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LAW AND GOVERNANCE STUDIES, SCHOOL OF LAW
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***Problems associated with formation and application of
Surety bonds under Ethiopian Insurance Law***

A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Master of Laws
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By

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May 2020

Declaration

I, the undersigned, declare that the thesis titled *Problems associated with formation and application of Surety bonds under Ethiopian Insurance Law* is original work of mine and has not been presented for a degree in any other University or academic institute and pledge that all sources of materials used in the thesis have been duly acknowledged.

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Dedication

Dedicated to my loving, caring and selfless mother, Workinesh Gebeyo Fetula, whose interest in this, as in all my ventures, has never been less than my own.

Acknowledgement

The Sovereign God be praised all the time!!

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Acronyms and Abbreviations

Art.	Article
Arts.	Articles
ADR	Alternative Dispute Resolution
C.C	Civil Code of the Empire of Ethiopia 1960 (Proc. No.165/1960)
Comm.code	Commercial Code of the Empire of Ethiopia 1960 (Proc.No.166/1960)
CBE	Commercial Bank of Ethiopia
CFN	Cassation File Number
E.I.C.	Ethiopian Insurance Corporation
ERCA	Ethiopian Revenues and Customs authority
FDRE	Federal Democratic Republic of Ethiopia
FGB	Financial Guarantee Bond
FH	Federal High Court
FN	File Number
FSC	Federal Supreme Court
ICC	International Chamber of Commerce
GPoL	General Period of limitation
No.	Number
Proc. No.	Proclamation Number
PLC	Private Limited Company
NBE	National Bank of Ethiopia
S.C.	Share Company
UNICITRAL	United nation Convention on Independent Guarantees and Stand-By Letters of Credit
URDG	Uniform Rules for Demand Guarantees (URDG 758)
UK	United Kingdom
USA	United States of America

Abstract

The making of insurance surety bonds in Ethiopia is atypical from the conventional way of doing the same elsewhere. These bonds, being signed only between a surety and account party, embodies terms and conditions which obtrude obligations on a non signatory party for whose benefit they are made and this way of doing the business has thus far sourced various enforcement challenges the solution of which has been observed to be perplexing. Particularly, the disputed application of privity rule in the context of the relationship that exist between a surety, obligee and account party in a surety bond arrangement has been a conundrum to obligee`s claim and surety`s defense. In fact the capability of such bonds to validly source rights and duties among the involved parties is contentious and the discord stems from the existence or not of enabling legal base to run such business by Ethiopian insurers. This thesis, using qualitative research method, argues the multidimensional problems which the use of insurance bonds as security devices are undergoing in Ethiopia`s insurance industry are attributable to the absence of a clear enabling legal base for insurers to run such business, the mischaracterization of these devices as insurance policies, the incompatibility which the making of the bond contracts have with existing laws and the inadequacy of the latter to regulate the peculiarities these devices possess.

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CHAPTER ONE

1. INTRODUCTION

1.1. Background of the study

A commentator explaining the worth of security devices puts it, “*Creditors worship security with apostolic zeal.*”¹ For they bestow creditors a right to seek satisfaction from more than one person and thereby minimize risk and financial consequence of default, securities given as an assurance of performance of duty have been life blood for copious businesses.² These security mechanisms are multifarious in the form they assume and the sort of security they are meant for. More generally, they thus far are placed in the form of personal surety/security, property (real) security and corporate surety bonds, also referred as documentary securities. The third form of security is issued by financial institutions (insurance companies and banks). In other jurisdictions it is also issued by surety companies that are mainly established to run the corporate bond business; which we so far do not have in Ethiopia.

These bonds are utilized in various business ventures under different naming and have significant vantage in building confidence in the actors to decide to enter into a given undertaking.³

Project owners or investors (known as *employers* in bond business) could rarely have a will to contract with contractors unless the latter produces security which gives a financial guarantee that in case it fails or delays delivery oppugnant to their pact, a surety will pay agreed compensation or will itself overtake and effectuate the construction. To this end, a surety bond known as *performancelconstruction bond* is often heavily utilized in this industry.⁴ And even after the contract is made, employers may not still be willing to effect advance payments to contractors unless the latter presents an assurance often in the form of *advance payment*

¹Gerard McCormack, *Secured credit under English and American Law*, Cambridge University Press.(2004)10

² *ibid*

³ Introduction to contract of surety bonding for contractors <http://www.sio.org> accessed on March,2020.

