read as follows:
A copy of the account shall be sent to the depositor once each year or more frequently, where customary or agreed, showing the balance to be carried forward including deductions to/from the account.

127. Article 901 - Place of Transaction
We suggest that this Article be redrafted to make it more amenable to current banking practices and future trends. Electronic cards have improved the accessibility of accounts outside the places where the accounts are opened. We believe that the saving clause at the beginning of the Article leaves much room for the parties to agree on this matter. At the end of the day, extended access of the account is a matter based on the agreement of the parties and not something which can be automatically assumed by one of them. Still, we feel more in-depth study should be made in this regard, and there should be nothing to be taken for granted. That being said, we believe that the current phrasing is sufficient to take care of the matter.

128. Article 902 - Several Accounts
No change is made by MoJ Draft.
But Ponsot's observation under this Article is worth considering. It reads as follows:

*This provision deals with a delicate issue which is the independence of the accounts in respect of one another. There is, however, another issue to consider: the case of a deposit account having two or more holders. So our suggestion would be to create a second sub–Article dealing with that point.*

Regarding the issue of the independence of accounts opened by the same person, one of the main consequences of Article 902 is that the banker may not operate any setoff between different accounts opened by the same person where, for instance, one of the accounts has a credit balance while the other a debit one.

In fact, such a solution is already given by Article 1833(d) of the Civil Code, according to which no setoff may occur where the obligation is to return a thing deposited. One may ask though what would happen if the parties are allowed to depart, by way of a special agreement, from such a prohibition? The parties have the possibility to pledge the credit balance of an account for securing the payment of the debit balance of another account, but it requires that the debt to be pledged, exists at the time it is pledged. French case-law admits such a possibility which may be useful in certain cases: in order to avoid any abuse, such a possibility must result from a special agreement (and not from the general conditions of the account).

Considering the current drafting of Article 902, the words “Unless otherwise agreed” are likely to enable such a result. However, for the reason mentioned above, the text should stress on the fact that the provisions to that effect have to be specially agreed.

Regarding the case where the account has several holders, i.e., a joint account, it could be useful to show that the holders of the account may give one another powers of attorney for operating the account unless the account is opened in such a manner that the joint-holders can jointly and severally operate it. This is the usual and/or account currently in use by banks. In such a situation, each of the holders of the account is entitled to operate the account and to bind the other holders of the account. This situation is different from the case where the account is held by one person who gives powers of agency to another person for operating the account. Indeed, in the latter case, the agent is not personally liable in case of abuse or misuse of his powers for the operations made in the name of the holder of the account.

The suggestion to complete the Code in this respect is certainly not indispensable. The implementation of the general rules on agency is indeed sufficient. However, we do believe that it is interesting to emphasize such a possibility of joint deposit account with mutual agency, insofar
as it may be very usefully employed in practice, especially for accounts opened among spouses. By the way, we already noticed that the current provision of this section contains solutions which are already provided by the Civil Code.

Ponsot proposes the following draft to address the issue of joint accounts:

**Article 902 - Several accounts and joint accounts:**

1. Where more than one account has been opened by the same person, at a bank or several branches of the same bank, each account shall, subject to a special agreement to the contrary, operate separately from the others.

2. In the case of a joint account, the joint holders of the account may give one another powers of attorney for the purpose of operating the account. In such a case operation effected by one of the joint holders of the account shall bind all of them. An agreement at the opening of an account in which the parties agree for the joint holders to operate the account jointly and severally shall have the effect of conferring such a power of attorney on one another.

We propose the following sub-Article 3 to be added to the above.

3. An agreement at the opening of an account in which the parties provide for the joint-holders to operate the account jointly and severally shall have the effect of conferring such a power of attorney on one another.

129. The Code does not contain any provisions in relation to the closure of Accounts. Ponsot recommends creating two Articles, the first one devoted to the cases where an account is to be closed, and the second one on the effects of the closure. According to him, two series of cases may be distinguished in relation to cases where the account is to be closed.

- Closure of the account either because of the expiry of the term, or, where the account is opened for an undefined period, upon decision of either parties and;
- Closure of the account because of a change in the situation of the holder of the account: death, inability or bankruptcy.

The first cases are merely the implementation of the general rules as to the termination of a contract. The only thing to be specified concerns the period of time for giving notice (agreed or customary period of time). In the second case, things are more difficult. Regarding the death of the holder of the account, the solution is normally the closure of the account, but the parties (the heirs) may decide to keep the account open for the needs of the liquidation. Incapacity (insanity, judicial interdiction) also entails the closure of the account, but here again the guardian, tutor or family council may decide to keep it open. In both cases, operating the account shall be subject to the rules applying to the new situation. i.e., consent of all the heirs, in the former case, application of the legal rules governing incapacity in the second case. Regarding the effects of bankruptcy on the account of the debtor, we notice that Book V of the Code does not provide anything in this respect. Article 996 provides the opening of an account for depositing the funds received by the trustee, but such a provision is not to be understood as entailing the closure of the account of the debtor. Closure of the account could have detrimental effects for running the business until the settlement of the bankruptcy. In this respect, under French law, it is winding-up that entails closure of the account, which means that the account remains open until the settlement of bankruptcy and where a composition is decided.

Again Ponsot proposes the following alternative draft Articles to address this issue.
**Article 902-1 - Closure of a Deposit Account**

(1) The closure of the account shall result from the following:
   (a) Expiry of the term,
   (b) In the absence of term, upon decision of either party,
   (c) Death or incapacity of the holder of the account,
   (d) Compulsory winding-up as a result of bankruptcy proceedings

(2) In the case where, pursuant to (b) above the termination of the account results from a decision of a party, the latter shall give prior notice complying with the agreed or, failing which, customary period of time.

(3) In the case of death or incapacity, the heirs or the legal representative of the holder of the account may decide to keep it open.

Concerning the effects of the closure, the general idea is that the account does not stop operating. New operations are not, of course, possible, but the operations in process at the date of the closure have to be treated. Thus the banker is bound to pay cheques issued at the time of the closure, subject to the necessary provision, but he may refuse to pay cheques issued afterwards. By the way, the closure of the account also entails the obligation by the customer to return the cheque books, but this question is generally treated by the agreement and does not seem to be worth regulating.

The closure of the account may show a debit balance. Such a balance is immediately receivable and bears interest at the legal rate of interest. The legal rate of interest shall apply notwithstanding the existence of a different rate of interest agreed by the parties, unless it results from the agreement that such a rate also applies after closure of the account.

Finally, the closure of the account should give rise to approval of the parties: the consequence thereof is that the parties may not retroactively contest the balance, unless in the case of error. The notion of error is to be understood as a factual error (mistake in reckoning) and not a legal error (absence of ground of an operation) which is regulated by Article 900.

The following suggestion is thus made:

**Article 902-2 - Effects of the closure**

(1) The closure of the account shall prevent the holder from any new operations. However, the banker shall be bound to effect operations in process at the date of the closure.

(2) Where the closure of the account shows a debit balance, the latter shall be receivable and bear interest at the legal rate, unless it is proved that the parties have agreed another rate of interest for that purpose.

(3) No claim shall be admitted against a settlement of account approved by the parties, apart from the case of factual errors.

**Section 2 - Bank Transfers**

130. Article 903 - Definitions

The section on bank transfers does not clearly specify the different types of transfer including local transfer and international remittances that involve several currencies and the corresponding issues of exchange control. It does not also address such areas as electronic cash transfer and other modalities such as cash to cash, cash to account, account to account and account to cash transfers. The use of credit card or the ATM for transfer of funds also needs further study. These developments are not always congruent with the conventional mode of transfer of funds upon
the written instruction of the transferor as is mentioned in Article 903(1) of the code and the
draft.

131. **Article 903(2)** governs bank account particulars which are known as RIB (relived identite
Bancaire) in French. This form and process enables the bank to check the identity of the person
ordering the transfer. The detail depends on the relations which the transferor has with the Bank.
The drafters have tampered with this sub-Article without giving any explanation. The phrase “by
the parties” seems to have been dropped perhaps by mistake. Further, the prohibition on transfer
to bearer is cancelled by the drafters for no apparent reason. Ponsot states that “although it is
very seldom in practice transfer orders given on a negotiable instrument to order or to bearer
is possible under French law.” He further states that the situation of the holder of such transfer
order is quite similar to the situation of the holder of a cheque (the rules applying to cheque
issued without cover not applying). He goes on to say: “Considering the absence of real interest
of transfer orders to bearer and in other respects the risks resulting from such a practice, our
advice would be to keep the current prohibition.”

132. **Article 903(4)** is new.
It may be necessary in view of the appearance of other commercial banks. Both the group and
the experts have indicated the need to provide for a system of clearing house under this or
the following Article. It is high time that the mechanism should be instituted in our system to
strengthen banking transactions and make them more secure. Clearing house is basically a place
where banks exchange checks and drafts and settle their daily balances. There is also a similar
practice for stock and commodity exchange transactions. How this system operates and the legal
tenet that it should stand on needs further study. We are told that there is a rudimentary form of
clearing house in practice. But a law enacted under Article 903 (4) could be used to formalize this
system until such time that matters is ripe to regularize the subject by special law.

133. **Article 904 - Type of Transfer**
The phrase “or at different branches of different banks” is added in sub-Article 1. Ponsot proposes
the inclusion of a second sub-Article left out in the French version of the Code which provides
for external bank transfer, and the manner of opposition to such transfers.

But we see no place for inclusion of such a sub-Article for three reasons:

1. Article 904 does not talk about opposition and there is no reason to talk about it for
   external transfer (only).
2. In the event of opposition, the party has to obtain order from the court.
3. The subject of the Article relates to types of transfer not to effects of transfer and no
   change is proposed by the group. The experts have suggested that this Article and
   Art. 906 are redrafted in light of the anticipation of electronic banking (e-banking)
   resulting from the current use of ICT in banking. But this requires close assessment of
   current practice by our banks and careful study of the law of e-banking elsewhere. The
   redrafting of the Article should thus await the results of such an in-depth study on the
   area.

134. **Article 905 - Sums for which the transfer order is given**
Unlike issuing a cheque, transfer order requires no cover. Nor does it give rise to penal offence in
case of insufficiency of cover (See Article 908.) Transfer order may be issued even in the absence
of cover on the basis of advance agreement with the Bank. No such agreement works for issuing
cheque where there is no cover or the cover in the account is insufficient. The transfer under this
agreement envisages two situations:
(a) Where there is sufficient cover in the account of the transferor; and
(b) Where there is no, or there is only partial cover, in the account of the transferor.

In the latter case, the transferor is required to have an earlier agreement with the bank to which a transfer order is issued. A case in point is transfer with credit card to which the bank issuing the credit card usually attaches terms and conditions in the usage of such an instrument.

Ponsot's suggestion to rephrase the Article does not change the content of the Article. It is, therefore, suggested that the draft be maintained.

135. Article 906 – Transfer of title. Cancellation of transfer order
The major change in Article 906 is introduced under sub-Article 1.

The issue under this section is the timing when the transfer becomes effective. This time is fixed under the Code as the time when the bank debits the account of the person who orders the transfer. The new draft changes this scheme and fixes it at the time when the bank credits the account of the beneficiary. In effect what is sought under this Article is:

(a) To state with precision and clarity the exact moment when title is transferred to the beneficiary; and
(b) To indicate the deadline beyond which the order cannot be reversed.

These two points of time do indeed coincide as the beginning of one is essentially the end of the other. In fact, debiting the account of the transferor results in crediting the account of the beneficiary if the operation is to be effected at the same branch of the same bank. But where the accounts are located in different branches of the same bank, or in different banks, or where an intermediary bank is to be involved in the transaction, the debiting and crediting processes may not be coinciding in point of time.

The draft does not address the problem of title between the debiting of the account of the transferor but before crediting the account of the beneficiary. The draft proposed under Art. 906 by Ponsot to exclude reference to places is good to close this gap. The additional clause in relation to creditors may also be useful as the beneficiary may not claim title to the money before his account is credited.

Recommendations:  - Adopt Ponsot's draft
                  - Replace 906(2) by 906(2) of Ponsot
                  - Accept 906(3).

136. Article 907 - Special provisions
This Article relates to direct credit. Ponsot describes this class of credit as follows:

Direct credit consists for the holder of an account, i.e., a bank client authorizing his bank to pay by way of transfer a defined and regular creditor (e.g., telecommunication, electricity, water, etc.) upon the presentation by such creditors of a transfer order for the payment of bills as provided under Article 906(3). Such an order constitutes final disclaimer of the right of cancellation. This process results in the execution of two powers of attorney at one and the same time. One is given to the creditor to issue a transfer order and presenting it to the bank; the second, to the bank to effect the transfer upon presentation of the transfer order by the creditor acting on behalf of the owner of the account. Article 907(2) seems to have fallen out of time envisaging situations where bank accounts were operated manually. Since bank transfers are, by and large, computerized even in our country, the caution envisaged under 907(2) may no longer be necessary.
137. Articles 910 on opposition of transfer by the transferor and 911 on transfer orders presented before declaration of bankruptcy of the person issuing the order are taken out of the Code, there being no apparent reason for the omission. A careful study of the rules needs to be made before finalizing the draft.

Section 3 - Deposit of securities

138. In Articles 912-918 only two words (both in Article 914) are affected by the new draft in the entire section. The word “Proceeds” at the title of Article 914 is replaced by “Yields” while the words “soon as” are left out, perhaps by mistake, in the proposed draft. The changes have no impact on substance. As we have seen in the comment on Title I of Book IV, negotiable instruments are categorized into commercial instruments, transferable securities and documents of title to goods.

Commercial instruments are further sub-divided into bills of exchange, promissory notes, cheques and traveller’s cheques.

Documents of title to goods are also elaborated under Articles 2813-2824 of the Civil Code and the Proclamation to provide for a warehouse Receipts System. There is no corresponding legal provision that elaborates transferable securities. This area is normally left to the law on stock exchange which is yet to come to Ethiopia. The importance and relevance of such a law is to provide for the establishment and regulation of markets for trade in the different forms of stocks and bonds. Although companies may issue shares and bonds (debentures) under the Code, the rules for the regulation of the trade are not yet in place.

139. The issues of discount under Articles 941-944, advance on securities under Articles 947-949 and pledge of securities under Articles 950-958 are clearly linked to the enactment of a law on stock exchange.

The absence of such a law has prevented banks from providing services indicated by the law. Two suggestions could be advanced in this connection.

1. Maintain the laws for future use.
2. Enact a law on stock exchange to facilitate their applicability.

Hiring of Safes: Articles 919-923

140. No major change is proposed in the draft prepared MoJ, except that Article 924 is dropped without replacement. Redundancy may be the reason for dropping it, and rightly so. The rephrasing of Article 922 is aimed at form rather than substance.

The omission under Article 923(2) of the sentence “…key giving the combination, the said safe shall be forced in” is a result of mistake and must be reinstated. Neither the drafters nor the French expert proposed any change on the chapter. As a result, we may as well maintain it.

Chapter III Contract of Current Accounts, Section I, Articles 925-929

141. As stated above, there is a conceptual incoherence in the application of the term Current Account. This incoherence is obvious from the definition of the term under Article 925 which stands at complete variance to the kind of service provided by the Banks in practice. In short, as far as Commercial Banks are concerned, current account means nothing other than a checking account. On the other hand, current account consists of the following two major elements as envisaged by the Code.
(A) Generality of Account  
- Reciprocal general settlement of debts and not particular settlement outside the account.  
- Each remittance is allocated as guarantee for the remittance made by the other party.

(B) Reciprocal remittance be effected or at least be possible.  
- It must be made alternatively and not successively.

Neither the French expert nor the drafters (MoJ) proposed major change in the entire chapter on contracts for current account. Both tacitly support the view to maintain the chapter. Experienced bankers, on the other hand, think otherwise, at least for two reasons. The first is that the term current account is no more in use in Ethiopian context. It is now used to mean “Demand Deposit”.

Secondly there is no such service as envisaged by the Code provided by Banks, and therefore the entire chapter may be removed for lack of applicability. The French expert Ponsot supports the maintenance of the chapter while admitting that it is not currently widely in use. He also thinks that there are details which may not be regulated and should be left to case law. In our view, the starting point is the availability and the need for such service. We now know that there was no such product either because there was no need for it or because banks were not providing it. The practice of banks at the local and international plane has to be carefully studied before deciding to remove or maintain it. In addition, the incoherence in terminology and practice must be addressed in such a way as to avoid confusion in the usage of the term.

