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Original Article

Preventive Restructuring Procedure as an Alternative to Bankruptcy under the Revised Commercial Code of Ethiopia

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Abstract

Ethiopia recently adopted Proclamation No. 1243/2021, updating its decades-old Commercial Code. The previous legislation has been altered in several ways by the new one. Book III of the previous code governing bankruptcy is one of the books that has experienced significant revisions. The new legal regime recognizes alternatives to bankruptcy proceedings to address the lack of pre-bankruptcy debt collection options. The aims of these processes include, but are not limited to, ensuring legal clarity, maximizing the value of the estate, and fostering economic stability through prompt, efficient, and effective procedures. A court-supervised preventative procedure for financially distressed debtor firms is one of those processes. This procedure allows debtor businesses to enter into court-supervised debt restructuring negotiations and settlements with their creditors without having to interrupt their normal course of business. Looking at the content, spirit, and organization of the section of the Code governing preventive debt restructuring, it is not incorrect to argue that it is modeled after the European Directive on Restructuring and Insolvency of 2019 (EUR 2019/1023) and the UNCITRAL Legislative Guide on Insolvency Law. This contribution makes a systematic analysis of this procedure without going too technical, to create a general understanding of it and thereby contribute to its possible use in practice by potentially interested businesses.

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Abbreviations and Acronyms

Art-Article
ECC- Commercial Code of Empire of Ethiopia, 1960
IMF-International Monetary Fund
PDRP-Preventive Debt Re-Structuring Procedure
Pro.-Proclamation
RCC-, Commercial Code of Ethiopia, Proclamation No 1243/2021
UNCITRAL-The United Nations Commission on International Trade Law
EDRI-European Directive on Restructuring and Insolvency

1. Introduction

In the course of business; a commercial decision or a series of decisions made regarding the risk it takes may result in making or losing money.[1] And, it could be so vital that it may bring about the collapse of the firm which may raise the question as to whom is to blame for the collapse.[2] The bankruptcy law under the Old Ethiopian Commercial Code[3] maintains the position that when a firm goes bankrupt, it is to blame.[4] This position has appeared persistently in different parts of the law including the part that provides for the effects of a declaration of bankruptcy.[5] This approach is out of date as legal systems have long recognized that taking business risks should not *per se* entail a condemnation.[6] Besides, this approach causes the exit of viable businesses from the market and in effect contravenes the policy choice of keeping viable businesses. In the contemporary world, the policy objective of maintaining potentially viable businesses in the market is realized by recognizing alternatives to bankruptcy proceeding adequately. Based on their time of utilization, these alternative procedures may be characterized as pre-bankruptcy procedures or post-bankruptcy procedures. A pre-bankruptcy procedure may take many forms such as; a simple composition; continued trading of the business and its eventual sale as a going concern; transfer of all or part of the assets of the estate to one or more existing businesses or to businesses that will be established; a merger or consolidation of the debtor with one or more other business entities; rehabilitation and a restructuring of debt and equity.[7] A post-bankruptcy procedure is often accompanied by liquidation, a procedure that usually results in the dissolution of a debtor when it is a commercial legal entity and the discharge of a natural person debtor.[8] Unlike the liquidation of struggling businesses, rehabilitation provides numerous economic advantages such as preserving jobs with the ensuing social and political advantages as it encourages

[1]Taddese Lencho, Ethiopian Bankruptcy Law: A Commentary: Part II, Journal of Ethiopian Law, V-24,No-2, 2010, p 78
[2] Ibid.
[3]Commercial Code of Empire of Ethiopia, 1960, referred to as 'ECC' herein after.
[4] Tadesse, *supra note* no-1, p 79
[5] Id, p-78
[6] Ibid
[7] Ibid
[8]The Guide generally provides for a public authority (typically, although not necessarily, a judicial court acting through a person appointed for the purpose) to take charge of the debtor's assets, with a view to terminating the commercial activity of the debtor, transforming non-monetary assets into monetary form and subsequently distributing the proceeds of sale or realization of the assets proportionately to creditors. Also see; UNCITRAL Legislative Guideline on Insolvency Law, United Nations Publication, 2005, 'UNCITRAL Legislative Guidelines' here in after

entrepreneurs to take risks.[9] There are multiple alternatives for rehabilitation of businesses and they go with multiple names in different legal systems.[10]

Under the ECC, businesses facing serious problems of financial default had a lesser chance of rehabilitation as the provisions obliged them to go through an involuntary bankruptcy process. [11]Besides, as the bankruptcy proceedings, scheme of arrangement, and composition under the ECC were costly, creditors like banks have largely relied on foreclosure laws.[12]In the course of its operation, a firm might sometimes find itself in the middle of financial distress that necessitates a bankruptcy procedure. Nevertheless, before resorting to bankruptcy procedures, there are different business rescue platforms, the aim of which is different from bankruptcy. These alternative procedures aim 'to maximize the possible eventual return to creditors' and 'to preserve viable businesses.[13] One of the major reforms in the RCC[14] concerning bankruptcy law is its clear recognition of pre-bankruptcy proceedings whose chief objective is the rescue rather than liquidation of struggling businesses. Preventive debt restructuring, reorganization, and sale of businesses as an ongoing concern are the three pre-bankruptcy proceedings introduced by the RCC. The preventive debt restructuring procedure allows debtor businesses to enter into court-supervised debt restructuring negotiations and settlements with their major creditors without having to interrupt their normal course of business.[15] A reorganization plan provides businesses with the opportunity to clear their debts and return to a healthy business life.[16] A sale of the business as a going concern is a scheme that comes into the picture where the re-organization plan fails to receive a majority of creditors' approval, leaving the new lease of life in the hands of third-party purchasers.[17]

This paper assesses a preventive debt restructuring procedure as an alternative to bankruptcy proceedings under the RCC by employing a doctrinal legal research method. It makes a systematic analysis of this procedure without going too technical, to create a general understanding of it and thereby contribute to its effective use in practice by potentially interested businesses. An overview of alternative proceedings to bankruptcy in general is provided, *albeit briefly*, before proceeding to the main theme of the paper.