⁴ Roger Ter Haar *et al*, *Construction Insurance and UK construction Contracts*, EBSCO publishing 3rd ed.(2016)237

bond/guarantee,⁵ which assures that should contractor fail to perform a work the value of which corresponds to the taken advance or should it fail to return to the employer taken sum in case the contract is rescinded, the surety will reimburse such amount to the employer. These bonds are also employed in rental of pricey assets like airplane, machineries and supply of goods and services etc. Similarly *customs bond* given to assure payment of taxes and duties or compliance with the requirements related to tax exemption privileges⁶ are instrumental in facilitating import-export trade. *Bid bonds* given to assure that a bid winner will honor terms of the bid and in case due to reasons attributable to it the owner has to rebid a project, a surety will compensate the owner extra costs of re-bidding and the cost difference between initial bid and next lowest bid are much utilized mostly in jumbo business bids.

Discernable from this brief discussion is how these security devices majorly serve in making the life of various business ventures which involve colossal amount of capital come into being by providing reliable assurance and thereby by significantly dish up the economy in various ways. However the way these bonds are made and applied in Ethiopia`s insurance industry is not without a flaw. The fact that these bonds while being signed only between a debtor and surety, obtrude on a non signatory creditor obligations the non fulfillment of which results in making creditors` claim under such bonds invalid, the absence of consensus as to the true nature of these bonds i.e., as to whether they are security devices or insurance policies, and the inadequacy of the existing legal regime to regulate them and the consequent inconsistent and perplexing solutions given by judicative bodies to problems arising thereunder has these days begun to devaluate their reliability and huge economic importance. Hence this thesis will principally try to examine the compatibility of the way this business has long been conducted with the existing laws, the adequacy of the latter to regulate it and trending practical problems there around.

⁵ Ibid

⁶See generally Art.116 to 119 of Customs Proclamation No.859/2014.ERCA is mandated to require security to ensure compliance in relation to payment of taxes and duties and condition of privileges granted.

1.2. Statement of problem and research questions

In recent years, the use of surety bonds issued by Ethiopian insurers as protective devices has begun to reflect trending problems whose solutions have been found to be perplexing. The being observed problems have much to do with the making of such contracts, the rights and duties of involved parties under such bonds, the adequacy and the contested applicability of existing legal regime governing these devices.

In some jurisdictions, suretyship and guarantee are different forms of security and the incongruity rests in the document a surety is bound to sign and the nature of its liability there under ⁷ while in other jurisdictions the terms are used interchangeably. In some states of the USA and common law countries, contract of surety is primary and direct as the surety assumes liability with account party/principal debtor/ contemporaneously on the same contract and has the position of *Co-debtor*, while contract of guaranty is collateral and secondary as guarantor's assumption of liability is not coeval with that of the principal but subsequent.⁸

Coming to the Ethiopian context, the Civil Code's suretyship provision uses the two terms interchangeably⁹ and one cannot find a vivid provision as to who is to sign a suretyship/guarantee contract. In fact the very application of these provisions to corporate surety bonds is even contested maintaining their application be limited to personal suretyship.¹⁰

⁷Christopher Henkel, *Personal Guarantees and Sureties between Commercial Law and Consumers in the United States*. The American Journal of Comparative Law Vol.62 (2014)334

⁸R. H. S, *Guaranty and Suretyship in Pennsylvania. An Attempt at Clarification*, University of Pennsylvania Law Review and American Law Register, Vol. 87, No.4 (1939)466

⁹ The C.C's section of suretyship is titled `suretyship` while the whole provisions (Arts. 1920- 1951) use the term *guarantee* except art.1950 which uses the term *surety*.