We think the concept terribly lacks terminological as well as practical clarity so much so that current account in Ethiopian banking transaction stands for nothing other than Demand deposit. Based on the opinion of Ponsot and other banking professionals, we suggest that the entire section be revisited again.

Chapter 5 – Credit Transactions

142. Section 1 - Open Credit, Articles 945-946

No change or comment is made in the MoJ draft.

The importance of this service can hardly be overemphasized. It is doubtful whether the existing two articles have sufficiently covered all that is needed to govern the service of open credit. We recommend further study on this vital service in banking transactions.

Section 4 - Documentary Credits, Articles 959-967

143. No change is made in the MoJ draft.

According to the notes of the master drafter of the Code, the Articles on this section were based on the Lisbon Conference of 1951. It was that conference which produced the “Uniform Customs and Practice for Documentary Credit”. That document played a pivotal role in facilitating international trade among nations serving as a harmonizing regime for the various cross border transactions. The original version has, however, gone through several revisions adding new concepts, while amending earlier positions. Espousing the motto of self regulation by business, the International Chamber of Commerce (ICC) has taken up the task of making it easier for companies in different countries to transact business with each other.

This includes ICC rules for the conduct of trade and settlement of payments for which the Uniform Customs and Practice for Documentary Credits is the foremost example. The latest
version of this document is publication No. 500 enacted in 1993 by the ICC. Comparison of this latest version of ICC with the corresponding section of the Code reveals significant variances.

These comparisons reveal that almost all the Code provisions badly need updating if they are to be put on line with the current thinking of UCP. But the UCP is not subject to the rigid rigor for amending a Code. In view of this, it may be necessary to include only major highlights in the Code, leaving soft areas to regulations or to totally remove the section on documentary credit out of the Code and deal with it by separate law so that the law may be amenable for amendment without affecting the Code provisions.

**Derivatives**

144. Banking is a dynamic sector in which market driven ideas emerge on a continuous basis. As a result, banks should be responsive to new ideas which give rise to new banking products. The idea of derivatives and derivative products is one example of great significance in this regard. A derivative product is a financial product that is derived from another financial product. For example an option to buy a share at some point in the future is a financial product derived from the underlying share. Similarly a swap on an interest rate is a product derived from the underlying loan, hence the term “derivative”.

The size of derivative market worldwide was estimated at USD 55 trillion in 1998. As a result the area can not be ignored not only due to the fact that it is the current trend in banking but also due to the size of the market worldwide.

**Forms of Derivative Activity**

- Speculation – Enabling one to enter into a deal without actually buying a share.
- Hedging – The matching of income and risk.
- Asset liability management – Combining a mixture of hedging and speculation strategy.
- Arbitrage – Strategy to take advantage of mismatches in prices or market conditions.

The fundamental need for both financial institutions and clients to enter into derivatives transaction is either to earn income (by selling or using a derivative) or to manage risk. The use of derivative products has expanded rapidly in the late 1980s and 1990s largely on account of the increased volatility in world financial markets.

Relations of financial derivatives are made subject to regulatory rules enacted by the state and to contracts signed between the parties. The Ethiopian banking sector is yet to open to the international market. When it does, the market on derivatives is sure to come with it. The same is true for stock exchange markets. It is therefore important to start preparatory studies in relations to these markets to be ready to provide for them when the time comes.
PART V


5.1 Introduction

Book V of the Commercial Code is the least practiced and least known of all the provisions of the Commercial Code. Why that is so is itself a matter that needs research. Book V consists of over 200 articles, divided into five titles. Because of the novelty, complexity and technicality of bankruptcy law, the very thought of reviewing it has been forbidding. When compared with the Commercial Code, the Draft produced by the Ministry of Justice has not changed a single article, except the miscopying of the Code Articles. Although the Code provisions were not changed in any shape or form, this was an opportunity for revising Book V of the Commercial Code.

1. Terminology: The Commercial Code of Ethiopia (hereafter "the Code") uses “bankruptcy” to refer to the process of business liquidation. The term “bankruptcy” in the literature refers to the whole procedure applying to debtors who have suspended or are about to suspend payments. In the United States, for example, bankruptcy is a common expression for liquidation, reorganization and adjustment of debts. The Code uses the title “Bankruptcy and Schemes of Arrangement” as if they are two distinct procedures, when in fact bankruptcy is a procedure that includes schemes of arrangement, among others. We therefore suggest that the term bankruptcy be used as a common expression for the whole set of procedures, and the bankruptcy proceedings as used in the Code be replaced by the term “liquidation,” for that is exactly what they are. Bankruptcy is a process that may set certain procedures in motion, namely, liquidation, composition, and schemes of arrangement (in Ethiopian case), reorganization, assignment, etc in other countries.

It was agreed in the plenary session that a terminology shorn off the stigma traditionally associated with bankruptcy be used to identify Book V of the Commercial Code. Some have expressed preference for the term “insolvency” but additional research needs to be done before one settles on one or another term for Book V. There is the additional task of finding an appropriate Amharic word for bankruptcy or insolvency. Members have also agreed that the term 'bankruptcy' (if it is to be used as a generic term for Book V) be used to refer to the whole range of Book V proceedings, not just liquidation as it is now the case.

2. The Code provides for three distinct general reliefs for debtors who have suspended payments or are about to suspend payments. They are bankruptcy (liquidation), composition and schemes of arrangement. A close reading of the provisions on schemes of arrangement reveals that the schemes are quite simply another form of composition (for comparison of the provisions of composition and schemes of arrangement, see below). The difference between schemes of
arrangement and composition is one of form rather than substance (such as the timing of the proposals, the required voting). The Code treats the two as separate because of its severance of bankruptcy (liquidation) proceedings from schemes of arrangement. We believe that this severance is unnecessary and propose a unitary proceeding which might lead to liquidation or reorganization, depending on the seriousness of the financial problems facing the business. In the bankruptcy laws of other countries are found other forms of relief which are not included in the Code. These include “assignment of business”, “sale of business as a going concern”, and corporate reorganization. We believe that these forms of relief are relevant in Ethiopian bankruptcy and we recommend that they be expressly incorporated in the Code. The incorporation of these new forms of relief is recommended after a careful study of their merits and otherwise in the Ethiopian context.

3. The drafter of Book V of the Code included some provisions in Book V anticipating (perhaps hoping) that they would be replaced or at least rewritten in light of the “future Civil Code” and the Civil Procedure Code. The Articles in question are Arts. 1055-1080, and 1101-1112. The drafter wrote these as provisional articles. We know what the drafter could not have known at the time (he submitted Book V in 1954, 11 years before the Civil Procedure Code came into force). We now have the Civil Code and the Civil Procedure Code. It is therefore necessary to examine these provisions in light of the provisions of the Civil Code and the Civil Procedure Code, as a matter of fact in light of current developments on these issues. It is, however, doubtful if the Civil Code has provisions comparable to those of Articles 1055-1080. In Book V, the only provision that makes a direct reference to the Procedure Code is Art. 1103. Articles 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, and 1112 may therefore need to be examined in light of the Civil Procedure Code (that does not mean, however, Civil Procedure Code should override the bankruptcy provisions!). The Provision that sets the order of priority (Art. 1110) should stand on its own. As it stands, it is problematic (see below) but bankruptcy law needs its own rules on the order of priority. (See comments below corresponding to Articles 1055-1080 and Articles 1101-1112.)

4. Another issue that requires a policy decision is whether we need specialized bankruptcy courts to hear and settle issues relating to Book V of the Code. In terms of the technicality, novelty and complexity of bankruptcy law, one might be justified; however, unless the approach of the Ethiopian bankruptcy law changes, there aren’t likely to be enough number of cases to warrant a specialized court to deal with bankruptcy cases. We propose that commercial division benches of the relevant federal court hear and settle bankruptcy cases, wherever such might be available.

Although the technicality of bankruptcy rules warrants the establishment of bankruptcy courts in Ethiopia, the small number of bankruptcy cases so far does not merit the establishment of special bankruptcy courts. We may have to do with commercial and/or civil division courts for a while.

5. Article 968 of the Code defines the scope of application of bankruptcy. Book V of the Code applies to traders (as defined under Article 5 of the Code) and to commercial business organizations within the meaning of Article 10 of the same Code with the exception of joint ventures. It is apparent from the language of the Article that civil partnerships (ordinary partnerships) are excluded from the application of bankruptcy. We thus favour the removal of the distinction between civil partnerships and commercial partnerships from the Commercial Code and of including civil partnerships under the rules of the Commercial Code. It does not of course follow that civil partnerships should be subject to the provisions of Book V of the Commercial Code.
Many countries apply their bankruptcy provisions to all debtors, natural or juridical, even if they are not traders. There are of course countries that restrict bankruptcy to traders only. It is interesting to note, however, that some of these countries (a case in point is France) have moved away from “trader only” regime for bankruptcy application. In the old times, indebtedness was a matter that affected traders only, but nowadays credits are being made available to consumers. It is therefore essential that we take these changes into account when we define the scope of bankruptcy provisions. Whether we should apply Book V to non-traders is another question altogether. Those countries that restrict their bankruptcy laws to traders have not completely neglected the insolvency of non-traders. They have provided for rules in their civil procedure codes for addressing non-trader insolvency. We may follow this approach, i.e., of applying Book V to traders and including rules in our civil procedure code for non-trader insolvency.

A related issue is the case of special regimes for some types of businesses, such as banking. Some authors have made a strong appeal for special regimes of bankruptcy for banks. Some countries, such as Italy and Norway, have provided for special rules for bank insolvency in addition to general insolvency rules. Other countries, such as the USA, have sui generis bankruptcy regimes for Banks. The majority of European countries apply ordinary bankruptcy rules to banks. In Ethiopia, Licensing and Supervision of Banking Business Proclamation No. 84/94 provides that the Commercial Code relating to dissolution and winding-up of companies applies to banks, with a proviso that the functions assigned to the liquidator and commissioner shall be exercised by a person recommended by the National Bank of Ethiopia and appointed by the Court. In addition, before bankruptcy proceedings are commenced against a bank, a notice shall be given to the National Bank of Ethiopia fourteen days prior to the commencement and the National Bank shall be permitted to appear before the Court hearing the case and petition to safeguard the interests of the creditors. Considering that the Proclamation just cited is very recent, it may be deemed an appropriate policy for Ethiopia to follow, but the Code needs some revision to that effect. Perhaps somewhat similar is the case of cooperative societies. The now repealed Agricultural Cooperative Societies Proclamation No. 85/1995 submits societies to the Book V of the Commercial Code, with what it calls “necessary modifications.” The subsequent laws that replaced it are silent on this matter.

Finally, the applicability of Book V of the Code to State enterprises requires a clear provision in the Commercial Code. Articles 39 and 40 of the Public Enterprise Proclamation No. 25/1992 explicitly state that Book V applies to state enterprises. It is doubtful whether the Government is willing to apply bankruptcy provisions to state enterprises (to our knowledge, no state enterprise has been declared bankrupt to date according to Book V). If the Government is committed to applying the same regime to state enterprises, an explicit provision should be inserted in the Code. Application of bankruptcy provisions to state enterprises places government enterprises under commercial discipline of bankruptcy as the private commercial counterparts.

On the issue of extension of bankruptcy proceedings to non-traders and non-commercial organizations, we appreciate the need for extension but have concluded that the commercial code is not a place for these kinds of proceedings. Anticipating a revision of the Ethiopian Civil Procedure Code in the foreseeable future, they have expressed hope that the insolvency of non-traders (e.g., consumers) be addressed in the future Civil Procedure Code.

On the question of civil partnerships, however, we believe that the determination of their status under Book I and II will also determine their status under Book V. The extension of Book V to civil partnerships should therefore await the final determination of their status under the Commercial Code in general.

* The Licensing and Supervision of Banking Business Proclamation No. 84/1994 has been repealed and replaced by Banking Business Proclamation No. 592/2008. The new Proclamation has provided for what is a virtual bankruptcy regime for banks, moving Ethiopia in the direction of those countries which create special bankruptcy regimes for banking business (e.g., U.S.A.); see Articles 32-48 of Banking Business Proclamation No. 592/2008.
On the treatment of financial institutions during bankruptcy, we have appreciated the nature of the problem and urge further research in light of the existing laws and the laws and systems of other countries.

On the treatment of state enterprises, we understand that our laws are as clear as can be, but the government has never used the channel of bankruptcy for some of the distressed state owned enterprises. In any case, members agree that an explicit provision in the Commercial Code might improve the situation in the future.

6. **Articles 979 and 980** should be placed immediately after 968 (see the comments under those provisions).

7. **Article 971.** We believe that the phrase “any fact, act or document showing the debtor is no longer able to meet the commitments related to his commercial activities” is too liberal a standard for initiation of a bankruptcy proceeding (a momentous decision for a trader) and we suggest that some restriction be inserted in this provision. Perhaps, the language as that used in the German law will do. German bankruptcy law requires “continuous inability to perform … financial obligations on grounds of permanent lack of assets” as a ground for bankruptcy.

We appreciate the dangers of too broad a commencement standard as that of Article 971 and have called for a circumscription of the commencement standard somewhat in line with that of the German Bankruptcy Code.

8. **Article 972** of the Code charts two paths for a trader “who suspends payments of his commercial debts”: bankruptcy proceedings or the approval of a scheme of arrangement. However, it is not clear from the Code which path the Court should prefer, although some would say that the Code seems to give preference to bankruptcy, presumably because the bankruptcy provisions precede the provisions for composition and schemes of arrangement. Many other laws oblige courts to give the bankrupt a chance to rehabilitate, and we see no reason why Ethiopia should not take this stance. Bankruptcy has far-reaching consequences upon, not just the debtor, but also his/her family, employees, consumers and suppliers of goods and services. It is in the interest of all these parties to give the bankrupt business a chance to revive. The court should, therefore, be directed by law to give business rehabilitation a chance, such as through schemes of arrangement, composition, business reorganization, or even assignment. In addition to a specific provision to that effect, we think it logical to put the Code provisions relating to composition and schemes of arrangement (Arts. 1119ff) before the bankruptcy provisions. Bankruptcy (liquidation) provisions should be matters of last resort, after all attempts at rehabilitating the business have failed or if it is apparent to the court that there are no chances of rehabilitating the business.

The corollary of the proposal above means that there should be a period, often known elsewhere as “observation period” during which the court suspends judgment about what action to take, i.e., rehabilitation or bankruptcy (liquidation). In other countries, this observation period lasts for up to three months. The choice between rehabilitation of the business or liquidation occurs once the financial situation of the debtor has been assessed and a determination made as to whether reorganization is possible. The advantages of this procedure are: (a) it is procedurally simple, flexible and cost efficient; and (b) it encourages early recourse by debtors to commence bankruptcy proceedings. Under the current rules of the Code (see Arts. 976 and 977), the Court may declare a debtor bankrupt based on its own perceptions from the documents submitted under 973 (the balance sheet, the profit and loss account and the list of commercial credits

---

*For suggestions to merge the provisions of composition and schemes of arrangement and replace the schemes of arrangement provisions by reorganization, see below.*
and debts), or after having obtained a report of a judge (sic) under Article 976(1) or after the first hearing under Article 977(1). The Code does not fix the time it takes for preliminary investigation (which in and of itself is problematic), nor does it indicate why the court should conduct preliminary investigation or hold a first hearing. We believe that this should be replaced by an observation period lasting for up to 90 days for the purpose of determination of whether any bankruptcy proceeding is warranted in the first place and, if bankruptcy proceeding is warranted, what best possible course of action to take (reorganization, composition, liquidation, etc). We believe a requirement of an observation period will prevent the proceedings from hastily moving to liquidate and dismember an otherwise viable business. A fixed time will also prevent delays in bankruptcy proceedings and preserve the assets from dissipation.

Fifteen days is hardly sufficient in order to establish if the suspension of payments is serious enough for declaration of bankruptcy. It is reasonable to extend the period to three months, in order for the debtor to be able to establish that the suspension of payment is quite a serious matter warranting application for bankruptcy [See Article L640-4 of the French Code (within 45 days following the cessation of payments)].