2.An Overview of Alternative Procedures to Bankruptcy Proceeding

Traditionally, liquidation was the only solution available to a business that defaulted on its debts.[18] Liquidation often results in the

[9] Tewodros Meheret, An appraisal of the Ethiopian Bankruptcy Regime, *De Jure*, 2017, 111-135 p 117 Available at http://dx.doi.org/10.17159/2225-7160/2017/v50n1a7. Accessed on December 12- 2023

[10] Ibid.

[11] Tadesse, *supra note* no-1, p-78

[12] Asress Gikay, The Role of Workouts under the US and the Ethiopian Bankruptcy Law: A Comparative Analysis, LLM Short Thesis, CEU eTD Collection, Central European University, March 29, 2011, p-13, Available at; https://www.etd.ceu.edu/2011/gikay_asress.pdf Accessed on Jan-11-2024

[13]UNCITRAL Legislative Guidelines, *supra note* no-8, , at 209 Para 3

[14] Commercial Code of Ethiopia, Proclamation no 1243/2021, *Negarit Gazeta, Gazette Extraordinary* 27th year, No. 23, 12th April 2021,Addis Ababa [here after the Revised Commercial Code-RCC]

[15] Id, arts- 588/2 and 617/1

[16] Id, art- 588/3

[17] Id, art- 689

[18]IMF, Contact Group on the Legal and Institutional Underpinnings of the International Financial System, Insolvency Arrangements and Contract Enforceability, September 2002,p-9, Available at;

reduction of the insolvent firm's assets to cash and then the distribution of the proceeds to creditors by priority rules.[19] Eventually, the firm ceases to exist as an entity, although its business may be carried on by those who acquire its assets.[20] Today, in virtually all national jurisdictions, bankruptcy law provides solutions other than the mere liquidation of a debtor business faced with financial distress. This solution is realized through the recognition of alternative procedures for bankruptcy. In this regard, Chapter 11 of the United States Bankruptcy Code[21] has been influential in the development of pre-insolvency proceedings globally.[22] Alternative procedures for bankruptcy may take several forms. For instance, it may include a simple agreement concerning debts where the creditors agree to receive a certain percentage of the debts owed to them in full, complete, and final satisfaction of their claims against the debtor.[23]

It may also include a complex reorganization where debts are restructured; some debt may be converted to equity together with a reduction of existing equity; the noncore assets may be sold; and unprofitable business activities may be closed.[24] Chapter 11 of the United States Bankruptcy Code recognizes reorganization and workouts as the major pre-bankruptcy procedures.[25]

Re-organization is the financial restructuring of a corporation, especially in the repayment of debts, under a plan created by a trustee and approved by a court.[26] The finances of a business are restructured so that it can continue to function.[27] The business then continues not only to pay its debts but also to provide its employees with jobs and to provide a return to its stakeholders.[28] Reorganization emphasizes more on the prospects of the business, as the debts are to be repaid from the future income of the business. Such payment depends on how the business survives the crises it is facing.[29] Another prominent pre-bankruptcy procedure is 'workout'. The Black's Law Dictionary defines a workout as "a debtor's agreement, usu. negotiated with a creditor or creditors out

https://www.imf.org/external/np/g10/2002/pdf/120502.pdf , Visited; Jan-18-2024

[19] Id, p-10

[20] Ibid

[21]The US Bankruptcy Code is also referred to as Title 11 of the United States Code. It governs the procedures that businesses and individuals must follow when filing for bankruptcy in the United States Bankruptcy Court. I was enacted by Pub. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549 and is considered as one of the most developed and practically tested bankruptcy laws of the world. For more see; 11 U.S.C. United States Code, 2011 Edition Title 11 – BANKRUPTCY, Available at; https://www.govinfo.gov/content/pkg/USCODE-2011-title11/html/USCODE-2011-title11.htm Accessed on; Aug-24-2023

[22]Although Chapter 11 emphasizes on an insolvency proceeding, it was designed to promote restructuring by encouraging firm managers to negotiate and confirm a plan of reorganization under bankruptcy court oversight within the shelter provided by a statutory suspension—the automatic stay. See; Irit Mevorach and Adrian Walters The Characterization of Pre-insolvency Proceedings in Private International Law, European Business Organization Law Review, 2020, p 9 Available athttps://doi.org/10.1007/s40804-020-00176-x Accessed on Jan-10, 2024

[23]Ibid

[24] Id, p 29

[25] IMF, *supra note* no-18, p-10

[26] Brayn A.Garner (ed) Black's Law Dictionary (9th ed. Thomson Reuters 2009) p 1301

[27]Irit Mevorach and Adrian Walters, The Characterization of Pre-insolvency Proceedings in Private International Law, European Business Organization Law Review, 2020 , p-7, Available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448821 Accessed on Jan-3-2024

[28] Ibid

[29] Ibid

of court, to reduce or discharge the debt."[30]This definition reveals that a workout has a contractual nature, and it can either be an agreement between the distressed debtor and creditor or creditors to reduce the debt or an agreement that can be used to extend the time of payment. A workout is, in essence, similar to a composition or reorganization but proceeds outside of insolvency law.[31] A close perusal of the provisions of Book III of the RCC reveals that there is no explicit recognition of workouts. Neither does the RCC contain equivalent provisions through which workouts can be enforced.