¹⁰ It is asserted that as corporate surety bonds business both at global level and in our country begun to be practiced only after the Civil and Comm.code were promulgated, it is wrong to argue application of the law to something the development of which comes into being long after the issuance of such law. Gezu Ayele Mengistu, *Ethiopian Banking and Commercial Instruments Law (2016)103*

Although not without critique, the Federal Supreme Court (FSC) Cassation Bench has rendered binding interpretation¹¹ that performance bonds issued by insurers are to be governed by suretyship provisions of the Civil Code. The decision, among other things, is profoundly criticized for equating corporate surety bonds that are commercial per se with personal sureties which could be assumed on gratuitous basis, and for failing to appreciate the peculiarities which the former possesses.¹²

On the other hand, the very characterization of insurance bonds as to whether they are security devices or insurance policies is also without consensus. As revealed in judgments of judicative bodies, there is a hold which considers surety bonds as a subset of insurance policies and ergo, argues their governance under insurance laws. It is argued that surety bonds, as any insurance policy does, give creditors protection against financial consequence of risk of default by account party. Arbitration panels, FHCs and FSC appellate bench have given decisions on various files that surety bonds are insurance policies to be governed by commercial code`s insurance provisions.¹³ This position not only put surety bonds under the government of this law but will, among other things, devoid insurers of subrogation right they could have had against account parties had the bonds been considered as a security device.¹⁴ It also differs who signatories of bond contract should be.

Apart from the absence of consensus on the applicability of suretyship provisions to corporate surety bonds, the failure of this and other laws to include a clear provision as to who parties to suretyship contract in general and corporate surety bonds in particular are or as to whether these contracts are bipartite or tripartite in nature might have also resulted in the way insurers in Ethiopia have long been issuing these bonds and which in fact has begun to be sources of legal disputes and discourses.

¹¹ EIC Vs Bale Rural Development organization [2012] FSC Cassation Decision CFN 47004 V.13.392-398

¹² Interview with Yenebeb Derseh, Legal Service Director at Nib insurance S.C, Addis Ababa, March 2020.

¹³ See case three and four as cited at note 112 & 113

¹⁴ This is so because insurer who has paid compensation to or on behalf of its insured has no right of subrogation against such insured. But a surety who pays a creditor can subrogate against principal debtor. See generally article 683 of the comm.code and article 1940 & 1944 of the C.C.

Besides, parties to surety bonds issued by all Ethiopian insurers for long are only account party and surety.¹⁵ These bonds are presented as securities to obligees that had no involvement during their making. These bipartite agreements contain terms and conditions which obtrude duties on a party for whose sole benefit they are made but who is not a signatory to the bond. Some of the duties are stated in the form condition precedent to the surety's liability towards obligee which should mandatorily be fulfilled by the latter in order for it to validly claim payment. They also contain agreed dispute resolution mechanisms via which disputes arising under the bond are to be first resolved.

Now the obvious legal hitch which the way these bonds are formed and applied in Ethiopia's insurance industry relates to the aptness of imposing duties having legal consequences on a person who is not a signatory thereto. Obligees often argue that they should not be bound by duties stipulated in an agreement to which they are not signatories. It is said that the rule of *privity of contract* debars sureties from invoking the application of the duties included in such bonds.

A counter argument which considers the position of creditors as the one setting a double standard is also sturdily raised. It is argued that obligees cannot claim a right/benefit under the bond while at the same time denying the application of duties specified under the same contractual document. The substance of the argument is, as obligees' right to claim payment from a surety emanates from nowhere but the bond contract, they cannot assert a half operation of the same instrument. If they are to benefit from the right, they should also comply with the duties stipulated under a document which is the very source of such right. They further assert that obligees sign main/underlying contract and effect advance payment there under only when they accept and get satisfied by the surety bond as presented to them. Hence, by so doing, obligees have circuitously consented to be bound by the terms and conditions stated in a given bond.

¹⁵ The researcher has proved this fact from appropriate authorities of all Ethiopian insurers via document observation and interviews conducted. See annexed documents.

Although it is not clear if issuing surety bonds is within the list of activities which insurance companies in Ethiopia are allowed to operate¹⁶, the way the business of issuing surety bonds is being transacted by insurers in the country is presumed to have the recognition of the NBE as any insurer in the country needs to have written approval of this regulator before introducing any product to the financial market.¹⁷Hence, the regulator is presumed to be privy to the general content or at least as to who parties to surety bonds sold by Ethiopian insurers are.