We have unanimously endorsed the proposal that gives businesses chance to rehabilitate before liquidation. They have accordingly accepted the proposal of the team to incorporate provisions for rehabilitation and reorganization of businesses before provisions of liquidation (straight bankruptcy). The French Bankruptcy Code, for instance, puts straight bankruptcy at the end after prevention of business difficulties, composition, and reorganization.

We also appreciate the need for “observation period” in Ethiopian bankruptcy law. Observation periods prevent a hasty declaration of an otherwise viable business as bankrupt. Caution should be, however, made so as not to let dissipation of the assets of the business during the observation period.

We again concur with the observations of the team that the provisions of schemes of arrangement are substantially similar to the provisions of composition, but call for additional research before the removal of one or the other of these schemes in bankruptcy or their merger.

On the question of notice, we propose that the period of notice be fixed in light of the need for and role of the notification. Since the French Bankruptcy Code has identical provisions in this regard, one needs to explore the issue further before any extension of the notice period is settled.

9. Article 973 (together with Article 1156): It is doubtful if these documents are ready for submission within fifteen days (or twenty for business organizations) of suspension of payments. This is quite simply too onerous an obligation. The period for submission should be extended to “two months” where the debtor is able to show reason. Besides, submission of other documents should be required or at least specified.

Some are worried about the risks of delay in the submission of documents required for declaration of bankruptcy. The period for submission of documents should however be weighed against the risk of dissipation of assets by the delaying tactics of the bankrupt debtor. The period might seem onerous to debtors, but the urgency of the situation might demand submission of all documents for early declaration of bankruptcy.

The submission of other documents, like court judgments, is quite reasonable and should be included in the Draft.
10. **Art. 974** should be moved to Arts. 989 and 990, because it is more intelligible that way. The issue of cross-border bankruptcy requires detailed regulations. UNICTRAL has developed a model law on cross-border insolvency. It may be instructive to look at the Model Law to develop Ethiopian rules on cross-border bankruptcy.*

Articles 974 (and 1157) do not specify the court to which an application is to be made. Jurisdiction over bankruptcy cases should be seen in light of Proclamation No. 25/96 (Federal Courts Proclamation). Article 5 of Proclamation No. 25/96 fails to mention “bankruptcy” as one of the subject-matters falling under the Federal Court Jurisdiction. In federal systems having parallel court systems (federal and state), bankruptcy is one of the subject matters that often falls under federal court jurisdiction. The US Constitution mentions bankruptcy as a federal matter. There are reasons why bankruptcy falls under federal court jurisdiction. Bankruptcy involves plurality of parties and suits, and is essentially a collective mode of enforcement, which is better handled in Federal courts. It is possible that Proclamation No. 25/96 failed to mention bankruptcy by accident rather than design. The Code can put the whole thing to rest by federalizing jurisdiction over bankruptcy matters.

Even if additional research on the issue of cross-border bankruptcy is needed, federalizing bankruptcy jurisdiction would relieve courts from seeking federal jurisdiction through diversity of parties (diversity jurisdiction). Bankruptcy cases would most likely involve multiple parties from multiple states, and it would only be logical to grant jurisdiction to federal courts.

11. **Article 975.** The conditions under which creditors may bring a petition for bankruptcy are not listed under Art. 975. This may lend itself to abuse by some creditors eager to exploit bankruptcy provisions in order to force the hand of the debtor. The power of creditors may be limited by qualifications like “a significant portion of the debt be undisputed and free of setoff” or “the debt must be based on court judgment” or “the composition of the debt vis-à-vis other creditors is significant.”

Also under what conditions must the public prosecutor bring petition for bankruptcy? How about the court itself? These should clearly be spelt out in the law to prevent possible abuse. In some countries, a public prosecutor may initiate bankruptcy against a business whose closure is in the public interest. Demonstration of illiquidity is not necessary. In other words, other acts such as a fraudulent, or criminal activity, serious breach of regulatory obligations or a combination of these (e.g., money laundering) may lead to petition by the public prosecutor of bankruptcy.

On the application for bankruptcy of a business enterprise by other parties, Article L640-6 of the French Commercial Code provides: “the Works Council or, in the absence of a works council, the employee delegates may inform the president of the court or the public prosecutor of any fact showing the debtor is in a state of cessation of payments.”

In our case the current rules under 975 are too liberal. They might encourage creditors to initiate bankruptcy against debtors in order to force the latter’s hands or even smear the latter’s reputation in the market. Thus we favor limitations based on the amount of debt the creditor is owed by the debtor (i.e., it should be significant) as well as the number of creditors. The particulars of the limitations should be determined by the team after additional research.

*An alternative consideration for exercise of jurisdiction may be its regulation in the light of the center of interest of the debtor. UNICTRAL Model Law Article 2 prescribes that any place of operations where the debtor carries out a non-transitory economic activity may be taken into account in the determination of jurisdiction. Some countries also base jurisdiction on the presence of assets of the debtor; see UNICTRAL Legislative Guide on Insolvency Law, pp. 41-43.*
On the application for bankruptcy by the public prosecutors for reasons other than cessation of payments (for e.g., for reasons of money laundering), the concern is that the public prosecutor might abuse its powers in this regard. Those people want bankruptcy proceedings to remain as proceedings for cessation of payments cases rather than as instruments for enforcement of crimes. The latter should be a matter of criminal law, not bankruptcy proceedings. If, however, cessation of payments occurs as a result of the criminal proceedings, the public prosecutor should be at liberty to initiate bankruptcy proceedings.

On the question of notification for bankruptcy by employees, or trade unions, though we agree with the proposal in principle we further call for additional research.

12. Article 976. There ought to be a provision that lets the court presume that there is indeed a case for declaring bankruptcy, i.e., in cases of petition by the debtor and where there is no objection by the creditors to the application.

The word “judge” should be replaced by “an appropriate expert” who can examine the books/records of the debtor and report back to the court (along with this, conflicts of interest issues need to be addressed).

Sub-Article 2 of Article 976 refers to a trustee before one is appointed. It is too early a stage to talk about a trustee, unless the court immediately moves to appoint a trustee (see Art. 981). Article 976 suggests that the court may appoint what is elsewhere known as “interim trustee.” If that is the case, there should be a clear provision to that effect.

Article 976 does not prevent the court from presuming bankruptcy on the basis of documents submitted by the debtor and creditors. The court does not have to order investigation all the time. In any case, a provision might be inserted to make that clear to courts.

The term “judge” in Article 976 is a bit confusing. It should be replaced by the expression “appropriate expert.” The expert appointed by the court for investigation must have the requisite expertise to investigate facts (for example, examine books and records) and report back to the court.

The need for “interim trustee” has also been appreciated by the business community and should therefore be inserted in the Draft.

13. Article 977. Shouldn’t there be a time limit for the determination of the date of suspension of payments? An observation period for determination of the real situation of the business should be included in Ethiopian law. An observation period may last up to three months. During this period, no presumption is made as to whether the business will eventually be reorganized or liquidated. Besides, grounds for denial of judgment should be included immediately after Art. 977.

A provision specifying the status of the business of the bankrupt debtor (e.g., whether the management stays in office during the observation period) should be inserted if an observation period is required. Otherwise, an observation period might open the way for dissipation of the assets of the business to the detriment of creditors. Perhaps, the observation period should also be seen in light of the provisions of the Commercial Code relating to provisional and conservatory measures (Articles 1004-1018).

14. Article 978. The application of this Article awaits the creation of a commercial gazette. In Article 978(2) the cumulative requirement is vague; it would be extremely difficult to both
entertain and alter the date of suspension of payments within that time limit. If this Article was to be of any practical use, an application shall be permitted within eight days from deposit and the court shall rule upon (alter) the date of suspension within fifteen days at the latest from the date of application.

Article L631-8 of the French Commercial Code allows “moving the date of suspension of payment” one or more times, without however going back more than eighteen months before the date of declaration of bankruptcy. Such action may be filed with the court by the administrator (trustee), the court nominee or the public prosecutor. The court shall judge the case after hearing or duly summoning the debtor. The petition must be filed within a year following the issuance of the commencement order (judgment of bankruptcy).

The importance of commercial gazette has been emphasized throughout the revision of the Commercial Code. The fate of the commercial gazette is therefore one that requires a serious commitment by the Government in all aspects, not just in the case of bankruptcy.

The French Code cited above seems reasonable in its requirement of hearing the bankrupt debtor before the date of suspension is revised. The team’s proposal regarding the period within which application is to be made and alteration of the date of suspension has been accepted by the plenary session.

15. Article 981. Ethiopian bankruptcy law establishes an office of commissioner to supervise the activities of a trustee. A recent USAID commissioned report∗ on Ethiopian Bankruptcy casts doubt on the need for a commissioner as an additional layer between the Court and the trustee and suggested that the Court supervise the trustee directly. The question is whether we need a commissioner between a trustee and a bankruptcy court.

Despite the report we believe that the commissioner should be retained. There should, however, be a clear demarcation and identification of the roles of the commissioner vis-à-vis the court and the trustees. One issue that should, for example, be ironed out is whether the commissioner mentioned in Book V of the Ethiopian Commercial Code is the commissioner mentioned in the Ethiopian Civil Procedure Code. It is also necessary to clarify whether a commissioner is an office identified in the Courts’ Proclamation (as part of the judiciary) or to be appointed by court in each case.

16. Article 983. Why do we have to give extracts from judgment in bankruptcy only to the petitioning creditors? How about other creditors (e.g., tax authority)?

Content of notice should have been specified. The notice shall include information on: (1) effect of commencement of proceedings; (2) time of submission of claims; (3) the manner and place of submission; (4) procedure and form; (5) consequences of failure; (6) information on meeting of creditors. The implementation of Article 983(4) and (5) awaits the commercial gazette.

It is therefore important to provide all the necessary details in the notice. The judge may rely upon the Civil Procedure Code in this regard, but it is helpful if the Commercial Code provides all the guidance a bankruptcy judge needs to conduct the proceedings.

17. Article 984. This provision is qualified by Art. 988 because the latter imposes a duty (as it is reasonable) upon the court to set aside a judgment of bankruptcy where the conditions set therein arise.

Why can’t a petitioner changing his mind be allowed to withdraw his claims?

Article 984 (3) is an appropriate provision, because otherwise a debtor (desperate to stop bankruptcy proceedings) may use an application to set aside as a tactic to delay proceedings. The court will not order suspension (in other words, the proceedings will continue unabated) in spite of an application to set aside the judgment of bankruptcy).

Thus it is reasonable to allow a petitioner to withdraw his claims with all the necessary consequences. The court should see to it that the petition has been withdrawn in good faith. The debtor should not be permitted to suspend proceedings by an application to set aside. The proceeding will continue unabated.

18. Article 985. Shouldn’t the Commissioner be notified of an application to set aside?

Since the trustee reports regularly to the commissioner, it is presumed that a notice to the trustee is a notice to the commissioner.

19. Article 987. Why can’t those judgments, excepted by Article 987(1), be set aside? For example, the creditors apply to remove the commissioner whom the court appointed in the judgment on grounds of conflicts of interest.

20. Article 988. Should include other grounds for setting aside: such as set-off; and debts subject to dispute.

21. Chapter 2 identifies the court, the commissioner, trustees and creditors’ committee (Arts. 989 – 1003) as persons responsible for conducting bankruptcy proceedings. The bankrupt debtor is missing. Shouldn’t the bankrupt debtor have some role in the proceedings?

We propose that the term “persons” be replaced by “organs”. Since debtors bear many duties in bankruptcy, it might be appropriate to specify their roles in bankruptcy. Book V of the Commercial Code does not identify debtors as persons responsible for conducting bankruptcy because it strips them off all powers.

22. Article 990. Multiple bankruptcy proceedings should be expressly prohibited.

One of the principal effects of bankruptcy is consolidation of all suits in a single (bankruptcy) court. This should hence be clearly indicated in Article 990, so should the prohibition of multiple bankruptcies.

23. Article 991. Who is a commissioner? Is the commissioner under Book V the one that is provided under Articles 122–136 of the Civil Procedure Code? If so, an express reference should be made. The question is legitimate in view of the fact that the drafter wrote Book V at least eleven years before the Civil Procedure Code finally came into force.

Shouldn’t the office of the commissioner be a permanent institution within the judiciary in order to effectively run the day to day problems of bankruptcy and have the time and resources to specialize on this area? The establishment of the office of the commissioner as a unit within the Federal judiciary can wake the bankruptcy provisions from their slumbers. The qualifications, character and integrity of the commissioner ought also to be specified in the law.

As the term commissioner in Book V might be confused with the commissioner in the Ethiopian Civil Procedure Code an alternative term should be found.
24. **Article 993.** The grounds for the replacement of the commissioner ought to be specified in the law. Besides, the petitioners and the creditors should be allowed to apply for the removal or replacement of the commissioner, rather than the court doing this on its own motion. Any removal of the commissioner without apparent ground can be disruptive to the smooth proceeding of a bankruptcy.

Therefore the persons who can apply for replacement of commissioners should be specified in the law. The court should not replace commissioners merely on its own motion. The trustees as well as creditors should be allowed to request replacement of a commissioner. It is also wise to specify the grounds (albeit not exhaustively) upon which commissioners may be removed.

25. **Article 994 (1).** Why is residence an issue? The phrase “qualified persons” should be qualified by what constitutes qualified under bankruptcy law, such as knowledge of bankruptcy law, commercial law, business law, experience in commercial and financial matters, knowledge of debtor’s business and the type of market, etc. The personal qualities of the trustee should also be specified in the law, such as integrity, impartiality, good management skills, sound reputation, no criminal record or record of financial wrongdoing, no previous insolvency.

We propose that Art. 994(3) is replaced by “where several trustees are appointed, decisions shall be made by a majority of them.” If several trustees are appointed, at least a majority of them should consent to be bound; otherwise, there is no point in appointing several trustees in the first place.

It is interesting to note Art. L631-12 of the French Code, which provides something to that effect, except that under French law, the “joint and several action” is to assist the debtor.

We see no reason for the requirement of residence in the appointment of trustees, although residence might be required after appointment.

It is impossible to exhaustively list the qualities of a trustee, but the personal as well as professional qualifications of a trustee should be enumerated in the law. These qualifications will serve as guideposts to courts in their appointment of trustees, but care should be taken not to make the qualifications so stringent as to exclude otherwise capable persons. The pool of qualified persons is likely to be limited at any one time and courts should be made do with what they can find.

The question of how decision should be made where several trustees are appointed requires additional research.

Article 994(4) lists persons that are unqualified to be appointed as trustees. Art.994 (4)(c) and (d) attempt to avoid conflicts of interest, but it is doubtful if they are exhaustive. Cases of prior or existing business relationships, prior ownership of the debtor, creditors, a relationship with a creditor of the debtor, prior representative or officer of the debtor, or creditor of the debtor are not addressed at all. Besides, the list under 994(4)(c) is relevant only to natural persons. Article 994(4) (c) should be broadened as to apply to conflicts of interests cases arising between juridical persons (e.g., business affiliations). Article L621-5 of the French Code provides “No relatives or affines, up to the fourth degree included, of the head of the business or the managers, if the debtor is a legal entity, may be appointed to any one of the positions…”

Article 994(5) prohibits self-dealing, because a trustee occupies a fiduciary position. There are other duties of fiduciaries (such as the business opportunity doctrine) which are not stated in this sub-Article.
That Article 994 (4) does not exhaust all possible cases of conflicts of interest has been appreciated by all members of the plenary session. It should therefore be extended to cover other cases of conflicts of interest and business organizations.

26. Article 995. The involvement of the bankrupt debtor in the administration of the estate (all be it under the supervision of the trustees and the commissioner) requires a policy decision. Shouldn't an honest debtor be allowed to manage his property in some limited cases? See Article 1021 of the Code.

Many insolvency laws divest the debtor of all rights to control assets and manage and operate the business in liquidation. Where it is determined that the most effective means of liquidating the estate is to sell the business as a going concern, some laws provide that the insolvency representative (trustee) should supervise and have overall control of the business while permitting the debtor to enhance the value of the estate and facilitate the sale of the assets by continuing to serve and advise the insolvency representative (trustee). This approach may be supported by the debtor’s detailed knowledge of its business and the relevant market or industry as well as its ongoing relationship with creditors, suppliers and customers.