Another legal instrument that has affected the bankruptcy laws of many states is the UNCITRAL Guideline on Insolvency Law, which recognizes voluntary restructuring negotiations[32] and re-organization proceedings[33] as two distinct alternative procedures to bankruptcy proceedings. Yet, the use of voluntary restructuring negotiations has generally been limited to cases of corporate financial difficulty or insolvency in which there is a significant amount of debt owed to banks and financiers.[34] Although this procedure is not governed by insolvency law, its success depends upon the existence and availability of an effective and efficient insolvency law and a supporting institutional framework.[35]

According to Ethiopian laws**,** the ECC provides for composition and scheme of arrangement as alternatives to bankruptcy proceedings.[36]Composition is one of the out-of-court settlement mechanisms often utilized by a financially distressed debtor.[37] It is available when the debtor who has already been declared bankrupt makes a proposition to the commissioner specifying the percentage offered to unsecured creditors and the period required for payment.[38] The commissioner must, in such cases, seek the advice of the trustee and creditors committee to be notified through a registered letter.[39] The letter must show a period of not less than twenty days and not more than thirty days within which the dissenting creditors may file with the registry their refusal to accept the proposed composition.[40] The creditors would then take a vote, and the proposal for a composition would be of no effect unless it was approved by two-thirds of the creditors, representing two-thirds of the debts.[41]

The second procedure recognized under the ECC, i.e., the scheme of arrangement, comes into play when a trader who has or is about to suspend payment and has not been declared bankrupt applies to a court of law for the opening of the same.[42] The application for a scheme of arrangement can only be accepted by the court if it includes the balance sheet of the

[30] Ibid
[31] Ibid
[32]UNCITRAL Legislative Guidelines, *supra note* no-8, pars- 2-18
[33] Id, pars- 23-32
[34] Id, pars-2-3
[35]Ibid, Unless the debtor and its bank and financial creditors take the opportunity to join together and voluntarily enter into these negotiations, the debtor or the creditors can invoke the insolvency law, with some potential for detriment to both the debtor and its creditors in terms of delay, cost and outcome
[36] Arts-1081 and 1119 of the ECC
[37] Irit Mevorach and Adrian Walters, *supra note* no-27, p10
[38]Meaza Ayalke Demessie,The Ethiopian Law of Bankruptcy: Its Shortcomings In Comparison to Modern Laws of Bankruptcy and Areas of Concern for Its Revision, (Unpublished, LLM Thesis, School of Law, Addis Ababa University) Oct.2011, p 67
[39] Ibid
[40] ECC, *supra* note no-3, Art-1082(5)
[41] Id, art-1084/1/
[42] Id, art- 1119

firm, the profit and loss account, a list of commercial creditors and debts, and the names and addresses of the creditors and debtors.[43] The debtor must file these documents together with a report giving the reasons for his suspension or impending suspension of payments and the reasons for his proposing a scheme of arrangement.[44] The parties involved in the process of the scheme of arrangement are the debtor, the delegate judge, the commissioner, and the creditors.[45] The court is also involved in processing the application and giving the final confirmation for the scheme of arrangement.[46] The commissioner supervises the whole process, particularly; he must prepare the inventory of the debtor's estate, check the list of the debtor's estate, check the list of debtors and creditors, and prepare a detailed report on the affairs and conduct of the debtor, the proposed scheme, and the guarantees offered to creditors.[47] According to Article 1136(1), the creditors should consider the scheme in a meeting chaired by the delegate judge. The scheme of arrangement must be approved by a majority of creditors representing not less than two-thirds of all non-preferred or unsecured debts.[48]

One of the major departures of the RCC from the old regime under the ECC is the introduction of pre-bankruptcy proceedings that aim to rescue, rather than liquidate, struggling businesses.[49] The new regime seeks to encourage businesses to initiate business rescue proceedings as early as possible to enhance the chances of business rescue and prevent liquidation.[50] Those pre-bankruptcy proceedings introduced by the RCC are a court-supervised contractual debt restructuring procedure[51], a reorganization procedure[52], and the sale of business as a going concern.[53]

The objective of the preventive debt restructuring procedure is "to ensure that, with the unanimous consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating, or to prepare for the sale of the business as a going-concern.[54] The procedure affords debtor businesses the opportunity to enter into court-supervised debt restructuring negotiations and settlements with their major creditors without having to interrupt their normal course of business.[55]Preventive restructuring is believed to be the least intrusive proceeding as the ordinary business of the debtor is continued unaffected and the restructuring plan is approved by the court only if all affected creditors have agreed to the plan.

The second alternative procedure to bankruptcy incorporated under the RCC known as reorganization is 'a procedure that, with the consent of a qualified majority of affected creditors, to timely, efficiently, and effectively restructure the debts as well as the operations of the debtor in a reorganization plan or realize the sale of its business as a going concern to the benefit of its creditors.'[56] Businesses facing