On the other hand, courts of different layers have differing stand on the applicability of terms and conditions of surety bonds to a non party obligee. In a case that was reviewed by FSC, the obligee jointly sued account party and surety based on underlying contract and *advance payment bond* respectively.¹⁸The trial HC closed the suit per surety's objection to Court's material jurisdiction based on the bond's arbitration clause which the appellate FSC affirmed. However, the Cassation Bench of the FSC overruled both decisions reasoning that as the obligee is not a party/signatory to the bond contract signed only between the principal and the surety, it is not bound by the arbitration clause stated therein. As the *ratio decidendi* of the decision dwells in a strict application of privity *rule*, it can be argued that it is not only the arbitration clause but also other terms and conditions of surety bonds are not to bind the non signatory obligees. It is said that this binding interpretation has the effect of not only making arbitration clause stated in surety bonds inapplicable to non signatory obligee but also renders surety bonds issued by insurers in Ethiopia *unconditional (On demand) surety bonds* which the insurers are legally prohibited from issuing.¹⁹It should be noted that some of the conditions stipulated in such bond are there in order that a surety could take necessary precautionary measures to avoid/minimize its

¹⁶Neither under the repealed licensing and supervision of insurance business proclamation No. 86 /1994 nor under the current Insurance Business Proclamation No. 746/2012(and its amendment Proc.No.1163/2019) and subsidiary laws there under are found any clear provisions which authorize Ethiopian insurers to transact surety bond business.

¹⁷ See article 3/3/b and 37/2/N of Proclamation No.746/2012 about the prerequisite to introduce a new insurance product and the effect of non compliance with this requirement, which is suspension and revocation of license as the case may be.

¹⁸MEDROC Gold Mining vs.EIC [2018] FSC Cassation decision, CFN 147506 (Unpublished)*Annexed*.

¹⁹The NBE Directive on Prohibition of Issuance of certain types of Bonds by Insurance Companies, Directive No. SIB/24/2004 prohibits insurers from issuing *unconditional bonds*.

liability such as safeguarding its effective indemnity claim against the principal should it finally be obliged to pay agreed amount to the obligee.²⁰ Rendering such conditions inapplicable on obligees greatly endangers sureties` interest as it will in effect devoid them of the opportunities they would have utilized to make their indemnity claim eventually effective.

Having the stated problems in mind, this thesis will be guided by the following key research questions:-

1. What legal and practical problems enclose the way insurance surety bonds are being transacted in Ethiopia?
2. Is there adequate legal regime governing surety bonds being issued in Ethiopia`s Insurance Industry? Are those governing suretyship under the Civil Code applicable to these bonds?
3. Are obligees bound by terms and conditions stipulated in surety bond contracts to which surety and account party are the only signatories? Can they claim benefit thereunder while arguing non application of duties on ground of privity of contract rule?

1.3. Literature Review

Although foreign literatures which give general overview of corporate surety bonds of which some are written in a given country`s legal regime context exist in good number , one can`t find published materials written on the legal and practical aspects of surety bonds issued by Ethiopian insurers. The dearth of scholarly materials is not in fact limited to surety bonds but also to the whole Ethiopian insurance legal regime. Yared Siyum Nigussie, in his graduate thesis, has tried to examine the legal basis of *First demand (independent) bank Guarantees* and the applicability of relevant laws thereto.²¹This research work focuses only on the captioned type of guarantee as being issued by banks and its center core of discussion is identifying the legal status of this device i.e., as to whether it is a bank loan or a guarantee given by the same, and examining the

²⁰ One of such common condition is the one which requires obligee to give early notice of loss involving actions and/or omissions of account party. Such early knowledge are believed to give a surety timely opportunity of taking conservatory measures as stated under Arts.1925 and 1948 of the Civil Code to make its indemnity claim effective.