The involvement of the bankrupt debtor in the administration of the bankrupt estate and in what situations requires additional research. We, however, in principle believe that innocent debtors should be given some role.

27. Article 996(1). “State bank of Ethiopia” should be replaced by “any commercial bank”.

28. Article 998. The grounds for removal of trustees are not exhaustively stated. Add the following grounds: (1) Non-compliance with duties (stated in Art. 996(2); (2) Gross incompetence or gross negligence; (3) Failure to disclose conflicts of interest; and (4) Illegal conduct.

Art. 998(3): Should the public prosecutor be involved where he is not the petitioner under Art. 975?

We believe that the public prosecutor should be free to apply for removal of a trustee even if it were not the petitioner in a bankruptcy proceeding.

29. Article 999. Grounds for replacement of trustee should be stated. The grounds include resignation, removal, death, serious illness, disruption or delay of procedures, etc.

We suggest the restructuring of Articles 994-999 as appointment, replacement and removal of trustees in consecutive articles, perhaps preceded by the powers and liabilities of trustees. As they stand, the Articles appear in haphazard order confusing readers.

30. Article 1000. This Article is entitled “liability of trustees” while the content is about “duties”. It should be read as “duties of trustees”.

Duties of trustees should be specified to the extent possible, such as the duty of confidentiality, and the duty to act with due diligence.

31. Article 1001. Trustees shall be reimbursed for proper expenses. The drafter is said to have proposed 5 percent of sums recovered as remuneration for trustee. In this connection, where the estate has insufficient funds, shouldn't the public treasury bear the cost of legal proceedings as it is under French law?
Publicly funding the institution of trustees, as it is done in France, might seem appealing, but in Ethiopia, where is the money to come from? That trustees shall be reimbursed for proper expenses and be compensated for their work, there is no question about it. But the idea of publicly funding this might sound far-fetching at present. Unless, of course, the business community can come together to create a fund to be administered by insurance companies, there does not seem to be any alternative for this.

32. Articles 1002-1003. Eligibility for membership in a creditors’ committee is not clearly specified under Ethiopian Law. It seems to us that perhaps too much discretion is given to the Commissioner, which may lead to abuses and disputes. A creditors’ committee is too important a body in bankruptcy to be left simply to the discretion of the commissioner. Art. 1002(1) hints that the Commissioner shall have regard to the “order of the list of creditors” appearing in the deposit made under Art. 1044, but it is not clear if he has to choose the top three or five appearing in the list (based on the amount of debt they are owed). Besides, Art. 1002 assumes that only one creditors’ committee is needed, but in practice creditors are not a homogenous group whose interests are appropriately mediated through a single creditors’ committee. Following the French model, it might be appropriate to permit the formation of at least two creditors’ committees composed of credit institutions and trade creditors respectively.

Is it necessary to form a creditors’ committee in every situation? French Commercial Code requires the formation of a creditors’ committee only where a business enterprise’s number of employees and annual turnovers exceed certain thresholds. In that case, a creditors’ committee is grouped into two, that of credit institutions and suppliers of goods and services. By law each creditor is a member where its claims account for more than 5 percent of the total claims (See French Commercial Code Articles L-626-29 to L-626-35).

In the UNCITRAL Legislative Guide, we find the following recommendations regarding the rights and functions of creditors’ committee:

- Providing advice and assistance to the insolvency representative (trustee) or the debtor-in-possession;
- Participating in development of reorganization plan;
- Receiving notice of and being consulted on matters in which their class has interest, including the sale of assets outside the ordinary course of business;
- The right to hear the insolvency representative at any time; and
- The right to be heard during proceedings.

In the UNCTIRAL Legislative Guide we also find a recommendation that the creditors be allowed, subject to approval by court, to select, employ and remunerate professionals that may be needed to assist the creditors’ committee to perform its functions. The insolvency law should specify how the costs and remuneration of professionals would be paid.

The Guide reveals three approaches in appointment of creditors’ committee: appointment by creditors themselves, appointment by court, and appointment by an administrative body.

Section 705 of American Bankruptcy Code provides the following concerning the Creditors’ committee:

§ 705. Creditors’ committee

(a) At the meeting under section 341 (a) of this title, creditors that may vote for a trustee under section 702 (a) of this title may elect a committee of not fewer than three, and not more than eleven, creditors,
each of whom holds an allowable unsecured claim of a kind entitled to distribution under section 726 (a)(2) of this title.

(b) A committee elected under subsection (a) of this section may consult with the trustee or the United States trustee in connection with the administration of the estate, make recommendations to the trustee or the United States trustee respecting the performance of the trustee's duties, and submit to the court or the United States trustee any question affecting the administration of the estate.

The members of the plenary session favour appointment of creditors’ committee by creditors themselves, within five days, failing which the court or the commissioner shall appoint the committee.

On the question of who qualifies as a member of the creditors’ committee, the members have agreed that a creditor’s claim shall constitute at least 5 percent of the total claim against the debtor to qualify for membership in a creditors’ committee.

Apart from these, the other proposals of the team have been accepted by the members of the group.

33. **Articles 1006 and 1007.** What is the effect of registration of all properties owned by the debtor? Do they alter the priority of creditors? Against which creditors are the universality of creditors to compete? Against the creditors after the declaration of bankruptcy? Is this just a requirement intended to warn creditors after declaration of bankruptcy? What happens when these creditors enter into contracts and have their debts registered fully knowing that the debtor is declared bankrupt? For a hint, it might be instructive to read Article 1089 where it is stated that the mortgage registered under Articles 1006 and 1007 is not affected by the confirmation of composition (except when the composition otherwise provides).

Registration of the claim of universality of creditors is sometimes relevant; in other words, it does indeed confer a priority over certain creditors, such as creditors after approval of composition. These articles should therefore be retained in the future code.

34. **Article 1008.** The duty of the trustee to report to the commissioner should be a continuous one. We therefore propose that trustees have the duty to furnish reports on a quarterly basis unless compelling reasons arise for reporting at an earlier time.

35. **Article 1010.** This rule speaks of property that is not subject to affixing of seals. It however fails to provide rules on certain types of property that are not worth preserving. A provision should be inserted to grant power to relinquish property that is useless/or of no value. (See Art. 996 (1). A comparative study should however be made before any specific rules are inserted.

36. **Articles 1010(2) and 1011.** The Competent Authorities should be specified (otherwise no one will do the sealing).

We believe that the competent authority should be appointed by court for purposes of sealing.

37. **Article 1012.** This Article states the right of the debtor to be present when letters addressed to him are opened by the trustee, but nowhere is it stated if the debtor has the duty to disclose all his correspondence to the trustee. This duty should be stated. Besides, in this age of emails and other forms of correspondence, a language wide enough to subsume all forms of correspondence should be used. Article L641-15 of the French Code provides “in the course of the...proceedings, the supervisory judge may order that the liquidator or the administrator...receive all correspondence sent to the debtor. The debtor, having been informed, may be present when the correspondence
is opened…any summons before a court, any notice of orders or any other correspondence of personal nature must immediately be given or returned to the debtor. The supervisory judge may allow the liquidator to have access to the electronic mail received by the debtor under the conditions to be determined…Where the debtor is engaged in an activity subject to professional confidentiality rules, the provisions of this Article will not apply.”

38. Article 1014. The time for preparation should be fixed instead of just being “without delay.” Matters addressed in Article 1014 have been commented upon by the accounting, auditing and management expert team.

39. Article 1016. How about in the case of declaration of absence? By the way this applies to the case of declaration after death (can a trader who is declared absent be declared bankrupt?) See Art. 980. We believe that the effect of absence on bankruptcy requires additional consideration.

40. Article 1017. Compare this with Article L621-8 of the French Code which provides “The administrator and…shall inform the supervisory judge and the public prosecutor of the progress of the proceedings on regular basis. The supervisory judge and the public prosecutor may request the disclosure of all deeds and documents relating to the proceedings at any time.”

41. After Article 1017, something similar to Articles L622-5 and L622-6 of the French Code should be provided. Under the French law, all third party “holders of documents” must hand over the documents and books of account to the administrator (trustee). The French Commercial Code requires “an inventory and a valuation of the debtor’s estate and the guarantees encumbering it” to be made. The debtor has the duty to furnish a “list of creditors”, “amount of debts”, “the main executory contracts” and any pending proceedings to which the debtor is a party.

42. Article 1019-1034. Section 1 is mistitled as effects as regards the debtor, whereas the content is about effects as regards not just the debtor, but also creditors, and third parties. Articles 1019-1024 are about the effects of bankruptcy upon the debtor, Articles 1025-1028 about the effects of bankruptcy upon creditors, and Articles 1029-1034 are about the effects of bankruptcy upon third parties (or they may even be more appropriately called avoidance provisions).

Articles 1019-1024 should therefore be entitled “Effects of Bankruptcy upon the bankrupt debtor”; Articles 1025-1028 would be entitled “Effects of Bankruptcy upon creditors”, and Articles 1029-1034 would be entitled “Invalidation of certain acts performed by the Debtor during suspect period.”

It is therefore suggested that the title of Section I (Articles 1019-1034) be broken down into:

Section I: Effects of Bankruptcy upon the Bankrupt debtor (Articles 1019-1024);
Section II: Effects of Bankruptcy upon Creditors (Articles 1025-1028);
Section III: Invalidation of certain acts performed by the Debtor during suspect period (Article 1029-1034).

43. Article 1019. Is it really necessary to retain the punitive element of bankruptcy, attaching legal stigma to the bankrupt? Whether the debtor leaves the area should be left to the discretion of the court.

The language of Article 1019 is restricted to physical persons. How about in the case of juridical persons? We propose that this should be extended to officers of juridical persons. However, the restriction should not be as a matter of law. It should be ordered by a court after conviction in a criminal court or as part of the bankruptcy proceeding. The bankruptcy court may, upon declaration of bankruptcy, order the restriction of the freedom of bankrupt debtor, where it has
reason to believe that the bankrupt debtor is about to abscond. In any case, that should be left to the discretion of the bankruptcy court.

44. Article 1020. The assistance to be provided for the bankrupt debtor requires a policy determination. Perhaps one option would be to let the debtor fend for him/herself out of the assets not liable to attachment under Article 404 of the Civil Procedure Code. But in general the Article’s relationship with Article 404 and other provisions of the Civil Procedure Code should be clearly established. Does Article 404 apply in bankruptcy proceedings?

We suggest that the assistance be provided for the bankrupt and the family should be in line with Articles 404ff of the Ethiopian Civil Procedure Code.

45. Article 1021. Employment of the debtor by trustees may be a good compromise for divesting the bankrupt debtor from his rights in the estate, as he has some intimate knowledge about the business which may come in handy during the winding up. Article L631-11 of the French Commercial Code provides “The supervisory judge will determine the remuneration for the duties performed by the debtor if the debtor is a natural person or by the managers of a legal entity. In the absence of remuneration, the persons referred to…may obtain subsidies to be fixed by the supervisory judge for themselves or their families, out of the assets.”

46. Article 1022. Where are these forfeitures and prohibitions to be found? We believe that the prohibitions and forfeitures should be specified in the Bankruptcy law, because bankruptcy demands that kind of specificity. Under French law, prohibitions include disqualifications from running, managing, administering, controlling any business organization, denial of voting rights (as shareholders), forced sales of shares, ineligibility for public office, prohibition from issuing cheques, and ineligibility for public procurement contracts. These prohibitions apply not just to the bankrupt debtor, but also creditors, third parties, relatives of the bankrupt debtor, and trustees. (See Article L653-1ff of the French Code and compare with Arts. 121 to 128 of the New Criminal code of Ethiopia (additional penalties).

More vetting should of course be done on the Criminal Code of Ethiopia and other laws before enumeration of any forfeitures and prohibitions are inserted in the Commercial Code. If the prohibitions and forfeitures are incomplete or non-existent, going along the French law might be suggested.

47. Article 1023. In certain situations, as in the conditions provided for under Art. 1039, it may be necessary to allow the debtor to remain in possession of the estate (all be it under the supervision of the trustee and commissioner) because of the intimate knowledge s/he might have about the business. Under French law, the debtor is allowed to continue to carry out “acts of disposal and management over his personal estate as well as to exercise rights and actions not included within the administrator's duties”. The “debtor may initiate or join… with a view to holding the perpetrator of a crime or a misdemeanour of which the debtor has been victim liable” (See Articles L622-3 and L641-9 of the French Commercial Code).

Alternative approaches to the treatment of the debtor during bankruptcy are provided in the UNCITRAL Legislative Guide:

1. Displace the debtor and appoint an insolvency representative;
2. Allow the debtor to remain in control with minimum supervisions;
3. Appoint a trustee to exercise some level of supervision as well as retention of existing management (intermediate approach).
There should be a provision that clearly identifies the “bankrupt estate.” Assets excluded from the bankrupt estate should also be clearly spelt out in the law. There are of course several provisions in Book V which indicate assets included in or excluded from bankrupt estate. (See for example, Articles 1029, 1030, 1031, 1033, 1069-1080).

The treatment of joint assets in bankruptcy proceedings should also be clearly spelt out. One approach would be to exclude joint assets from bankruptcy proceedings. The other approach is to identify that part of the joint asset belonging to the bankrupt debtor and apply bankruptcy rules on that share.

The effect of bankruptcy upon the property of the bankrupt debtor’s spouse is not clear. The drafter left out provisions on this hoping that the general rules of family law would provide an answer for this.

The UNCITRAL Legislative Guide defines the bankrupt estate as:

“The Bankrupt estate shall include all assets of the debtor, including rights and interests in assets, wherever located, whether in the possession of the debtor at the time of the commencement of the proceedings, and including all tangible and intangible assets. Additional provisions should be added, such as ‘the bankrupt estate includes the bankrupt debtor’s rights and interests in encumbered assets and in third-party owned assets, assets acquired by either the debtor or the trustee after the commencement of the bankruptcy proceedings, assets recovered through avoidance or other actions.’”

The UNCITRAL Guide also describes assets excluded from the bankrupt estate:

“These assets owned by third party that are in possession of the debtor, such as trust assets, assets which will be returned to the owner once the purpose for which they are in possession of the debtor has been fulfilled (bailment), assets subject to reclamation, and in case of a natural person, post application earnings from the provision of personal services by the debtor, assets that are necessary to earn a living and personal and household assets, such as furniture, household equipment, bedding, clothing, and other assets necessary to satisfy the basic domestic needs of the debtor and his family.”

Some role might hence be assigned to the debtor during bankruptcy, consistent with the position expressed previously on this matter. But whether the debtor should have a role in any proceeding should depend on his intimate knowledge of the line of business, the agreement of the creditors’ committee and the discretion of the court.

We therefore propose the adoption of the definition of the “Bankrupt Estate” in the UNCITRAL Legislative Guide

48. Article 1026. This provision needs some reconsideration. There is a strong case to be made in favour of applying the rule to secured creditors as well. Many laws provide that encumbered assets are included in bankrupt estate, thus limiting the enforceability of security interests by application of stay. This has several advantages. This limitation is crucial particularly where the encumbered asset is essential to the business (for example, factory building). Of course, where encumbered assets are included, certain protections ought to be provided in the law, which will help maintain the value of the encumbered asset or the secured portion of the creditor’s claim. An application of the stay against even secured creditors should not deprive them of their rights in encumbered assets.

What types of suits are subject to suspension? Under French law, the commencement of the proceedings suspends all payments of claims arising prior to the commencement of the proceedings, except set-off payments of connected claims. It also prohibits payment of claims arising after the commencement except some specified claims, such as claims related to the management of the
estate and the debtor’s daily necessities of life and alimony claims (See Article L622-7 of the French Code).

The consequence of payment (by trustee) of creditors’ claims otherwise than through the collective action should be stated. For that, it may be instructive to look at the last sentence under Article L622-7 of the French Code.

Under French Law, all legal actions and proceedings for enforcement against the debtor are continued other than for a payment of money, rescission of contracts, or for enforcement of actions in respect of movable or immovable properties (Articles L622-21 and L622-23 of the French Code).

On the treatment of secured creditors, in some laws, encumbered assets are included in the bankrupt estate, thus limiting the enforceability of security interests by application of stay; however, the value of the encumbered asset or the secured portion of a creditor’s claims should be maintained. Other laws provide that encumbered assets are unaffected by bankruptcy proceedings and secured creditors may proceed to enforce their legal and contractual rights. (Source: UNCTIRAL Legislative Guide).