[43] Id, art- 1120/1/
[44] Id, art 1120/2/
[45] Id, art 1125/2/(a) and (b)
[46] Id, art 1119 and 1131
[47] Id, art 1135
[48] Id, art 1140/1/
[49] Tadesse, *supra note*, no-1, p- 3
[50] Ibid
[51] RCC, *supra* note no-14, art-617
[52]Id, art-630
[53] Id, art-588/4
[54] Id, art-588/2/
[55] Ibid
[56] Id, art-588/3/

financial difficulties can propose a reorganization plan, which, if voted favorably by a qualified majority of creditors and approved by a bankruptcy court, can provide the businesses with the opportunity to clear their debts and return to healthy business life.[57] The last pre-bankruptcy proceeding provided by the RCC is a sale of business as a going concern. A going concern is an accounting term used to address a business that is financially stable as it can fulfill company liabilities as and when they fall due to no threat of impending liquidation, albeit a history of financial distress.[58] When it is unlikely for the reorganization plan to receive a qualified majority of creditors' approval, the new regime under the RCC provides for an alternative scheme of the sale of the business as a going concern in which the struggling business will have a new lease of life in the hands of third-party purchasers.[59] This procedure involves the debtor seller selling its business to the buyer, along with all of the things that are necessary for the latter to continue operating the business. The debtor seller must also keep running the business up until the day of sale.[60] The importance of the sale of going concern compared to liquidation is that the going concern value is, in principle, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders, and clients, continues to generate revenues, and limits the impact on workers.[61]

3.Preventive Debt Re-Structuring Procedure as Alternative to Bankruptcy Proceeding Under the Revised Commercial Code of Ethiopia

3.1. Opening of the Proceeding

A preventive debt restructuring proceeding is triggered by the sole application of a debtor who is not yet in cessation of payments or has been in cessation of payments for less than forty-five days and faces actual or foreseeable economic or financial difficulties.[62] The RCC authorizes only the debtor to initiate the preventive debt restructuring procedure.[63] Similarly, the European Insolvency and Restructuring Directive provides, as a principle, that preventive

[57]Ibid

[58]Jaul Williamson, What does it mean to sell a business as a going concern? Available at https://www.sellingmybusiness.co.uk/articles/financial-distress/what-does-it-mean-to-sell-a-business-as-a-goingconcern#:~:text=Transferring%20a%20business%20as%20a,such%20as%20equipment%20and%20premises accessed at 08/01/2024

[59] RCC, *supra* note no-14, art-588/3

[60]Joshua Elloy, What is a Sale of a Business as a Going Concern?, Senior Legal Project Manager and Lawyer at legal vision, Available at; https://legalvision.com.au/sale-of-a-business-as-a-going-concern/ Accessed on 08/01/2024

[61]Article 7 and 8 of European Insolvency and Restructuring Directive, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019

[62] RCC, *supra* note no-14, art-617/1

[63]The UNCITRAL legislative guideline that serves as a model law for modern insolvency law with voluntary restructuring negotiation empowered the creditor/s also for the initiation of the Voluntary restructuring negotiation. Similarly, the European Insolvency and Restructuring Directive under its article 4(7) and (8) stated that: Preventive restructuring frameworks shall be available on application by debtors. However, it further recommended that Member States may also provide that preventive restructuring frameworks shall be available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are micro, small and medium-sized enterprises (SMEs).

restructuring frameworks provided for under this Directive shall be available on application by debtors.[64] There are basic preconditions, often called a viability test, for a debtor to initiate a preventive debt restructuring proceeding. A cessation of payments should last for more than 45 days. [65]Cessation of payments shall occur when the debtor is unable to pay its debts, which are due and payable with its liquid assets.[66] In addition, the debtor must face actual or foreseeable economic or financial difficulties. The RCC does not impose any further viability requirements on a debtor. It, for instance, does not limit debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations from accessing a restructuring framework. In this regard, the European Insolvency and Restructuring Directive recommends that the member states require debtors to prove their viability at their own cost, which means adhering to the obligations of bookkeeping and accounting.[67] This position promotes the preservation of the rule of law and has an economic benefit for states. Furthermore, obeying the obligation to keep books and do accounting serves as an early warning tool that can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. Early warning tools, which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments, could be triggered by, for example, non-payment of taxes or social security contributions.[68]

Alongside the petition for the initiation of the proceeding, the debtor shall provide the bankruptcy court with its latest financial statements, a memorandum outlining the circumstances of its financial difficulties and means to resolve them, as well as cash-flow projections.[69] The Court may order the debtor to provide any further documentation and information it deems necessary and may order third parties, such as banks or tax authorities, to provide them.[70] Once the viability test to initiate a preventive debt restructuring proceeding is met and the proceedings are initiated, the matter of the duration of the proceeding comes to attention. The very objective of this proceeding is to promote economic stability, maximize the value of the estate, and ensure legal certainty through efficient, effective, and timely procedures.[71] By timely procedures, it means concluding within a short period of time to rescue a distressed business from getting liquidated or leaving the market. Under RCC, the duration of the preventive debt restructuring proceeding is set to be completed within four months.[72] However, the court may grant an extension provided that the debtor demonstrates that it is

[64]Article 7 and 8 of the Directive. However, Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor

[65]Ibid

[66]RCC, *supra* note no-14, art-590/1

[67]Article 4(2) of the directive reads as: Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

[68] Ibid

[69] RCC, *supra* note no-14, art-617/2

[70] Ibid

[71] Id, art-588/1

[72] Id, art-618(1)

likely that the restructuring plan would be accepted unanimously by the affected creditors.[73]Yet, the total duration of the plan to be concluded, including extensions and renewals, shall not exceed eight months.[74] Hence, the duration of the proceeding shall not exceed eight months in any case.