²¹Yared Siyum Nigussie, *The Law Governing Unconditional (First demand- Independent) Bank Guarantees in Ethiopia* (Published LLM thesis, Addis Ababa University,2017)

adequacy of the existing legal framework to govern it. As such, although this work might have some informative value, it has no significance to the subject under this study as it does not and in fact was not meant to consider any of the problems this thesis has identified. A book written by Gezu Ayele Mengistu²² has a section which somehow talks about surety bonds issued by financial institutions but as such is only a bird's eye view of the bonds, its significance to this study cannot be felt as such. A graduate thesis written by Melese Mamo has tried to demonstrate the role financial institutions in Ethiopia play in improving the construction sector and infrastructure development of the country through the financial securities they issue and public financing. It emphasized the vitality of these institutions in battenning the young and low capacity construction sector of the country.²³

1.4. Methodology of the Research

As it sets to study relevant laws, related court cases and standard surety bond contracts, the thesis principally involve doctrinal research inquiry.²⁴ And for it further aims to analyze practical problems associated with application of surety bonds, it also employ non doctrinal method. To this end, qualitative method of data collection technique is used. To capably do the exposition of legal and practical problems pertaining to the subject matter under study and recommend better way forward, both primary and secondary data sources are utilized.²⁵

Domestic laws related to the matter, standard surety bond contracts issued by Ethiopian insurers and interviews are utilized as its primary sources for such sources are believed to contain affluent information and observations which help understanding the identified problem.

Interviewees, totally eleven in number, are senior attorneys, legal service heads of insurance companies and licensed lawyers selected based on purposive and convenience sampling which will be guided by interviewees' expertise and prior confrontation around the identified problems. Two senior attorneys in the NBE whose work position relates to the regulation of insurance

²²Gezu Ayele(note 10)100-107

²³ Melese Mamo Gebre, *The Role of financial institutions for the Ethiopia`s Construction Industry*, (Published masters of Science in Civil Engineering thesis, Addis Ababa University faculty of Technology,2017)

²⁴ Amrit Kharel, *Doctrinal legal research*, National Law College (2018)1. <https://www.researchgate.net/publication>. Accessed on April2020.

²⁵ Ibid at 2.

sector selected based on their seniority in rank are also interviewed. In order to be flexible and consistent in asking interviewees, semi structured interviewing method is applied.²⁶ Standard bond terms issued by eight of the seventeen existing Ethiopian insurers are analyzed via content analysis technique to understand their making and contentious terms.

In order to lay down comprehensive understanding of basic principles on the topic under inquiry; books, articles, internet sources and literatures are consumed as secondary sources. Four FSC Cassation decisions along with their related lower courts` rulings and one FHC decision selected based on their direct relevance to identified research problem are analyzed to show the gravity of the being explored problems in reality and solutions given by judicative bodies. With a view to include and analyze all binding interpretations the Cassation bench of the FSC rendered in relation to identified problem, exhaustive search of published cases on all volumes (1 to 23) has been made. Basic principles of laws are benchmarked in the analysis of laws and court decisions, and descriptive technique is used to analyze data collected through interview.

1.5. Objective and significance of the study

In so much as they are fastidious enough in placement of financial security against risks of abandonment and non performance by account parties, investors devoting their capital in various business ventures are much interested in the existence of passable legal regime governing such devices in order that they could possess a good level of certainty. For these devices are very decisive in major economic transactions, their being compatible with existing laws, if any, is also of equal importance so that beneficiaries could comfortably exercise their rights there under. As they shoulder a huge financial risk, insurers issuing such security devices do also have mammoth stake in the afore stated concerns as they hugely impact their profitability and even existence. As such healthily operating business of insurance surety bonds plays a pivotal role to the national economy in general and insurance industry in particular.

Having these vital concerns in mind, the thesis set systematic exposition of problems pertaining to the formation and application of insurance surety bonds being issued in Ethiopia`s insurance

²⁶ Catherine Dawson, *Practical Research Methods* (1st, Cromwell Press, Oxford 2002)14.

industry as its main objective. In furtherance of this general objective, investigating the compatibility of the way these bonds are being utilized with existing related laws is set as its specific objectives,

In terms of significance, this thesis will mainly acquaint stakeholders with the necessary knowledge as to the status and challenges which the use of insurance bonds in Ethiopia is undergoing and thereby take appropriate measures to rectify the ramifications. It will also inform legislator and financial sector regulator the need to introduce more laws to govern the business of these bonds. It is also believed that the thesis will serve as the basis for further studies in the area.