What is the effect of Article 1026 upon sureties/guarantors of the bankrupt debtor? Can they benefit from suspension of suits against bankrupt debtors? Article L622-28 of the French Code provides that “The issuance of the commencement order shall stay any action against individuals who are sureties…until the order confirming the plan or pronouncing the liquidation.”

We maintain the current rules of the Code. Secured creditors can proceed against the collateral (security) as if no bankruptcy proceeding were pending before the court.

On the issue what actions are suspended by the declaration of bankruptcy, we support the enumeration of actions subject to suspension and actions not subject of suspension, as the French Law stated above does.

On the question of suits against guarantors/sureties of the bankrupt debtor, we are of the opinion that suits against guarantors/sureties should not be suspended, for suspension would encourage guarantors/sureties to take property out of jurisdiction during suspension to avoid enforcement. Suspension of suits against guarantors would also tend to undermine the claims of creditors against guarantors.

49. Article 1029. Shouldn't transactions between related persons be avoided as a matter of law? How about undervalued transactions?

It has also been proposed to set the second part of Article 1029(d) as chapeau.

Having discussed the fate of creditors whose transactions have been invalidated (voided) as a result of actions under Article 1029 we have concluded that these creditors should be reinstated to the position had the transaction never existed. However, because bankruptcy affects the position of creditors, they should be allowed to join a universality of creditors.

Article 1209A introduced by the MoJ draft has been accepted by the community.

50. Article 1030. This provision is too general. Payments in the ordinary course of business, such as a payment of rent, utilities, should not be invalidated. Since it is only a permissive provision, it may be tolerated though.
The exception under Article 1030 is logical. However, we propose not to invalidate payments made in the ordinary course of business.

51. **Article 1033.** This provision should be harmonized with the rules on negotiable instruments.

   The last phrase of Article 1033 (1) “having received the value of the instrument” should read as “having received from the drawer/maker…”

52. **Article 1034.** There should be a provision stating that only a trustee may bring actions for invalidation under Articles 1029-1031.

   Thus another provision in Article 1034 that designates the trustee as the party who can bring actions for invalidation is necessary.

53. **Article 1035.** The duties of bankrupt debtors should be laid down before the duties of the trustees. These duties should include: the duty to cooperate, to surrender business records, assist trustees in preparation of creditor lists, to disclose information on customer lists, cash flow, marketing information, industry trends (where these are available).

   As specifying the duties of the bankrupt debtor is therefore acceptable an independent Article should be written before Article 1035 for that.

54. **Article 1035-1038.** These Articles should be read together with Arts. 1103 -1108.

55. **Article 1035: 1035(1).** The use of the word “depreciable” should be avoided because all property except land is depreciable. Of course, the sale is conditioned upon its preservation being costly, which makes this provision tolerable. In any case, the use of the word “depreciable” is not helpful and we suggest that it be removed. Perhaps, this Article should also include permission to abandon or relinquish “useless” property (because it is unique or does not have value) the preservation of which is costly.

   Some members of the community have suggested the replacement of the word “depreciable” by “property whose value will reduce” for that will include goods that may become obsolete as a result of technology (e.g., electronic goods).

   Since useless property may be abandoned or relinquished when approved by the commissioner in bankruptcy, an additional sub-Article to this effect is required under Article 1035.

56. **Article 1035(2) should be Article 1036, and Article 1036 (1) and (2) should be Article 1035(2) and (3) respectively.**

57. **Article 1036(2).** Should the Commissioner have all the discretion to “fix the conditions of sale?” In other words, method of sale is not specified (See however Arts. 1103-1108 which apply during compulsory winding up). Neither are the procedural protections in case of sale (such as notice to creditors) provided.

   Use or disposal of encumbered assets is not provided; nor is the encumbrance of encumbered assets.

   Ability of the trustee to sell securities free and clear of securities should be provided, subject to certain conditions, such as the holder of the security should be notified of the sale and consents, the sale must be in excess of the value of the security interest, the secured creditor should be compelled
to accept cash or substitute equivalent security interest; where the trustee is unable to obtain the consent of the secured creditor, the court should authorize him to sell the property anyway.

The modalities of sale of joint assets should be clearly spelt out. In the case of divisible joint assets, the share of the debtor may be easily identified and sold. Where the division is impractical or where division would significantly reduce the value of the property some mode of selling the property has to be considered.

Treatment of cash proceeds should be clearly specified in the law, particularly the cash proceeds of the sale of an encumbered property. Perhaps, a provision similar to Article 996(1) will do.

Some laws distinguish between use or disposal in the ‘ordinary course of business’ and outside the ordinary course for purposes of determining who may make decisions as to use or disposal and the protections that are required. The trustee may use and dispose of property in the course of ordinary business without requiring notice to be given to creditors or approval of the court. Use or disposal outside ordinary course of business requires approval of the court or of creditors (some extend to the debtor).

The UNCITRAL Legislative Guide presents a variety of options under different laws, as can be seen below:

**Methods of sale**

Many insolvency laws require assets to be sold by auction, with some requiring the creditor committee, to approve other means of sale, such as by private contract, if it is more profitable. Some laws give the power of sale in the ordinary course of business to the trustee and impose the duty to obtain the best price reasonably obtainable at the time of sale. These laws preclude a sale to related parties to avoid collusion.

**Procedural protection in case of Sale**

- Notice to creditors and to prospective purchasers in the manner that will ensure the information is likely to come to the attention of interested parties;
- Allowing creditors to raise their objections or concerns;
- Requiring assets to be valued by neutral, independent professionals (in case of real estate and specialized property);
- In case of auctions, requiring pre-bidding qualifications and minimum prices where appropriate and preventing and punishing collusion among bidders.

**Sale of Encumbered Assets**

If encumbered asset is not part of insolvency estate, the secured creditor is generally free to enforce its security interest.

In some laws, the trustee may dispose of encumbered assets in both liquidation and reorganization.

Other laws distinguish between liquidation and reorganization; the trustee may dispose of assets during reorganization, but during liquidation, his powers are time-limited.

**Further encumbrance of encumbered assets**

Existing secured creditor will have priority for the secured portion of its claim over any new secured creditor.
We believe that the Commissioner should permit sale; however, the method of sale should be in accordance with the provisions of the Ethiopian Civil Procedure Code. The provisions of Article 1036 should be rewritten more like the language of Article 1103, which is about sale after compulsory winding up.

On the sale of immovable property before compulsory winding (if there is such thing after revision), we are of the opinion that the position taken in Article 1104 should be adopted. In other words, sale of immovable property should be possible even before compulsory winding provided that such sale is approved by court.

58. Article 1036. Sale of immovable property not provided for. Compare Art. 527 of the Civil Code which provides the following regarding the powers of the trustee (in different context):

The powers of the trustee on the property which form the object of the trust are those of an owner. He may not, however, alienate immovable property except with the authorization of the court, without prejudice to any provision to the contrary in the act of the constitution of the trust.

59. Article 1038(2) provides “…exceeds the jurisdiction of the trustees…” Where is the limit set? Perhaps the limit is set by the Commissioner under 1038(1).

We think the limit should be set by the commissioner, not by court.

60. Article 1039. If the earlier proposal to introduce an observation period is accepted, continuation of business shall be permitted as a matter of law for the duration of the observation period. Article L622-9 of the French Code provides “The business activity shall be continued during the observation period, subject to…”

We also propose that a provision be inserted in Article 1039 permitting the trustee to provide security for post-bankruptcy creditors, if the court approves the extension of security having regard to the interest of creditors or the public. We appreciate the difficulty of raising additional finance for continuation of business if the trustee were not empowered to provide security to post-bankruptcy creditors. Injection of additional finance is often in the interest of universality of creditors, and if it takes provision of security to get that finance, so be it.

61. Article 1040. Compare this Article with Articles L-622-14 to 16 of the French Code. Under French law, the administrator (trustee) may decide not to continue the lease, which shall take effect immediately. The lessor may not request termination of the lease until three months from the date of the order (even then only for non-payment). If the sums are paid before this period, the lessor shall lose the right to request termination.

Members of the community are in favor of further consideration of the French Law and UNCITRAL Legislative Guide.

62. How about other contracts? Shouldn't there be provisions on what is to be done about them? Some contracts require special treatment: labour contracts, contracts for special services, financial contracts. Compare with Article L622-13 of the French Code.

Also what is the status of certain contract clauses (such as for automatic termination, acceleration) upon bankruptcy? Under some laws, these clauses are upheld; under others they are overridden, making them unenforceable. In general, the treatment of contracts after declaration of bankruptcy requires detailed provisions.
The UNCITRAL Legislative Guide presents the issue of treatment of contracts during bankruptcy in the following terms:

Where one party has not performed: no special rules required. Where both parties have not performed: commonly, those contracts are subject to stay in a manner that prevents the other party from exercising a right in termination, allowing performance to continue or the contract to be rejected. Typically the trustee is charged with making this evaluation of how the contract should be treated.

Under some laws, contracts are unaffected by the commencement of bankruptcy proceedings; the general rules of contract apply.

Other laws link the continuation and rejection in a common procedure that requires the trustee to take some positive action with respect to the contract, such as providing to the counterparty a notice as to the continuation or rejection.

Other laws specify the time period within which the trustee should take positive action (usually ranging from 28 to 60 days).

A number of laws adopt a default rule to the effect that failure of the trustee to act within the specified period results in the contract being treated as rejected or unenforceable.

We are of the opinion that the treatment of contract has been adequately dealt with in Article 1786 of the Civil Code. We don't feel that additional rules are needed in the Commercial Code. If both parties agree to continue the contract, it may be with additional guarantee or security.

63. After Article 1040, add one Article which states the consequences of acts in violation of Articles 1035 to 1040. See the last paragraph of Article L622-7 of the French Code which provides “all acts or payments carried out in violation of the provisions of this article shall be nullified on motion of any interested party or of the public prosecutor to be submitted within a three-year period beginning with the performance of the act or the payment of the debt. …”

The actions for invalidation of acts in violations of Articles 1035 to 1040 may be brought by any interested party, the bankrupt debtor, the creditor and the public prosecutor.

64. Articles 1041-1054. General comment on Section 1 of Chapter 5

Shouldn't setoff be possible, particularly where fraud is not involved or that the claim did not arise during the suspect period?

The issue of allowing some creditors to take advantage of setoff has raised concerns among some members of the business community. The concern is that some creditors are allowed to opt out of the bankruptcy proceedings (from which they may obtain less than the full amount of the debt) simply by the accident of owing some debts to the bankrupt debt. But in view of the interest to limit the costs of having to initiate suits against these creditors, setoff should be allowed. Hence, creditors who can setoff claims are not required to present claims to the trustee and the trustee does not have to initiate claims against them to recover the debt owed to the bankrupt debtor. However, where the creditor has claims in excess of setoff, he should be allowed to submit claims with the proviso that he should present all his claims and allow the trustee to recover the claims against him. He can't have it both ways.

65. Article 1041(1). Which creditors are required to produce proof of their debts? Should employees, for example, be required to produce proof? How about foreign debts: there are issues of language and authentication (notary)?

It may in principle be agreed that some claims be proven from the records and accounts of the bankrupt debtor. However, caution should be made because the bankrupt may enter the names
of some fictitious creditors to undermine the claims of real creditors. Records and accounts are not reliable, as can be gleaned from the multiple records and accounts traders keep for various purposes. The trustee represents the interests of creditors and should be vigilant towards the possible fraud in the records and accounts of the bankrupt debtor. If after close scrutiny of the accounts and records, it appears to the trustee that they are reliable, he should be at liberty to admit some claims from the records and accounts without having to require the creditors to present their claims. This reduces the cost of presenting claims. We propose the following provision:

The creditor may be relieved from proving the debt where the trustee has reason to believe that based on the records and books of the bankrupt debtor the debt really exists.

On the question of foreign debts, we believe that such debts should be admissible. Foreign debts are debts whose creditors do not reside in Ethiopia and the contracts of which were concluded outside Ethiopia. Rules regarding letters of credits, with regard to import and export items, resolve the issue of foreign debts, but there are foreign debts outside the letter of credit system. These foreign debts should be allowed admission, but the issue of language should be resolved.

66. Article 1042. Aren’t there other more effective methods of notification? We don’t have commercial gazette, therefore this provision awaits firm decision on its existence. Production of proofs within fifteen days of the publication is a very short period.

The issue of commercial gazette has been discussed at great length before. It is a matter which requires firm decision in general. Fifteen days is very short. It should be extended to thirty days.

67. Article 1043. The elements of verification should be mentioned in the law; classification of claims, assessment of underlying legitimacy. Besides, informal procedures for verification of claims, such as from the bankrupt’s books and records, should be allowed.

There should be a standard claims form, supported by documentation. The form shall contain questions like the amount of the claim, basis of debt, any priority or security interest claimed.

68. Article 1048. Parties that have the right to contest debts should be specified: trustees, parties in interest, other creditors, bankrupt debtor?

We have considered the pros and cons of granting certain parties the right to contest debts and favor granting even the bankrupt debtor the right to contest debts in the interest of justice. The following provision is accordingly proposed:

A debt may be contested by the trustee, the creditors and by the bankrupt debtor.

69. Article 1049. Provisional admission is a useful tool to allow creditors to participate in the proceedings to the same extent as other creditors. It is important for valuation of certain claims such as mass tort.

70. Article 1052. Shouldn’t some claims, such as foreign tax claims, claims arising from illegal activity and fines and penalties be excluded from drawing upon a bankrupt estate?

Some people propose relegation or subordination of foreign tax claims, claims arising from illegal activity and fines instead of denying these claims in their entirety. This would mean that these claims would be admissible, but payable only after all other claims have been satisfied. Others are of the opinion that these claims should not be admissible as a matter of policy. We,
however, are in favor of denying these claims during bankruptcy. The following provision is accordingly proposed:

**Claims arising from foreign tax claims, penalties and fines shall not be admitted.**

71. **Articles 1055-1080.** These Articles define (and limit) the rights of certain creditors during bankruptcy. These creditors include creditors whose claims are guaranteed by the bankrupt debtor (1055 and 1056), pledgees (1058 and 1059), lessors (1060, 1061, 1062), sellers of movable property (1063), creditors authorized to get preference by the commissioner (1064), mortgagees and creditors secured by immovable property (1065-1068), business mortgagees (1069-1072), and creditors who have the right to recover (1073-1080).

The drafter included these rules as ‘provisional articles,’ because he did not at the time know what the Civil Code and other laws might have set down regarding these creditors. We doubt that the Civil Code has satisfactory answers for these cases; so we suggest that they be retained, perhaps with some modifications after a thorough study of the rules under consideration.

These provisions (although termed “provisional” by the original drafter) do not have counterparts in the Civil Code and Civil Procedure Code and should therefore be retained, with minor modifications here and there in view of the general modifications to Book V of the Commercial Code.

72. **Article 1060.** Compare this Article with Article L622-16 and L641-12 of the French Code.

73. **Article 1062.** Compare the Article with Article L622-15 and Article L641-12, second paragraph of the French Code.

The issue in discussion here is the scope of the lessor's rights during bankruptcy. If it is stipulated in the contract of lease that the lessee (now bankrupt) should pay three years' lease in advance, this provision in the contract shall not entitle the lessor to claim this payment immediately, for that would frustrate the policy considerations of bankruptcy.

In addition, the lessor's preferential right during bankruptcy pertains only to the movable property furnishing the leased immovable property.

74. **Articles 1065-1072.** These Articles probably belong to chapter 6, section 2 (somewhere among Articles 1101-1112); they are about distribution of proceeds. Compare Arts. L643-4 with 643-8 (by the way, the French Code calls this process paying creditors).

These provisions are not limited to the issue of proof. Some of the provisions are about proof (about submission of claims by secured creditors) while others are about distribution of the proceeds as between secured and unsecured creditors. There seems to be medley of issues addressed in these Articles. These are not places for distribution of the proceeds. The provisions should therefore be confined to the issue of submission of claims by secured creditors, and the issue of distribution should be taken to its proper place, i.e., after Articles 1100ff. We therefore propose the following Article in place of Articles 1065-1072 (with additional agreement to take these provisions to other appropriate parts of Book V):

**Creditors secured by mortgage on immovable property and business shall be allowed to submit proof in accordance with Articles 1041ff and subject to the order of distribution in Articles...**
75. **Articles 1073-1080.** There was a discussion on whether there is any place in Book V for Articles 910 and 911 of the Commercial Code (which were unaccountably removed in the draft of the MoJ). The rules of these Articles should be retained and the rules can be at home in either Book IV (as Arts. 910 and 911) or Book V in provisions dealing with recovery (1073-1080), although Book IV seems a better place considering the proximity of the issues to transfer.