3.2. Objectives and the Material Scope of the Proceeding

PDRP, unlike the traditional approach of liquidating a business in financial difficulties, has the aim of restoring it to a healthy state or, at least, saving those of its units that are still economically viable.[75] Article 588(1) of the RCC states a common objective for preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings. Their common objectives are to promote economic stability, maximize the value of the estate, and ensure legal certainty through efficient, effective, and timely procedures.[76]The specific objectives of the preventive debt restructuring proceedings are explained under Article 588(2) of the RCC. The provision states that 'the objective of preventive debt restructuring proceedings is to ensure that, with the unanimous With the consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating, or to prepare for the sale of the business as a going concern.[77]

Concerning the scope of the proceeding, in principle, a restructuring framework should be available to debtors, including legal entities, natural persons, and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. In this regard, Article 589 of the RCC generally enumerates to whom the proceedings under Book III, *i.e.*, preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings, shall apply. By this provision, 'the proceedings referred to in this book shall apply to traders and business organizations, other than joint ventures having no legal personality, as well as craftsmen and natural persons exercising independent professional activities.[78] Thus, the preventive restructuring proceedings shall apply to traders as defined under Art. 5 of the RCC, business organizations, craftsmen's, banks, and other financial institutions (if no other special laws are applicable) and to state-owned enterprises (if no other special laws are applicable).[79]

3.3. Court Having Jurisdiction

As pointed out at the beginning, a preventive restructuring proceeding is subject to supervision by a court of law. Hence, it is imperative to identify which court has jurisdiction to entertain certain preventive restructuring proceedings under Ethiopian laws. The RCC states that the Ethiopian Court has jurisdiction in preventive restructuring proceedings, Reorganization proceedings, and bankruptcy proceedings shall be in the Federal High Court of the place where the individual's principal place, the registered office of the

[73] Id, art-618/2
[74] Ibid
[75] European Insolvency and Restructuring Directive, *supra* note no-61, p-19
[76] RCC, *supra* note no-14, art-588(1)
[77] Id, art-388(2)
[78] Id, art-589(1)
[79] Id, arts-589(1) (2) (3) (4)

company, or the legal person is situated.[80] Also, the cumulative readings of articles 5/1/d and 3/1/a of Federal Courts Proclamation No. 1234/2013[81] confirm this statement. Accordingly, for an individual trader, the jurisdiction goes to the Federal High Court of the trader's principal place, whereas for a business organization, the Federal High Court of the place where the organization is registered or where the legal person is situated will have jurisdiction.

The Court at which preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings are opened; shall have jurisdiction for actions that derive directly from these proceedings and are closely linked with them, such as actions regarding the restructuring and reorganization plan; the confirmation of the sale of the business as going-concern; the ongoing contracts; the liability of the supervisors, trustees, controllers and directors of the debtor; the submission, verification and admission of claims; the rights *in rem*; set-off; the sale or transfer of assets; the ranking of claims; the distribution of proceeds; the invalidation of acts; the validation and enforceability of contracts; the discharge of the debtor and the closure of the proceedings.[82]

Regarding international jurisdiction for the opening of proceedings and related judgments Article 602 of the RCC sets a governing rule. Accordingly, the Ethiopian courts have jurisdiction to open main proceedings if the center of the debtor's main interest is situated in Ethiopia.[83] The center of main interest shall be the place where the debtor conducts the administration of its interest regularly and which is ascertainable by third parties.[84] In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary.[85] In the case of a physical person, the center of its main interests shall be presumed to be the principal place of business in the absence of proof to the contrary. [86]The judgment opening preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings concerning a debtor having its center of main interest in Ethiopia shall have universal effect.[87] Furthermore, Ethiopian courts have jurisdiction for actions that derive directly from these proceedings and are closely linked with them.[88]

3.4. Persons and Bodies Responsible for the Conduct of the Proceedings

The operation of preventive debt restructuring procedures involves a bankruptcy court, a supervisory judge, and an expert in the field of restructuring.[89] The bankruptcy court is the Federal High Court of the place where the registered office of the company is situated.[90] It is the court that opened reorganization or bankruptcy proceedings that shall supervise all proceedings and shall make orders on matters that are outside the powers of the supervisory judge.[91] Besides, it hears appeals from orders

[80] Id, art-600/1
[81]Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia; Federal Courts Proclamation No. 1234/2021, 27th Year No.26 Addis Ababa 26th April, 2021
[82] RCC, *supra* note no-14, art-600(2)
[83] Id, art-602
[84] Ibid
[85] Id, art-602/1
[86] Ibid
[87] Id, art-602(2)
[88] Id, art-602(5)
[89] Id, arts-604-616 and arts-619-622
[90] Id, art-600(1)
[91] Id, art-604(1)

of the supervisory judge.[92] Regarding the conduct of the court proceedings, the RCC imposes that they be held in camera.[93] The opening of preventive restructuring proceedings, including information exchanged during the proceedings and the restructuring plan, shall remain strictly confidential.[94]Any violation of this provision shall result in civil and/ criminal liability.[95]

A supervisory judge is appointed by the court at the judgment opening of the proceedings.[96] It shall be chosen from among the members of the court but may not be a member of the court that opens the proceedings. The supervisory judge shall have the powers: to admit pre-insolvency claims against the estate; to take or cause to be taken by the appropriate authorities all steps and measures necessary to preserve the assets; to authorize transactions or agreements that are outside the ordinary course of business; to decide on the continuation or termination of ongoing contracts; to authorize the payment of pre-insolvency claims; and to decide on the disputes arising in connection with the constitution of the classes of creditors.[97]In addition to this, it has the power to refer to court any claims that fall within its jurisdiction. He/she also has the power to call the creditors committee as required by law, where he considers it necessary.