1.6. The scope and Limitation of the study

Although surety bonds as security devices could also be issued by Banks and other financial institutions, the scope of this thesis is confined only to those which are issued by insurers in Ethiopia. It gives special emphasis on the legal implication of the identified problems which stems from the very formation that finally impacts the application of these bonds in real time. As the issue has not yet catch the attention of the country`s legal scholars, dearth of published researches and articles written on insurance surety bonds in Ethiopia is the significant limitations which this thesis has to bear.

CHAPTER TWO

2. INTRODUCTORY REMARKS ON CORPORATE SURETY BONDS

2.1. Introduction

Securities make business world go around.²⁷ Although principally made for so, their importance is not limited to beneficiaries to whom assurance of performance is afforded but also for debtors and the society in general. It is palpable that a debtor who offers security will have better access to business opportunities, loan and loan extension than the one who does not.²⁸ In so doing, securities assist and facilitate business activities which buttress national economy from which wider society can benefit. Hence, the need to put robust legal and institutional framework for regulation and enforcement of these devices is axiomatic.

Personal surety/family suretyship and real (property) securities are oldest forms of securities where the security right of creditors is against human person and a thing respectively. In the former case, the security comes from another person who assumes obligation towards a creditor to pay in his place if the debtor latter defaults while in the latter case it is a property itself which occupy the position of surety as a security for default of its owner or another third party.²⁹ In most cases, a surety or a third party owner of encumbered property assumes duty on gratuitous bases. Mortgage and pledge are the major types of real securities, although other less common like antichresis, accession, sell with ownership reserved and rights of redemption can also be mentioned in this category. Corporate surety bonds are comparatively recent forms of securities.

2.2 Corporate or compensated surety bonds

Surety bonds are security devices which a performing party, a principal debtor/account party, produces to a party who expects performance of duty, creditor (*obligee*), as an assurance that should the former fail to properly carry out its duty under the main/underlying contract, a person

²⁷ David Knowles, Business Law, *Principle and cases in the legal environment*, study guide (8th edition), Aspen college series (2010)89

²⁸id

²⁹Albert H. Putney, *Guarantee and suretyship, insurance and Bankruptcy*, Popular Law Library(1908)139

named in the bond as a *surety* will pay compensation or will do promise/s as agreed in the bond.³⁰The surety charges the principal premium in exchange for guaranteeing the principal's performance and to ensure that the principal *has some skin in the game* and to make effective the surety's indemnity claim against the principal on sum which it might pay out on the bond, the surety normally requires the principal to produce collateral as a condition of issuing the bond. These bonds are believed to be more reliable and easy enabling for creditors to realize their security interest as compared with personal and real securities. These vantages emanate from the financial strength and relative stability which their issuers possess. In personal surety, creditors carry risks of surety's disappearance, death, insolvency, fraudulent impoverishment etc. In real securities, the encumbered property might get destroyed or might significantly lose value over time before creditor's security interest is realized. Besides, the process which mortgagee/pledgee should have to go through to dispose or own secured property involves cumbrous procedures.

For corporate surety bonds are given by financial institutions which operate in corporate form and as these institutions run capital in multi billions/trillions, the risks of absconding and fraudulent impoverishments are almost none. *The corporate surety never dies*, and the close supervision from government makes loss from insolvency a very seldom incident.³¹

2.3. Nature of corporate Surety Bonds

Surety bond is a common appellation given to security devices issued by insurers, banks and specialty surety companies. *Insurance bonds*, *insurance surety bonds* or *surety insurance* or *insurance guarantees* are terms in use when these bonds are issued by insurers, and *bank letter of guarantees* and FGB are labels for those issued by banks. The general nature which surety bonds exhibit are briefly the following:-

2.3.1. Accessory/secondary nature of the obligation

Rights in general are referred to as accessory if they don't have independent existence or if they are not created for their own sake but due merely on default of another act.³² Securities in general and surety bonds in particular do not bring independent entitlement/benefit to the beneficiary for

³⁰John F.Dobbyn, *Insurance Law in a Nutshell*, west academic publishing, 5thedition(2015)476

³¹id

³²Sir Thomas Erskine Holland, *Elements of Jurisprudence*, 13thed.(2006).St Paul west publishing(1936)48

whose sake they are created. They rather are there to assist the enforcement of another principal right. As such, insurance bonds, however named or described, and irrespective of the form they assume as conditional or unconditional are accessory in nature.