    Thus we think the proper place for Articles 910 and 911 is in Book IV, not Book V.

    We further propose that Articles 1075-1078 be placed immediately after Article 1063, because of the proximity of issues addressed by the latter to the former.

76. **Articles 1081-1100 and Articles 1119-1153.** The substance of composition is similar to schemes of arrangement. There are of course differences on the time when these proposals are made, the vote required for their approval, and the amount of debt required to be paid. A scheme of arrangement is just another form of composition. In a unitary formula we are proposing, they should perhaps be seen as one, and the provisions of schemes of arrangement should look more like provisions for “reorganization” of business.

    The timing of proposal for composition is not at all convincing. Why shouldn’t a debtor who is about to suspend payments propose a composition? Compare with Article L611-4 of the French Code which provides “A composition procedure is instituted … for the persons who carry out a commercial or craftsman’s activity, who encounter an actual, or a foreseeable legal, economic or financial difficulty, and who have not been in a state of cessation of payments for more than forty-five days.”

    We are for composition prior to bankruptcy (liquidation), as put in the French Bankruptcy law, not as put in Book V, which is after bankruptcy proceedings. Hence, we propose the merge of the provisions of composition and schemes of arrangement. So are the proposals to incorporate provisions for reorganization. Other provisions notwithstanding, the order of proceedings as agreed upon by the members of the group is composition, reorganization and liquidation.

    Putting the provisions of bankruptcy (liquidation) at the end of the spectrum would clearly send the message that priority should be given to the rehabilitation of business through composition and reorganization, before the business is forced to disband through liquidation. The details of reorganization should be specified after thorough study of the provisions of some other countries in this regard.

77. **Article 1084(1).** Compare the Article with Art. 1140.

78. **Article 1093(1).** Persons who may apply for setting aside composition should be specified.

79. **Articles 1101-1112.** The drafter included these in the Commercial Code as ‘provisional articles’ anticipating rules in the Civil Procedure Code. The provisional rules of the Commercial Code might exist in the Civil Procedure Code, but the circumstances in which the Civil Procedure Code applies and the Bankruptcy rules apply are different, justifying special rules for bankruptcy cases. It is also wise to provide all the rules on bankruptcy (procedural as well as substantive) in the Commercial Code. The question should therefore be not whether the procedure Code has rules on the issues addressed under Articles 1101 to 1112, but whether the so-called “provisional rules” are up-to-date and represent the current development in this regard (See the position of the plenary session under Articles 1055-1080 above).
80. Article 1104. The power of the trustee over property encumbered by security (liens, mortgages, pledges) is not clear. Under French law, lien holders and mortgagees may exercise their right to bring separate action if the liquidator has not begun to sell the encumbered property within three months from the date of commencement.

The power of mortgagors over encumbered property has been a source of intense controversy in practice in Ethiopia. The Civil Code of Ethiopia unequivocally permits the mortgagor to transfer as well as further encumber the encumbered property. In fact, any agreement to the contrary is illegal. Unfortunately, mortgagees in practice often restrict the power of mortgagors to transfer as well as further encumber the encumbered property. The mortgagees take away documents of title regarding the encumbered property and effectively remove the property from the market. The practice has been contrary to what is provided in the law. It is also against the spirit of encumbrance. Security does not give the mortgagee the right to title, it only grants them the right to sell the property in times of default.

This controversy over the extent of the rights of secured creditors is likely to spill over to bankruptcy proceedings, if and when these proceedings become common. But there seems to be no reason to restrict the rights of trustees to sell encumbered property if they can find buyers who can take the property with the encumbrance or if the trustees can pay the mortgagees the basic claim.

What is not resolved is the extent to which secured creditors may proceed against the security, untroubled by the bankruptcy proceeding. The current rules of the Commercial Code permit secured creditors to satisfy themselves from the encumbered property without any consideration for the rights of unsecured creditors. Should secured creditors be restricted somehow, even for a limited period of time, as in the French law? Some people seem to favor the existing rule of unrestricted right for secured creditors. But it should be noted that the interests of secured creditors would often come into conflict with the interest to revive the business of the bankrupt debtor. If, as proposed before, we are to insert provisions for reorganization of insolvent businesses, we may have to restrict not just the power of unsecured creditors but also that of secured creditors. In view of the fact that many major creditors only lend money against collaterals, this action may be of paramount importance.

81. Article 1110. This Article determines the order of priority in the distribution of dividends among different classes of creditors. Art. 1110 (c) mentions preferred creditors, but does not define them, which is problematic. A number of other Ethiopian laws establish preference in favour of certain creditors. The Ethiopian Labour Proclamation in its Article 167 accords preference to employee claims. The language of the Labour Proclamation in this regard is peremptory. It provides:

Any claim of payment of a worker arising from employment relationship shall have priority over other payments or debts.

In a similar vein, the Income Tax Proclamation accords preference to tax claims of the Government. Again the language of the Income Tax Proclamation is peremptory. Article 80 of the Income Tax Proclamation No. 286/2002 provides:

From the date on which tax becomes due and payable under this Proclamation, subject to prior secured claims of creditors, the Authority has a preferential claim over all other claims upon the assets of the person liable to pay the tax until the tax is paid.

The language of the Commercial Code makes no distinction between different types of debts given priority by other laws. Even if one were to agree that no such distinction should be allowed,
one would need a clear provision in the Code to that effect. Apart from the priority of preferred
creditors, Art. 1110 of the Commercial Code requires a policy decision. Should one maintain
the order of priority under Article 1110 or is a change necessary? Priority is a question of public
policy and it is necessary to check if the current public policy of Ethiopia is fully reflected in the
order of priority set in Article 1110 of the Commercial Code.

Article 1110 (b) also requires reconsideration. There are at least two questions in this regard.
(a) Should priority be accorded to these sums in the first place?
(b) Who is to determine the sums?

Article 1020 of the Code states that the sums are determined by the Commissioner. But it is
not clear whether the sum so determined refers to the sum before distribution (i.e., during the
proceedings) or the distribution as described under Art. 1110. A related question is the application
of other laws, such as the Civil Code, in the determination of the sum for the debtor and his/her
family.

Article L641-13 of the French Commercial Code provides:
1. Claims arising regularly after the issuance of the order commencing or pronouncing
the judicial liquidation … shall be paid as they fall due.
2. If they are not paid as they fall due, they will be paid according to their preferential
lien before all other claims, except for the claims secured by the lien provided in …
of the Labour Code, those that are secured by the lien for legal fees, those that are
secured by the lien provided for in … as well as those that are secured by a security
over immovable assets or those secured by a special security over movable assets to
which a right of retention is attached…
3. Their payment shall be made in the following order:
(a) Claims of wages and salaries for which funds have not been advanced in
compliance with the … Labour Code;
(b) Legal fees;
(c) Loans and claims arising from the performance of continued contracts …and
where the other party accepts deferred payments….
(d) Sums that have been advanced in application of Article… of the Labour Code;
(e) Other claims according to their priority order.

See also Article L622-17 of the French Code.

Article 1110 is a central provision in the Bankruptcy Code. Central as this provision is, it has
rarely figured in actual decisions dealing with priority of creditors. Some decisions of courts
have given priority to tax claims, some to employee claims, and some to secured creditors, but
seldom have these decisions referred to Article 1110 of the Commercial Code. That is probably
because Book V of the Commercial Code is not known in the courts.

Articles 1065-1072, with respect to secured creditors, should be put here with some modifications.
Article 1110 should treat the case of unsecured creditors, including preferred creditors. With
respect to encumbered property, secured creditors will have priority of distribution against all
kinds of creditors. The members of the group seem to espouse the absolute priority of secured
creditors against all creditors, with respect to, that is, the encumbered property. If the encumbered
property is unable to satisfy the claims of secured creditors, they shall be relegated to the status
of unsecured creditors for the rest of their claims.

Of unsecured creditors, the first in line should be creditors who bear the costs and expenses
of the bankruptcy. These include the fees to be paid to trustees and other professionals, the
costs of running the bankrupt estate and post-bankruptcy creditors. Next in line is maintenance
claims (for the living of the bankrupt and family). Then comes the claims of employees of the bankrupt estate. And next in line should be other preferred claims (e.g., tax claims), and the last will be other unsecured creditors. The order of priority under Article 1110 should therefore be:

1. Cost and Expenses;
2. Maintenance Claims;
3. Employee claims;
4. Other Preferred Creditors;
5. All other unsecured Creditors.

82. Article 1113. Add one more ground “where the trustee has sufficient sums at his disposal to satisfy the creditors” Persons who may apply for closure of bankruptcy proceedings should be specified.

Under the French law the liquidator (trustee), the debtor or the public prosecutor may apply to court at any time; the court may initiate on its own.

At the expiry of two years from the commencement any creditor may also apply for closure.

83. Articles 1114 and 1117. The effect of closure as a result of insufficiency of assets appears to be too harsh on an innocent debtor. It is only in cases of absence of any claim against the estate (1117(2)) that a debtor is restored to his full rights. A contrario, if the bankruptcy is closed as a result of final distribution (compulsory winding up) or, by reason of insufficiency of assets, the debtor is not discharged. This appears to be at variance with modern trends of discharge in bankruptcy. We propose that the debtor be discharged except where he is culpable in someway. Debtors should be allowed discharge if they have not acted fraudulently and have fully cooperated with the trustees, commissioner and the court.

Under Article L643-11 of the French Commercial Code, the debtor is discharged and individual claims of creditors are terminated as a result of closure of bankruptcy proceedings except where the claims of the creditor arise from criminal convictions of the debtor or where the rights are attached to the person of the debtor. Other exceptions are where the personal disqualification of the debtor has been ordered or where the debtor has been found guilty of criminal bankruptcy or where the debtor or a legal entity of which he was a manager has been submitted to previous liquidation proceedings closed due to an excess of liabilities over assets less than five years before the commencement of this one. Also a guarantor or co-obligor who has made a payment in place of the debtor may sue the latter after the closure. In the event of fraud affecting one or more creditors, the court shall allow the resumption of individual right of action by those creditors against the debtor.

Where the closure of bankruptcy proceedings is pronounced due to an excess of liabilities over assets and it appears that assets have not been sold or that litigation in the interest of creditors has not been initiated during the proceedings, these claims may be resumed after the closure.

The UNCITRAL Legislative Guide provides the following recommendations in the area of discharge:

The insolvency law may specify that the discharge may not apply until after the expiration of a specified period of time following commencement, during which the debtor is expected to cooperate with the insolvency representative.

Where the law provides that certain debts are excluded from discharge, those debts should be kept to a minimum in order to facilitate the debtor's fresh start. These debts include claims arising from tort, maintenance agreements, fraud, penalties, and taxes.
Where the law provides that conditions may be attached to a debtor’s discharge, those conditions should be kept to a minimum in order to facilitate the debtor’s fresh start. These conditions may be recommended by the trustee or by the court, and they include restrictions on the debtor’s ability to obtain new credit; leave the country; carry on business for a certain period of time; or practice its profession for a period of time.

See also § 727 US Bankruptcy Code

The current rules on discharge in the Bankruptcy Code do not allow any discharge unless the debt has been fully discharged. The idea that bankruptcy in and of itself is not only unfortunate but culpable is outdated. Many other countries now grant discharge to innocent bankrupt debtors and allow them another chance/shot at life. We therefore fully endorse this idea of discharge in bankruptcy and have called for revision of the articles cited to reflect new developments.

84. Article 1116. The duties of the trustee/s upon closure should be specified. The French Commercial Code requires the liquidator (trustee) to submit the accounts upon closure.

85. Article 1119. In many respects the provisions of schemes of arrangement are similar to composition (their difference is one of form rather than substance). The following table compares the provisions of composition with that of schemes of arrangement.

<table>
<thead>
<tr>
<th>No.</th>
<th>Composition</th>
<th>Schemes of Arrangement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Commencement Time</td>
<td>Commencement Time</td>
</tr>
<tr>
<td></td>
<td>Article 1081: After suspension of payments and only after the expiry of the period under Article 1046.</td>
<td>Article 1119: After suspension of payments or for imminent suspension of payment.</td>
</tr>
<tr>
<td>2</td>
<td>Content of the Proposal</td>
<td>Content of the Proposal</td>
</tr>
<tr>
<td></td>
<td>Article 1081(2): The percentage offered is not specified by the law; nor are the period of payment, the guarantees, legal costs and remuneration of trustees specified by the law: all these are determined by the debtor.</td>
<td>Article 1121: The proposal should include an undertaking to pay not less than 50% within one year, or 75% within 18 months, or 100% within three years, with material or personal guarantees included, or a proposal to assign all assets held by the debtor.</td>
</tr>
<tr>
<td>3</td>
<td>Proposal made to whom?</td>
<td>Proposal made to whom?</td>
</tr>
<tr>
<td></td>
<td>Article 1082: Commissioner who shall take the advice of trustees and creditors’ committee.</td>
<td>Article 1119: To court.</td>
</tr>
<tr>
<td>4</td>
<td>Creditors’ Vote</td>
<td>Creditors’ Vote</td>
</tr>
<tr>
<td></td>
<td>Article 1084: The proposal should be approved by 2/3rds of creditors representing 2/3rds of the debts.</td>
<td>Article 1140: The proposal should be approved by a majority of creditors representing 2/3rds of all non-preferred or unsecured creditors.</td>
</tr>
<tr>
<td>5</td>
<td>Confirmation</td>
<td>Confirmation</td>
</tr>
<tr>
<td></td>
<td>Article 1086: By court.</td>
<td>Article 1144: By court.</td>
</tr>
<tr>
<td>6</td>
<td>Supervision of the Carrying out</td>
<td>Supervision of the carrying out</td>
</tr>
<tr>
<td></td>
<td>Article 1088: By the commissioner, the trustees and the creditors’ committee.</td>
<td>Article 1151: By the commissioner (and to some extent by the delegate judge).</td>
</tr>
</tbody>
</table>
From the table above, one cannot but conclude that a scheme of arrangement is just another form of composition, or adjustment of debt. Do we really need two separate regimes for what is at bottom an adjustment of debt?

If the difference is to be one of substance rather than form, the proposal for a scheme of arrangement should contain more than just an adjustment of a debt (i.e., an agreement to pay a certain percentage of the debt within a certain period of time specified in the law). The plan should be one for reorganization of business and may contain the following proposals, among others:

- Transfer of part or the whole of the business;
- Modalities for continuing the business, including the finance needed and the sources of finance;
- Proposal by shareholders to subscribe to additional capital;
- The continuation of contracts;
- Layoffs which may be carried out under the provisions of the Labour law;
- Replacement of managers and/or directors; etc

The plan, in other words, should include proposals for level and prospects for employment conditions for continuation of the business as a viable entity, including the need to layoff redundant employees. It may also propose modification of share capital (increase or reduction of share capital), the replacement of one or more managers, etc. It is essential for the proposal to be such that it reorganizes the business in a way that makes the business viable again to pay its debts. Only then will creditors probably accept reorganization as a substitute for immediate payment of their debts. Under Articles 1119ff of the Code, there are no provisions that even remotely hint that these proposals might be made in order to pursue reorganization as a credible alternative to straight bankruptcy (liquidation).

If these changes are made, we should probably no longer call Articles 1119ff “schemes of arrangement.” Reorganization might be a more accurate term in such case. At the beginning, we have also suggested that these provisions (with all the modifications) be moved to the beginning of Book V in order to send a clear message that in times of bankruptcy (understood in its broadest sense) Ethiopia prefers the reorganization of a business to its liquidation. The specifics of business reorganization as a result of bankruptcy should of course be written only after a careful study of what is really involved together with other provisions of the Code, notably Book II (relating to increase or reduction of capital, conversion or amalgamation of business organizations, etc).

For proposals regarding Articles 1119ff, see our comments and the discussions of the plenary session under Article 1081ff.