The third person responsible for the conduct of the proceeding is an expert in the field of restructuring. He or she is appointed by the court at the suggestion of the debtor.[98] Yet, an aggrieved creditor may file an application to the Court for the replacement of the expert in the field of restructuring at any time during proceedings. Hence, the court may grant such an application at its discretion.[99] Experts in the field of restructuring are expected to be bound by rules of professional conduct and ethical standards appropriate to their respective professions.[100] Furthermore, acting independently, the expert in the field of restructuring shall, among others, carry out those tasks[101]*i.e.,* to determine the creditors participating in the preventive restructuring proceedings; to assist the debtor and the creditors in drafting and negotiating a restructuring plan; to convene and preside over the creditors' meetings; to supervise the activities of the debtor during the negotiations on a restructuring plan and report periodically to the Court on the progress of the negotiations; to present the restructuring plan to the Court for confirmation; and to prepare the sale of the business as going concern, as the case may be. In meeting his duties, the expert in the field of restructuring may: order the debtor or any third party to provide necessary additional financial or accounting information; and appoint independent experts, to audit the financial situation and business plan of the debtor. [102]However, a creditor may file with a court for the replacement of the expert in the field of restructuring at any time during the proceedings.[103] The provision does not indicate grounds for the application of the replacement;

[92] Ibid
[93]Id, art-623
[94]Ibid
[95]Ibid
[96]Id, art-605
[97] Id, art-606
[98] Id, art-619
[99] Id, art-620
[100] Id, art- 611(1)
[101] Id, art-621(1)
[102] Id, art-621(2)
[103]Id, art -620(1)

rather, it gives a court discretionary power to determine the grounds.

3.5. Treatment of the Ongoing Contracts

Ongoing contracts are contracts, including, but not limited to, essential services contracts and immovable property leases where the debtor carries out his business, including premises forming part thereof and occupied by himself or his family, between the debtor and one or more creditors under which, at the moment of the opening of proceedings, at least one party still has to perform an obligation that is specific to the contract.[104] The opening of preventive restructuring, reorganization, and bankruptcy proceedings shall not affect the continuation of ongoing contracts.[105] Hence, notwithstanding any contractual provision to the contrary, creditors may not be allowed to withhold performance or terminate, accelerate, or, in any other way, modify ongoing contracts to the detriment of the debtor solely by reasons of: a request for an opening or the opening of preventive restructuring, reorganization, or bankruptcy proceedings; or a request for a single stay of individual enforcement actions, or the granting of such a stay in the framework of preventive restructuring proceedings.[106] Besides, creditors may not claim the payment of any pre-insolvency claim arising under the contract as a condition precedent for the continuation of the contract. However, creditors may submit an opposition to the decision to continue or terminate ongoing contracts. Any opposition shall be decided by the supervisory judge within seven days of the opposition.[107]

3.6. Rights and Obligations of the Debtor and the Creditors

Following the opening of the preventive debt restructuring procedure, the debtor enjoys different kinds of rights and is also subjected to several obligations. The rights and obligations of the debtor in the course of the proceeding are scattered under several provisions of Book III of the RCC. Starting with its rights, following the opening of the proceeding, a debtor has the right to apply to a court for a single stay of action.[108] A single stay of action means a temporary suspension of the enforcement of a claim by a single creditor against a debtor or a third-party security provider. The stay of action shall cover all types of claims, including secured and preferential claims.[109] The rationale behind such a grant is to support the negotiations for a restructuring plan. However, despite its importance, the law imposed a duration barrier. Hence, the total duration of the single stay of actions shall not last longer than the duration of the preventive restructuring proceedings.[110] Another key right granted to the debtor is remaining in possession of his business.[111] Even more, the debtor shall have the power to take all decisions falling within the ordinary course of business.

Having said this much about a debtor's rights, following the opening of the proceeding, the debtor must provide the bankruptcy court with its latest financial statements, a memorandum outlining the circumstances of its financial difficulties and means to resolve them, as well

[104] Id, art-593(2)
[105] Id, art-593(1)
[106] Id, art-593(3)
[107] Id, art-594(1) and (2)
[108] Id, art- 625(1)
[109] Id, art-625(2)
[110] Id, art- 625(2)
[111] Id, art-625(3)

as cash flow projections.[112] Also, the debtor shall pay all debts arising in the ordinary course of business, except for the claims already subjected to a single stay as per Article 625 of the RCC.[113] Failing this might necessitate the opening of re-organization proceedings. Similarly, the debtor also must pay remuneration to the expert in the field of restructuring.[114]

Coming to the rights and obligations of the creditors, the overarching principle of proceedings set out in Book III of the RCC is to protect the legitimate interests of creditors.[115] To this end, the new insolvency law grants various participation rights to the concerned creditors. The creditors shall have the right to submit their observations and be heard at court hearings throughout the proceedings.[116] Another basic right that helps protect the creditor's legitimate interests is information rights.[117] Accordingly, a creditor, a group of creditors, a class of creditors, or the general creditors' meeting shall have the right to request all relevant information from the expert in the field of restructuring, the supervisor in reorganization, and the trustee in bankruptcy.[118] A creditor, a group of creditors, a class of creditors, or the general creditors' meeting shall make such a request in writing to the expert in the field of restructuring. Then the expert in the field of restructuring shall provide a response within ten days from the receipt of such a request and shall satisfy the request as quickly as possible.[119] However, to satisfy the asking creditors or a class of creditors, the request must be justified and not overly burdensome.[120] If the request happens to be unjustified or overly burdensome, the expert in the field of restructuring may decline the request.[121]

Additionally, the creditors shall have the right to seek to amend the restructuring plan and make counter-proposals.[122] In preventive restructuring proceedings, the restructuring plan shall be approved unanimously by all affected creditors.[123] This means the restructuring plan shall be accepted by all affected creditors participating in the preventive restructuring proceedings.[124] Unless the restructuring plan is unanimously approved and accepted by creditors, it will have no effect.[125] The creditors have the right to apply to the court for the setting aside of the restructuring plan if the debtor fails to carry out the terms of the restructuring plan.[126]If the application to set aside the procedure is accepted, the creditors have the right to retain the benefit of the new financing privilege priority obtained under Article 628 of the