2.3.2. Contractual and Triangular nature

The relationship surety bonds generate between surety and creditors is contractual in nature and hence are subject to the general law of contract in addition to the applicable special law, *if any*. Due to this, it is said that the law of surety is simply a backwater off the broad river of the law of contract.³³

Surety bond contracts are *triangular in nature* in the sense that they presuppose the existence of three separate contracts. The first is *underlying/main contract* which is made between account party and creditor on which a surety bond contract is based. The second is *Surety bond/contract* which is made for the exclusive benefit of creditors. This second contract could be tripartite where the three parties; creditor, debtor and surety sign or simply bipartite to which only a surety and creditor are signatories. But as will be discussed in chapter three the making of this second contract is different in Ethiopia's insurance industry case as only surety and account party are signatories to this contract. The third is a *counter indemnity contract* which is made between account party and surety. In the banking industry such contract is named *mandate contract* and involves assessment of credit worthiness/financial standing of account party and collateralization the latter's real property.³⁴

2.3.3. Co-extensiveness of payment obligation

Co-extensiveness principle is what mainly dictates payment obligation of surety under conditional surety bonds. Per this principle surety will not have any liability unless the underlying obligor is held liable, and it has secondary liability that comes into force only when the underlying obligor has defaulted. Corollary to this principle is *whatever discharges the principal will likewise discharge the surety*³⁵ and per this principle, surety is entitled and bound

³³Forsyth and Pretorius Caney, *the law of suretyship in South Africa*,(1992)13

³⁴ Yared(note 21)

³⁵ Robert D.Aicher, Deborah L. Cotton and TK Khan, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, American Bar Association.Vol.59,No3(2004)897

to invoke defenses available to account party.³⁶The account party's default as condition precedent to liability of surety has been qualified in recently developed forms of surety like unconditional bonds which are subject to *principle of independence* wherein the guarantee is by definition taken to be independent of underlying contract and surety's liability is based on terms of guarantee agreement than following principal's default.

2.3.4. Surety bonds are always commercial *per se*

Unlike personal and real sureties which could be given gratuitously³⁷, surety bonds are always commercial in nature and due to this nature they are commonly referred as *compensated sureties*.³⁸ But so far as surety bonds are being issued by financial institutions which are essentially for profit, one cannot find surety bonds issued on gratuitous basis. A principal debtor usually pays surety a premium as consideration for the service.

2.4 Taxonomy of surety bonds

Though uncommon and mystifying classifications of surety bonds like automatic vs. non-automatic, and abstract vs. casual could rarely be seen enormous amount of literature reveals that the most conventional classification of surety bonds is into conditional vs. unconditional. The latter type is also referred as *on demand*, or *on call* or *independent surety bonds*. The dichotomization is essentially founded on the trigger of a surety's payment obligation and in some cases the interplay between the underlying/main and surety bond contract.

2.4.1 Conditional vs unconditional/on demand surety bonds

To get-go with the common feature of the captioned forms, both provide security to beneficiary in respect of non-performance by account party in the underlying transaction. It is said that the fact that conditional bonds are subject to various defenses and conditions which in turn makes

³⁶ This principle can be discerned from Art. 1926, 1936 and 1942 of C.C.

³⁷ See generally art 1921, 2826 and 3049 of the Civil Code. In fact nothing prevents these two securities to be given for consideration.

³⁸ William H. Woods, *Historical Development of Suretyship from Prehistoric Custom to a Century's Experience with the Compensated Corporate Surety*.

creditor`s claim there under prone to litigation and loose time value of money, has necessitated the invention of unconditional surety bonds which are recent.³⁹

The main distinction between conditional and unconditional bonds relates to the requisite conditions for making call on the bond. A given bond is conditional where surety becomes liable only upon proof of account party`s default and the resultant loss. Thus proof of such default is a condition precedent to surety's liability. Under these bonds, in addition to proof principal debtor`s default, there might also be stipulated conditions in the bonds which a beneficiary must comply with before calling on the bond.⁴⁰

Under unconditional bonds, surety will become liable merely when demand is made upon it by the beneficiary with no obligation on the latter to prove default of account party.⁴¹The only condition precedent for calling on the bond is a written notice of payment to surety. These bonds are dictated by *principle of independence* and per this principle, a surety cannot invoke defenses derived from the underlying transaction and payment obligation is solely defined by the terms of the guarantee.