---

* Cf. French Code Articles L626-3 to 626-8, L626-15 to 626-17, L626-26
86. Title IV: Special Rules Concerning Bankruptcy and Schemes of Arrangement with Respect of Business Organizations (Articles 1154-1165). We don’t believe a separate title is needed for business organizations, and therefore propose that the rules under Title IV be inserted in the other Titles of Book V. Our specific comments are as follows:

1. Article 1154 is here only because there is a separate title for business organizations.
2. Article 1155(1) repeats Article 968 (1), and is therefore redundant.
3. Articles 1155(2) and (3) may be put immediately after Articles 979 and 980.
4. Article 1156, if at all necessary, may be included in Article 972, as sub-Article 2 of the latter.
5. Article 1157, if at all necessary, may be included in Article 974.
6. Article 1158(1) may be put in Article 972 as sub (3) of the latter.
7. Article 1158(2) may stand on its own, but should be included in Articles 968 ff.
8. Article 1159 belongs to Article 1035, perhaps as sub (3) of Article 1035.
9. Article 1160 should be placed somewhere in Articles 968 ff.
10. Article 1161 belongs to Article 979, should be Article 979 (2).
11. Article 1162 may be placed somewhere in Articles 1035 ff.
12. Article 1163(1) may be placed somewhere in Articles 968 ff.
13. Article 1163(2) may be placed in Articles 1041 ff.
14. Articles 1163(3) and (4) should be placed under separate title immediately before Section 2 of Chapter 5, Title 2 (i.e., before Articles 1055-1056).
16. We also notice that some provisions of this title use the term “firm” (see Articles 1163, 1164, 1165), a term not recognized elsewhere in the commercial code. We therefore suggest that the term be replaced by “partnership” or “company”, as the case may be.

87. Article 1161. How about death of a partner? Shouldn’t something similar to Article 980 be provided under Article 1161?

88. Article 1166. The sum should be raised (to one hundred thousand birr) for obvious reasons. The French law provides for the following procedures for what it calls “simplified liquidation procedure” (Articles L644-1 to L646-6).

- Sale through private sale within three months from the date of commencement; and sale of the remaining assets through public auction;
- Verification of claims is limited to those claims of which the ranking could enable payment in the distribution and to claims resulting from a contract of employment;
- The liquidator draws up a draft distribution plan which he files to court for consultation by any interested party and for publication. Any interested party may dispute the plan before the supervisory judge;
- The liquidator carries out the distribution according to the plan;

* Why should a person be declared bankrupt when liability is sufficient? Compare Article with French Code, Articles L651-2, L652-1, L652-2, L652-3, and L652-4
• One year at the latest after the commencement of the procedure, the court shall pronounce the closure of the proceedings. The court may decide to continue the proceedings for a period not exceeding three months by way of specially reasoned ruling.

That the sum should be raised to one hundred thousand Birr is undoubtedly reasonable. The revised bankruptcy law of Ethiopia should also set time limit for accelerated (petty) bankruptcies. The French law that requires one year limit, subject to extensions in some cases, is quite reasonable. Some of the other innovations of French law should also be considered in the revised bankruptcy law.

89. Arts. XXXX. Do we need to include provisions for liabilities, sanctions, personal disqualification, prohibitions, criminal bankruptcy and other offenses, as the French law does?

We have provisions in the New Criminal Code of 2004 regarding offenses related to bankruptcy [See Arts. 725-733 of the New Criminal Code of Ethiopia (or Arts. 680-689 of the now repealed 1957 Penal Code)].

The question is whether these provisions in the Criminal Code are sufficient. See Articles L643-9 to L654-15 of the French Code.

We in principle believe that provisions for liabilities, sanctions, personal disqualifications, prohibitions, criminal bankruptcy and other offenses should be included. However, this should only be done after additional research on bankruptcy laws of other countries and the Ethiopian Criminal Code.


- Title I: General Provisions
- Title II: Bankruptcy
- Title III: Schemes of Arrangement
- Title IV: Special Provisions Concerning Bankruptcy and Schemes of Arrangement with Respect to Business Organizations
- Title V: Summary Procedure

In keeping with our comments, we propose the following changes and rearrangements.

- Title I: General Provisions
- Title II: Composition (merging composition and schemes of arrangement)
- Title III: Reorganization (after a thorough study of reorganization literature and laws of other countries)
- Title IV: Bankruptcy (liquidation)
- Title V: Summary (Accelerated) Procedure
- Title VI: Penal Provisions???

* The reason we placed question marks for Title VI is because we are not certain that the penal provisions appropriate to bankruptcy should be included in the Commercial Code or be inserted in the Criminal Code.
PART VI

Comments On Accounting, Auditing, Finance/Investment, Business Organization and Management

6.1 Book I: Traders and Businesses

6.1.1 Detail Comments

Article 4 and 27 Bodies corporate under public law
- In the draft version of the Commercial Code the phrase “religious institutions” is deleted. As far as the profits generated by these institutions are used for their day-to-day activities, the operation of these institutions should not be regarded as “trade”. However, it is wise to impose restrictions on the scope of business activities that these institutions operate.
- Hence, it is better not to delete the phrase from the aforementioned Articles.

Article 5 Persons to be regarded as traders
- Article 5 defines traders by listing the type of trades. Such definition links business with owners as oppose to separation of business from owners (modern concept of business organization)
- Hence, the new revision should reconsider this definition from the grounds of business entity concept.
- Business entity is “an activity carried on commercial basis for generating revenue with ultimate aim of capital growth (accumulation of capital) by any person (natural or judicial), within a definitely identified resources and transaction”.

Articles 63 and 64
- Art. 63 define traders and business organizations that are required to keep books and accounts
- However, the article do not discuss about Small & Medium Enterprises (SME). Although Art. 64 seem to mean SME (petty traders), it should be clearly stated in the law.
- Note also that in many developing countries such as Ethiopia, most business activities run at SME level.
- The consolidation of Articles 63 and 64 is acceptable.

Articles 65 — 68
The discussion under these Articles is not whether to retain them in the new version or not (These Articles are important and should be retained in the new version).

However, the issues are whether to provide for:
- General guidelines or prescribe detailed accounting/auditing/finance procedures;
- Accounting information verses accounting information system;

---

5 The definition of SME could change from time to time. For our purpose, see Proclamation No. 34/1996; and Council of Ministers Regulations No. 33/1998 Micro and Small, Enterprises Development Agency; and CSA publications.
• Rules applicable to all types of business irrespective of size verses taking into account the size of businesses;
• Rules versus international relevance.

In light of these considerations, the following comments are forwarded:

**Article 66 — Entry of dealings**
• This article prescribes procedures; and this is normal accounting routine to be included in other accountings regulations.
• Hence, better delete the Article.

**Article 67— Inventory and balance sheet**
• This article seems to indicate a “Merchandising” type of business. In addition, it is too detail a matter to include into the Code. This is also normal accounting routine to be included in other accountings regulations.
• Thus it is better to delete the Article.

**Article 68 — Keeping of books**
• Similar to the previous one, this Article also prescribes very detailed accounting routines
• The prescriptions are not consistent with current practices. As a result of the advances in information technology, the accounting recording style has reached an online or real time system.
• Hence, it is better to delete the Article.

**Articles 69 and 70 — Preservation of books**
• Some confusion may arise as a result of different period prescriptions:
  • Commercial Code old version----“for ten years”.
  • Commercial Code revised version----“for not less than ten years”.
  • Income Tax Law (Procl. No. 286-2002), Art. 48 (4) -- “for ten years after the end of tax period”.
  • Federal Auditor General Proclamation (the recent one) has also period designation (3 or 5 years?)
• Hence, adjustment should be made to the Article.

**Article 73 — Scope of application**
• The Article should be retained.
• However, 73(2) should state explicitly its position on Small and Micro Enterprises (SMEs).

**Article 74 — Assets in the balance sheet**
• The title of the Article is confusing. However, the Article seems to list the major financial documents of business organizations.
• Hence, it should be stated and redrafted as follows
  • **Art. 74 — Financial statements**
    (1) The basic financial statements of any commercial business organization shall include:
    (a) Balance sheet;
    (b) Income statement (Profit and loss statement);
    (c) Capital statement;
    (d) Cash flow statement; and
    (e) Notes to the accounting policy.
(2) The balance sheet shall contain assets, liabilities and equity accounts on a specific date.
(3) The Income statement (Profit and loss statement) shall contain revenue, cost and expense accounts for the specific period.
(4) The Capital statement shall contain the movement of capital including additions and deduction for the specific period.
(5) The cash flow statement shall contain collection and disbursement of cash for the specific period.
(6) Details of each category shall be described in the Accounting & Auditing Regulation.

Article 75 — Liabilities and the balance sheet
• The Article is revised as presented in Article 74.
• Hence, better delete the Article as it is redundant.

Articles 76 and 82
• These articles are presenting similar issues.
• Hence, it should be combined and redraft as follows
  • Article 76 — Amortizations, depreciation and depletion
    (1) Amortization is the accounting measurement of the loss sustained by the intangible assets that necessarily depreciate with time.
    (2) The provisions for depreciation are intended to provide for the reduction in the value of fixed assets which can reasonably be expected.
    (3) The provisions for depletion are intended to provide for the reduction in the value/cost expiration of natural resources which can reasonably be expected.
    (4) Provisions for amortizations, depreciation and depletion shall appear under the respective headings of the assets in the balance sheet.

Article 77 — Establishment expense
• The title is rarely used in the current business vocabulary. Instead, phrases such as “Organizational expenses”, Start-up costs” are common. Thus, it has to align to the current usage.
• Since this cost is under the category of “intangible expenditures” it should be amortized according to Generally Accepted Accounting Principles (GAAP). Hence, the following statement should be added:

  “Organizational expenses shall be amortized according to GAAP and relevant income tax regulations”.

Articles 78 and 79
• These are accounting details that are not useful for the Code.
• Hence, better delete them.

Article 80 — Capital and reserve
• (1) This sub-Article defines the word “Capital”. Although the definition is referring the initial capital of a company, it is fine to retain as it is. For details of this account, it is also important to link with the Accounting & Auditing Regulation.
• (2) However, the definition of “Reserve” in sub-Article (2) is a bit confusing. The definition should distinguish between “fund reserve” and “retained earnings” as a reserve. So it should be restated as follows:
“...part of profits preserved for the undertaking or cash/fund segregated and not forming part of the capital shall constitute a reserve. Details Capital & Reserve shall be prescribed in the Accounting & Auditing Regulation.”

Article 81 — Balance carried forward
- Same comment as for Articles 78 and 79.

Article 83 — Adjustment accounts
- Same comment as for Articles 78/79

Article 84 — Valuations
- Better to retain after adjustment:
  - Bring Art. 85 and make it Art. 84(6).
  - Add the following statement as Art 84(7).
  “The valuation of goodwill and other incorporeal elements shall follow GAAP.”

Articles 127, 128, 130 and 131
- The Articles should be written and rearranged so as to avoid ambiguities.
- Issues related to goodwill should be under similar section. Hence, Articles 130 and 131 should be under section 1 of chapter 2.
- The Articles should thus be rearranged as follows:
  - Art. 127 — Corporeal and incorporeal elements
    A business may consist of corporeal such as equipment or goods; and incorporeal elements such as goodwill.
  - Art. 128 — Goodwill and other incorporeal elements
    (1) A business may consist of goodwill and other incorporeal elements such as:
     a) The trade name;  
     b) The special designation under which the trade is carried on;  
     c) The right to lease the premises in which the trade is carried on; 
     d) Patents or copyrights; and 
     e) Such special rights as attach to the business itself and not to the trader. 
    (2) The goodwill results from the creation and operation of a business and is of a value which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services. 
    (3) Internally assessed goodwill is not acceptable. 
    (4) A trader may preserve his goodwill by instituting proceedings for unfair competition or by setting up the legal or contractual prohibitions provided in Articles 30, 40, 47, 55, 144, 158, 159, 204 and 205 of this Code.

Article 129 — Assets and liabilities
- The title of Article 129 is misleading. It should be named as “separation of business & ownership”.
- And the Article has nothing to do with section 1 or chapter 2; and should be presented after the revised Art. 74 (see above).

6.1.2 Recommendations (Summary)
1. It is advisable to make the accounting/finance/auditing provisions of the Code as general as possible. The detail accounting/finance/auditing procedures should be enacted in separate
accounting/finance/auditing regulation. As a result, we propose that some of the Articles of the old versions such as Art. 66, 67, 68, 75 should to be deleted; and others should be reorganized or rephrased (see the details above). However, we strongly recommend that the Code should link with the envisaged accounting/finance/auditing regulation to be issued from time to time.

2. The revised Commercial Code should also devote sufficient number of rules to SMEs in a clear and unambiguous manner. Our view is that these companies should not be treated as big corporate entities; on the other hand, these enterprises have to operate in regulated manner. We feel there is a need for separate (and special) law to regulate the commercial activities, and including accounting, auditing and management architecture, of these enterprises. The revised Code should make adequate reference to the special law.

3. The proposed Commercial Code should also reflect the international developments of accounting/finance/auditing profession. As companies operating in the nation are becoming more international, the need to embrace international accounting standards and policies is becoming important. Although the details are expected to be promulgated in separate accounting/auditing laws, the proposed Code should incorporate the link to these laws (see Arts. 77 and 84 above).

4. We assume a necessity for establishing a National Accounting/Auditing Board to regulate the profession and issue necessary regulation from time to time.

6.2 Book II: Business Organizations

6.2.1 Title I—General Provisions

Article 210 — Business organization defined
- Sub-Article (1) defines a business organization as “any association arising out of a partnership agreement”. Should there be a need to have a partner to form a business? How about companies of an individual owner? The statement needs some adjustment.

Article 212 — Different business organizations
- Sub-Article (1) lists six forms of business organizations. However, there are also other form of the business organization within the code but not given sufficient coverage and application as others. Examples:
  - Holding Company (Articles 360, 370, 379, 451 and 384)
  - Parent and Subsidiary/Branch & Home Office/Head Quarter (Art. 360, 384 and 556)
  - The revised code has also included a “one man” company
- These forms of business organizations should be described in a complete form including their accounting/auditing architecture and management similar to others.
- As discussed in Book I of this code, in addition to cooperatives, the law should provide legal existence of organizations in the form of SME. Thus, these forms of business organizations should be described in a complete form including their accounting/auditing/management architecture similar to others.
- Overall, there is a need to re-examine the validity of all business organizations of the Code within Ethiopian business environment and international context.

Article 213 — Commercial Business Organizations
- The Article is deleted and its issues are segregated under Art. 212. But it is much better to retain the Article as it has more clarity.
6.2.2 Title II: Ordinary Partnership

Article 262 — Paying out partner leaving

- In order to give more clarity to sub-Article (1), the phrase “as defined by professional appraiser” shall be inserted between the phrase “…the basis of value” and “of his rights…”

6.2.3 Title VI: Companies limited by shares

Article 306 — Minimum amount of capital

- Some 47 years ago, the code prescribed Birr 50,000 to be the minimum start-up capital for share company.
- Now, the economics situation of the country and the world has changed. Hence, the minimum capital mentioned above may not be sufficient to cover even the cost of start-up for big share companies.
- The purpose of forming a share company is to pool capital so as to operate at a large scale. Today, with 50,000 start-up capital one can’t start even small businesses.
- Furthermore the number of share companies should not be as large as small business organizations. It does have synergy and economic of scale. It is not economical for a nation to have small but many share companies in the light of the ever increasing cost of regulation law enforcement costs.
- Although the prescribed Birr 50,000 the minimum start-up capital has already changed for some industries such as Banking and Finance (the current minimum is 10 million), we propose the start-up capital for share companies be Birr 500,000.

Article 315 — Valuation of contribution in kind

- Sub-Article (1) prescribes that valuation be done by the Ministry; or leaves the job to shareholders according to Proclamation No. 376/2003. We recommend that valuation be made by professional experts in the field.

Article 318 — Prospectus

- Sub-Article 2 is important despite Proclamation No. 376/2003. Valuation should be made by professional experts in the field.

Chapter 4 Directors, Auditors, Shareholders’ Meetings

- In our opinion, it is preferable to name the title as “Governance”.

Article 348 — Chairman-General Manager-Secretary

- Sub-Article 4 should separate the multiple role of the director. Hence, the General Manager should not be a Chairperson of the Board of Directors.