[112] Id, art-617(2)
[113] Id, art-626(1)
[114] Id, art-622
[115] Id, art-597(1)
[116] Id, art-598
[117] Id, art-599.
[118] Ibid
[119] Ibid
[120] Id, art-599(3)
[121] Ibid
[122] Id, art-627(1)
[123] Id, art-597(2)
[124] Id, art-627(2)
[125]As per art-627(3) of the RCC, the restructuring plan may contain; the rescheduling of the claims of the affected creditors or/and the waiver of claims of the affected creditors or/and the settlement of claims through the issuing of financial debt instruments subject to laws regulating the issuance of financial debt instruments or/and the conversion of claims of the affected creditors into equity or/and the reduction and increase of capital of the debtor to be subscribed to by creditors or third party investors (subject to the mandatory provisions of this Code,) or/and the sale of existing or issuance of new shares in favor of creditors or third party investors.
[126] RCC, *supra* note no-14, art-632(1)

RCC.[127] Concerning creditors' obligations, they are obliged to execute the confirmed restructuring plan. Article 629(6) of the RCC provides that, upon confirmation of the plan by the Court, the restructuring plan shall be deemed to constitute an executory title.

3.7. Confirmation of the Restructuring Plan and Its Effects

As stated at the beginning, the entire process of debt restructuring is supervised by a court of law. This supervision right is inclusive of the final judicial confirmation by the concerned court of law. Once the preventive debt restructuring plan is adopted by the negotiating parties, the next step would be the confirmation of the plan by the court on the fulfillment of the minimum conditions set by the law. The execution and implementation of the plan are possible only after confirmation by the court.[128] Nonetheless, the court does not confirm the plan without any further investigations. Before confirmation, the court shall first ensure that the conditions under which the restructuring plan can be confirmed are fulfilled. In confirming the restructuring plan, the Court shall verify that: third parties' interests are adequately protected, concerning the taking of security interests and in the framework of new financing; and that the restructuring plan has a reasonable prospect of preventing the bankruptcy of the debtor and assuring the viability of the business.[129] Furthermore, if the terms of the restructuring plan require the approval of the shareholders, the court shall make sure that the approval is made in compliance with the provisions of the RCC. [130]Eventually, after making sure of the fulfillment of the required conditions, the Court will confirm the restructuring plan.[131] Upon confirmation of the plan by the Court, the plan shall be deemed to constitute an executory title, *i.e.*, it is binding upon all participatory or affected parties. However, creditors that are not involved in the adoption of a plan are not affected parties, as the confirmed plan does not bind them. In principle, the success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation.

3.8. Review Procedures

Here it should be noted that the court's confirmation of the plan is not absolute, and there are platforms of review by the affected parties for some justifying reasons. Once a court confirms the plan, there are three distinct avenues of review: appeal, amendment of the restructuring plan, setting aside the restructuring plan, and conversion to reorganization.[132]Regarding appeal, the affected parties should be able to appeal a decision on the confirmation or rejection of a restructuring plan issued by an administrative authority or judicial authority. However, to ensure the effectiveness of the plan, to reduce uncertainty, and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects that potentially preclude the implementation of a restructuring plan.[133] Besides, the grounds of appeal must be

[127] Id, art- 632(3)
[128]*Id, art*-629(1)
[129]Ibid
[130] Id, art-629(3)
[131] Id, art-629(1)
[132] Id, arts-630-633
[133] Ibid

determined and limited.[134] One of the parties that can be affected by the plan is a debtor, and the debtor may appeal against the judgment of the court rejecting the restructuring plan.[135]The debtor is allowed to appeal against the decision to reject the plan in a confirmation under Article 617(1) of the RCC, which allows the debtor only to initiate the proceeding. To avoid unjustifiable delays, the RCC also prescribes a time limit within which the appeal must be invoked. Accordingly, appeals shall be filed within ten days from the judgment of the court rejecting the restructuring plan.[136]

The second venue for review is the amendment of the restructuring plan. In principle, it should be possible for any amendments to the plan to be proposed or voted on by the parties, on their initiative, or at the request of the judicial authority.[137] Despite the principle that states 'upon confirmation of the plan by the court, the restructuring plan shall be deemed to constitute an executory title[138]; the parties may agree to amend the restructuring plan after its confirmation.[139] Such an amendment shall be valid and binding between the parties without being subject to any confirmation by the court. In other words, once the parties agree to amend the plan and upon the conditions of negotiation, the amendment has an automatic binding effect on the parties without the court's confirmation.

The third venue for review is setting aside the restructuring plan.[140]Where the debtor fails to carry out any terms under the restructuring plan, irrespective of its weight and type, the creditors are allowed to apply to set aside the restructuring plan. This paves the way for a creditor to easily leave the plan. Once the unanimous approvals of the creditors are secured and the confirmation by the court is made, the ground for setting aside the restructuring plan should not be made easy. It is plausible to distinguish a ground that best serves the interests of the creditor from those that do not affect the interests of the creditor severely. The other ground for setting aside the preventive restructuring plan under the RCC is the opening of reorganization or bankruptcy proceedings. The opening of a reorganization or bankruptcy proceedings shall result in the automatic setting aside of the restructuring plan.[141]

The final avenue of review is the conversion of preventive restructuring proceedings to reorganization proceedings or bankruptcy proceedings, which can be requested by a debtor or by the court's motion of a court.[142] Of course, the Court may convert preventive restructuring proceedings to bankruptcy proceedings on its motion where the restructuring plan has been rejected by the Court or the restructuring plan has been set aside.

3.9.The Recognition of Foreign Judgments

In the contemporary world, it is increasingly easy for firms and individuals to have assets in more than one country and to move assets across borders.[143] Hence, it is desirable to have

[134] Ibid
[135] *Id.art*-630(1)
[136] Id., art- 630(2)
[137] UNCITRAL Legislative Guidelines, *supra* note no-8, par. 30
[138] RCC, *supra* note no-14, art-629(6)
[139] Id, art-633(1)
[140] Id, art-632(1) states that 'where the debtor fails to carry out the terms of the restructuring plan, a creditor may apply to the Court to set aside the restructuring plan and to open reorganization or bankruptcy proceedings'
[141] Id, art-*632(2*)
[142] Id, art-689
[143] UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018),

a simple regime for recognition and enforcement of insolvency-related judgments that can assist in the recovery of value for financially troubled businesses, thus increasing the potential for successful reorganizations or liquidations. [144]To this end, our law provides some preconditions for the recognition of foreign court judgments related to bankruptcy. It states that,

> The judgment opening preventive restructuring, reorganization, bankruptcy, and insolvency proceedings, as well as insolvency-related judgments handed down by the jurisdictions of another originating state, shall only be recognized by Ethiopian courts provided that the foreign judgment is not contrary to Ethiopia's public order, including its fundamental principles of procedural fairness; the foreign judgment has not been obtained by fraud; and the foreign judgment has been handed down by a competent court by Ethiopia's conflict of jurisdictions rules.[145]

This provision indicates that judgments of foreign courts will be recognized by our courts only if they do not contravene Ethiopia's public order, including its fundamental principles; if the judgments were not obtained through fraud; and finally, if the judgments are rendered by the court with jurisdiction by the law of their origin. Furthermore, recognition of the foreign judgment must comply with Ethiopia's commitments under international treaties or agreements. Hence, no preventive restructuring proceedings, reorganization proceedings or bankruptcy proceedings have been opened in Ethiopia concerning the same debtor, and the foreign judgment must not be inconsistent with a judgment issued in Ethiopia in a dispute involving the same parties.

4. Conclusions

As stated above, the introduction of preventive debt restructuring procedures is one of the major reforms made by the RCC. The procedure is aimed at ensuring that, with the unanimous consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating or preparing for the sale of the business as a going concern. The content of the RCC's section governing this procedure reveals that most of its provisions are modeled after the European Insolvency and Restructure Directive Voluntary Restructuring Negotiations and the UNCITRAL Legislative Guidelines. The ECC does not recognize the pre-bankruptcy preventive debt restructuring procedure. The only pre-bankruptcy debt enforcement procedure the law recognizes is a scheme of arrangement. This procedure is aimed at securing the creditor's interest rather than rehabilitating or rescuing financially distressed businesses.

The new Ethiopian bankruptcy law embodied under the RCC elaborates on important aspects of the conduct of preventive debt restructuring procedures, including, *inter alia*, who may initiate the restructuring proceeding, what a debtor must submit to open the proceeding, who is involved in the proceeding, including

available at: https://uncitral.un.org/en/texts/insolvency/modellaw/mlij visited on July 5, 2023

[144] Ibid

[145] RCC, *supra* note no-14, art-603(1)

their rights and obligations, the time within which the proceeding must complete, review mechanisms, etc. The RCC does not empower the creditors to initiate the proceeding, but only the debtor. Regarding the parties involved in the procedure, the law designates a debtor and creditors to negotiate. The bankruptcy court and an expert in the field of restructuring played the facilitation role.

Article 617 of the RCC provides a viability test for access to the preventive restructuring procedure. In addition, in a modern preventive debt restructuring procedure like the European Insolvency and Restructuring Directive, debtors' accounting and bookkeeping records are set as a viable condition to invoke the restructuring procedure. A debtor with good accounting and bookkeeping records is viable to invoke the proceeding. This is useful both for the debtor and the government. Furthermore, obeying the obligation to bookkeeping and accounting serves as an early warning tool that can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. Hence, removing the barriers to the effective preventive restructuring of viable debtors in financial difficulties contributes to minimizing job losses and losses of value for creditors in the supply chain, preserves know-how and skills, and hence benefits the wider economy.

Lastly, regarding setting aside the restructuring plan, the RCC leaves the power to determine the grounds of application to the creditors' discretion. Where the debtor failed to carry out any terms under the restructuring plan, irrespective of its weight and type, the creditors can easily apply for a setting aside of the restructuring plan. This paves the way for a creditor to easily leave the plan while different efforts have been made to confirm by the court. The above analysis also reveals that even though the RCC has recognized the debt restructuring procedure and its potential utilization by interested businesses in financial distress, there are shortcomings that can hinder its practical applications. *Firstly*, the initiation mechanism must be reviewed in a way that allows the creditor(s) to initiate a preventive restructuring procedure. It will increase the trend to use the proceeding to rescue the distressed business and protect the interests of the creditor. *Secondly*, the country needs to review its viability condition and limit access to a restructuring framework for debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations. However, the country needs to make sure that the debtors that have taken adequate measures to remedy the issues that gave rise to the sentence, to provide creditors with the necessary information to enable them to decide during restructuring negotiations, is viable for the procedure. Because it serves as an early warning tool, it can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. The mechanisms employed by the European Insolvency and Restructuring Directive are worth considering. *Thirdly*, to adequately serve the key objective of the restructuring, the existing laws should be reviewed and incorporate the involvement of the employees' representatives in the preventive restructuring procedure. *Lastly*, as sometimes setting aside a confirmed preventive restructuring plan could be necessary, the country's bankruptcy law must be reviewed to stipulate the justifiable

grounds to set aside a confirmed preventive restructuring plan