Article 351— Replacement of directors

- Sub-Article 5 should provide an option for creating alternate directors’ position instead of replacing auditors as directors. This will avoid conflict of interest and protect the independence of auditors.

Section 2 — Auditors

This section shall be redrafted as follows:

Article XXX — Definition (New)

(1) An auditor is a person qualified, appointed, licensed and authorized by the appropriate government authority to examine accounts and accounting records, compare the
charges with the vouchers and revenues, verify financial statements, and state the results of the states of affairs of the company.

(2) Unless otherwise indicated in the code, the term auditor means an external or an independent auditor.

(3) An audit firm is a firm consisting of auditors as defined in sub-Article (1) of this Article.

**Article YYY — Qualification (New)**

- The required qualification for an auditor shall be described in Accounting and auditing regulations.

**Article 368 — Appointment of auditors**

- Sub-Article (1) prescribes the need for assistant auditors. This is not the issue of the Code. Instead, it is better to have alternate auditors as in the case of directors.

**Article 369 — Nomination**

- Sub-Article (3) requires an auditor to sign along with the name of the company whose accounts he is auditing. However, according to the current regulation, the certifying & authorizing body auditors & accountants, the Federal Auditor General, requires them to write as “Certified & authorized Auditors”. Hence, we recommend the sub-Article to be edited according to the current or future regulation as appropriate.

**Article 370 — Persons not competent**

- The title of this Article is not what is described in the content. Thus it is better to name it as “auditors’ independence”.
- In sub-Article (1a) the phrase “shareholders” shall be included among the lists of groups that reduce the independence of auditors.
- Sub-Article (2) provides a management position for auditors after three years from date of termination of their original function. Since their prior relation as auditor affects subsequent activities of the company, it is better not to allow them for any managerial position even after three years; or to prolong the period to five years.

**Article 372 — Remuneration**

- Under Sub-Article (2) the power to determine remuneration is given to the Ministry of Trade and Industry in case the general meeting fails to agree on remuneration of auditors. Due to professional relationship, it is preferable to give such authority to the Office of the Auditor General or the National Accounting & Auditing Board of the country.

**Article 374 — Duties of auditors**

- Items (a) and (b) should be amended as follows:
  - (a) To audit the books and accounts of the company;
  - (b) To verify the correctness and accuracy of the financial statements and accompanying schedules

**Article 379 — Audit of accounts of a holding company**

- In this Code, there is no other description regarding the nature of accounts in a holding company. Thus, it is not recommended to talk of audits without proper dealings of accounts of a holding company. Hence, we recommend that a “holding company” be treated as a separate form of business organization in the Code.
Article 386 — Inspection report
• The title is placed in error. Articles 381-385 are discussing about investigations. The outcome of this work is certainly, investigation report and not inspection report. Hence, the title should be changed into “Investigation report”.

Article 406 — Right to inspect documents
• The draft code is more elaborative than the original code. However, the following comments are required on the draft document.
  
  (a) Financial statements.
  (e) Support financial documents.
  (f) Documents showing support (source documents) recommendations with regard to decisions.
  (h) Delete since it is impractical.

Chapter 5 — Debenture
• The title should be named as “Bond” and the word used throughout the Code.

Article 446 — Accounts. Annual report
• Delete the word “accounts” from the title of this Article as it is redundant.
• Sub-Article (1) should be rewritten as follows: “At the end of each financial year, management shall prepare financial statements and accompanying schedules as described in the Accounting & Auditing Regulation”.
• Delete sub-Article (2) as it is contained in sub-Article (1) above.

Article 447 — Submission of accounts and report to the auditors
• Delete the title and replace with “submission of Reports to the auditors”.
• Edit the body of the Article as follows: “The financial statements and the directors’ report shall be submitted to the auditors….”

Article 448 — Drawing up of the balance sheet and the profit & loss account
• Rewrite the title of the Article as follows: “Drawing up of the financial statements”.
• Sub-Article (1) should be edited as follows: “The financial statements shall be …. ”
• Sub-Article (2) should be edited as follows: “The profit and loss statement…..”

Article 450 — Amortization and allowances
• Rewrite the title of the Article as “Provisions”.
• The whole article should be replaced by the following statement: “Provisions shall be made, as defined in Art. 76 (amended), for all categories of assets according to the Generally Accepted Accounting Principles and based on the Accounting & Auditing Regulations.”

Article 451— Accounts of holding companies
• See the comment given about Article 379 earlier.

Article 452— Profits
• The word “Profit” is expected to be defined in detail in the Accounting and Auditing Regulation. Hence, better delete sub-Article (1).

Article 461— Publication of the balance sheet
• Rewrite the title of the Article as follows: “Publication of the financial statements”.
Article 463 — Right of withdrawal from the company
• The second statement of sub-Article (1) of this Article should be rewritten as follows: “where the shares are not quoted on the stock exchanges, they shall be redeemed at fair market price of the company’s assets as listed in the balance sheet.”

6.2.4 Title VII: Private Limited Companies
Article 512 — Capital
• Sub-Article (1) should be redrafted. Accordingly, and as discussed in Art. 306 above, we propose the start-up capital for private limited company be Birr 100,000.
• Capital of the company should be stated in the Articles/memorandum of association.
• Increase and decrease of capital should also be stated in the Articles/memorandum of association

Article 517 — Terms of memorandum of association
(k) It should be changed to “an auditor, if any”.

Chapter 2 Shares
• In order to avoid terminology confusions, the title should be named as “contribution” and be used throughout the Code.

Article 525 — Management
• In order to streamline the usage of terminology, “Governance” should be made the title and be used throughout Title VII.
• Sub-Article (1) should be redrafted as follows: “A private limited company shall be managed by a manager. In case of those companies that require board of directors, the manager shall not be a director.”
• Sub-Article (2) should be redrafted as follows: “Where there are more than 10 members; or where the capital is greater or equal to Birr 500,000, decisions……”
• Sub-Article (3 - new): “Where there are more than 10 members; or where the capital is greater or equal to Birr 500,000, such a company shall have no less than three and/or more than seven directors.”
• Sub-Article (4 - new): “The operation, administration, liabilities and remuneration of directors is the same as those companies limited by shares.”
• Sub-Article (5) should be redrafted as follows: “Where there are less than 10 members; or where the capital is less than Birr 500,000, members……”
• Sub-Article (6) “Where there are less than 10 members; or where the capital is less than Birr 500,000, these companies will be governed by SME regulation pertaining to issues of management, accounting & auditing.

Article 537 — Right to inspect documents
• Sub-Article (1) should be redrafted as follows: “…and take a copy of the financial statements and the auditors report.”

Article XXX — Maintaining accounts (New)
• A new article should be inserted and read as follows:

(1) “Where there are more than 10 members; or where the capital is greater or equal to Birr 500,000, a complete set of account shall be maintained”.
(2) “Such companies shall prepare financial statements of the company as described in Article 74 and the accounting and auditing regulation.”
(3) The financial statements of the company & directors’ report shall be submitted to the auditors and the Ministry of Commerce and Industry not less than forty days before the notices calling the annual general meeting are dispatched.

(4) Subject to relevant tax laws, depreciation, depletion and amortization schedules should be prepared. Details of the computations and reporting shall be described in the accounting and auditing regulation.

Article 538 — Auditors
• Sub-Article (1) should be redrafted as follows: “Where there are more than 10 members; or where the capital is greater or equal to Birr 500,000, auditors shall be appointed in the memorandum of association.”

Article XXX — Publication of the financial statements (New)
• A new article should be inserted in here and read as follows:

“Within thirty days of the approval of the financial statement, a copy thereof together with the relevant minute of approval by the meeting shall be sent by the directors to the Ministry of Trade and Industry for publication in the Official Commercial Gazette.”

6.3 Book III: Carriage and Insurance

Articles 561-603 — Carriage by land
• This part of the law requires complete revision. We recommend that the new revision should consider long and short distance carriages (regional & federal issues), domestic and international carriages, associated insurance costs (domestic & international) separately for goods and public transport, current international conventions on carriage by land, etc.

Articles 604-653 — Carriage by Air
• This part of the law also requires complete revision. We recommend that the new revision consider domestic and international carriages, associated insurance costs (domestic and international) separately for goods and public transport, current international conventions on carriage by air, etc.

Article 654 — Definition
• The Article did not define what insurance is. It neither explains the term risk as a component of insurance. Yet the Article defines the phrase “insurance policy”. We therefore, recommend proper definition of the two terms. One type of definition could be:

“An insurance contractual arrangement under which one party (the insurer) agrees to pay an amount of money to another (the policy holder) on the occurrence of a defined event, in return for payment of a…. ” In relation to Art. 654, we would like also to recommend the need for lists of classes of insurance, types of insurable interests, etc.

Article 657 — Proof of contract of insurance
• The Article did not consider the technological developments of today’s insurance markets. Now one can buy insurance policy using machines. Hence, the Article should align with advances in technology.
Note also that there are ample experiences that not all insurance activities require policy contracts, e.g., performance bonds. Thus the Article should align with the practice.

Article 658 — Particulars in the policy

- The term “guarantee” in sub-Article (e) should preferable be changed into “sum insured”.

Articles 689 and 690 — The MoJ draft and the original Code

- In connection with the above Articles, we are in a position to include the possibility of having “a comprehensive insurance policy”. This policy contains both liability and property. Although one can detach this policy from taking various Articles separately, it is preferable to have as one stand-alone Article.

Article 701(2) — Beneficiary of the insurance policy

- In connection to the controversy of the above sub-Article, our position is more to spouses and the family definition. Hence, whether their names are mentioned in the policy or not, we incline to their advantage. This may have impact on the transferability of the policy. However, we prefer social issues before the return on investment.

Articles 713 and 714 — Games and Gambling

- This part of the law requires complete revision. We recommend that the new revision consider international developments in games and gambling (the various modes of casino), private lottery businesses, the application of insurances in games, etc.

6.4 Book IV: Negotiable Instruments and Banking Transactions

Title I: General Provisions

Article 715 — Definitions

- Sub-Article (2) defines what negotiable instruments are. We propose that the definition include other contracts too: forward contracts, future contracts, and option contracts.

Title II: Commercial Instruments

Article 854 — Maturity/ Article 855 — Presentment for payment

We endorse the possibility of the issuance of “post dated cheques”.

Title III: Banking Transactions

Article 896 — Nature of the contract

- The Article states (implicitly) the presence of different modes of deposit. We recommend that the modes be explicitly listed for practical simplicity.

Article 899 — No overdrafts

We think it is up to the bank to provide OD on such deposits or not. Why not we leave the option to the bank?

Article 900 — Statements of account

- It is preferable to re state the title as “Bank Statement” instead of “Statement of Account”. In addition, this statement is not only providing “the balance to be
carried forward” but also additions and deduction to/from the account. Thus, the descriptions of Article 900 should reflect this fact.

**Article 903— Definition/ Article 904 — Types of transfer**
- Sub-Article (1) of Article 903 states about transfers of account to account. However, there are other modes of transfer. Such as account to cash or person; cash to account and cash to cash. Thus, the sub-Article should consider such relevant issues into account.

- We feel it is time to clearly indicate the role of financial clearing house instead of presenting as Article 903(4). Although principle of clearing house is more related to stock exchanges, it is highly required for other financial institutions as the number of banks is increasing.

**Article 904—Types of transfer/Article 906 - Transfer of title, Cancellation of transfer order**
- We recommend that these Articles be drafted in anticipation e-banking or ICT application in financial transactions.

### 6.5 Book V: Bankruptcy and Schemes of Arrangement

**Article 968 — Scope of Application**
- Sub-Article (1) states that Book V applies to any trader within the context of Article 5 of the Code. However, as explained in Book I, SMEs and Public Enterprises need special treatment when it comes to bankruptcy.

- Yet it would be wise to include the objectives of the Book in the Article.

**Article 973 — Documents to be annexed to the notice**
- Sub-Article (1a) should include the following: “and accompanying notes to the accounts”.
- Sub-Article (1b) should replace “profit and loss account” by “income statement”.
- Sub-Article (1c) instead of “lists”, “schedules” of commercial credits...

**Article 976 — Preliminary Investigation**
- The team proposes the “Investigating Team” should include Professional Accountants/Finance. Or the quality of members should include such qualification.

**Chapter 2, Section 3: Trustee (994-1001)**
- The qualification mix of this group should be spelled out clearly in the Code. Preferably, it should include Management, Professional Accountants and Finance experts.

**Article 1000 — Liabilities of Trustees**
- The Article states about the potential liabilities of trustees while managing the debtor’s estate. This is similar to the liabilities of managers under Articles 33-43. Hence, it is preferable to correlate these two areas of management.

**Chapter 3, Section 3: Inventory**
- The title/terminology should correspond to the items discussed under the topic. Hence, better to name it as “Financial Statements and Reports”.
Article 1014 — Preparation and deposit of balance sheet

- It is better to rename the title of the Article as “Preparation of Balance Sheet and Reports”. And similar statements, in the body, should be amended accordingly.

Article 1015 — Inventory of debtor’s property

- It is better to rename the title of the Article as “List of debtor’s property”.
- Although the importance of bankrupt estates is mentioned in the various Articles, nowhere is provided a valid and all inclusive definition of a bankrupt estate. Hence, we recommend a definition of the term and to include, in the definition, all current, fixed and non-fixed (intangible) assets of the debtor.

Article 1041 — Production of proof by creditors

- To protect the interest of both the debtor and creditors, we recommend that all creditors provide the proof for the sum. Confirmation of liabilities is an important element of the internal control procedure in business.

Article 1046 — Claims

- In sub-Article (1) the phrase “balance sheet” should be replaced by “financial statements”.

Article 1110 — Distribution of proceeds of winding-up

- Wages and salaries are part of the operating costs of any business process. Hence, better discharge these obligations before any distribution to creditors.

Article 1116 — Proofs not claimed by creditors

- It is in the interest of all parties in the bankruptcy process that the trustee should wind up its activities by submitting the final audited financial statement to the court. It is our recommendation that these ideas should be incorporated in the Draft Code.

Article 1116 — Terms of application when applied

- In sub-Article (1) the phrase “balance sheet” should be replaced by “financial statements”.
- We also support the introduction of more business rehabilitation methods rather than direct bankruptcy procedures. Hence, are recommended the addition of business reorganization and rehabilitation before actual bankruptcy.
REFERENCES

Commercial Bank of Ethiopia (CBE), Overdraft Financing Policy and Procedure Manual (1999);  
French Commercial Code (as Updated in 2006), translated by Louis Vogel and Francoise Perochon;  
Harvard Law Review, Vol. 45, No. 4 (1932);  
Ministry of Justice, Draft Commercial Code (Draft, unpublished)  
Ponsot, D., Comments on the Revision of the Commercial Code of Ethiopia, May 2001 (unpublished);  
United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law (2005);  
UNCITRAL Convention on International Bills of Exchange and International Promissory Notes (1988);  
USAID: Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, Booz/Allen/ Hamilton, January 2007;  
Winship, Peter (ed. and trans.), Background Documents of the Ethiopian Commercial Code of 1960, HSIU (1974);  
1930/31 Geneva Conventions on Bills of Exchange and Promissory Notes;  
Civil Code of Ethiopia, Proclamation No. 165/1960;  
The Civil Procedure Code of Ethiopia, Extraordinary Issue No. 3 of 1965  
The Commercial Code of Ethiopia, Extraordinary Issue No. 3 of 1960  
The Penal Code of Ethiopia (1957) (Repealed)  
Commercial Registration and Business Licensing Proclamation No. 67/1997  
Federal Government Commercial Registration and Licensing Council of Ministers Regulations No. 13/1997  
Commercial Registration and Licensing Council of Ministers (Amendment) Regulations No. 87/2003  
Commercial Registration and Licensing Council of Ministers (Amendment) Regulations No. 95/2003  
Trade Practice Proclamation No. 329/2003
Trade Mark Protection Proclamation No. 501/2006
Supervision and Licensing of Banking Business Proclamation No. 86/1994 (repealed);
Supervision of Insurance Business Proclamation No. 85/1996
Agricultural Cooperatives Societies Proclamation No. 85/1995 (repealed);
Public Enterprise Proclamation No. 25/1992;
The National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008;
Banking Business Proclamation No. 592/2008;