The surety does not involve itself in the rights and obligations as they exist on the basis of the underlying relationship and it need not concern itself with any disputes between the account party and beneficiary.⁴² The execution of unconditional bonds is dictated by a canon which is conventionally coined as *`pay first argue latter`*. Once demand for payment is made by the beneficiary, a surety is expected to just pay without examining the existence of performance default and extent of loss. However if the account party is of opinion that the demand is unreasonable (i.e. he was not in default thereof or that the actual loss sustained by beneficiary was less than the amount requested), it can request temporary injunction from court to have the payment frozen until a judgment on the merit/substance of the case between itself and creditor is

³⁹Yared (n 21)1

⁴⁰Azizan Supardi &Hamimah Adnan, *Legal Analysis on Malaysian Construction Contract: Conditional versus Unconditional Performance Bond*. Journal of Politics and Law.Vol. 2,(2009)28

⁴¹ Id

⁴²Roeland Bertrams, *Bank Guarantees in International Trade, The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil law and Common Law Jurisdictions*(third revised edition ICC publishing (2004)13

given.⁴³ If the injunction is not secured for whatsoever reason and the payment is made, the account party's resort is proceeding to recover paid amount under the guarantee from the beneficiary.

Considering some relevant international laws in this area; URDG⁴⁴ under article 5 states that a guarantee is independent where it is independent of the underlying relationship and the guarantor is in no way concerned with or bound by such relationship. The UNICITRAL convention⁴⁵ considers guarantee as an independent where guarantor's payment obligation to creditor is not dependent upon the existence or validity of any underlying transaction except presentation of documents.

2.4.2 The classification of surety bonds under Ethiopian law and the industrial practice

Looking at our laws, the only relevant law as to the classification of surety bonds is the prohibitory NBE directive No.SIB/24/2004.Like its predecessor, this directive classifies insurance bonds into conditional and unconditional not lucidly but circuitously. It clearly mention and define unconditional bonds which insurers are prohibited from issuing but is, however, silent as to whether insurers can issue conditional surety bonds. It is argued that the fact that the NBE clearly prohibits only issuance of unconditional bonds can be taken to mean that Ethiopian insurers can by implication issue conditional surety bonds.⁴⁶ It is also said that the business of surety bonds by Ethiopian insurers preceded the law and the law is formulated after the development of the business.Prior to the issuance of directive No. SIB/23/2002, insurers used to issue both conditional and unconditional bonds based on their clients` needs without having clear legal base to do so for they are legally allowed and licensed by the regulator to transact insurance businesses. The regulator did not interfere until it recognized that unconditional surety

⁴³Mohd Akhtar Beg, *Default insurance and surety bonds:the difference and how they operate*, International Journal of Law,Vol.5 (2019)30-32

⁴⁴See the preamble and article 5 of URDG 758(2010) ICC publication. This rule is non- binding and applicable only by agreement of parties.

⁴⁵Art.3 of the UNICITRAL

⁴⁶Interview with Yenebeb (note 12)

bonds were ruining the insurer`s profitability and affecting the national economy due to various factors.⁴⁷

Although FHC and FSC showed inconsistency on different cases over the matter, the FSC Cassation division ruled that issuing surety bonds is inherently part of insurance business and there is no law which prohibits insurers from doing such business.⁴⁸The Cassation Bench has also given similar interpretation in its other file.⁴⁹These cases are analyzed under section 3.4.

However, neither of the NBE`s directives are clear if proof of account party`s default is a precedent condition for an obligee to lodge its claim to the surety under unconditional surety bonds. Such bond under the directives is defined as *bonds payable to beneficiary on demand, without any pre-conditions attached to such payment.*

The two Phrases i.e. *on demand* and *without any pre-conditions attached to such payment* in the definition are of high weight to argue that beneficiaries have no duty to prove account party`s default as the only condition to claim payment as per the directive is making a call for payment.

On the other hand, by virtue of the binding interpretation the FSC Cassation gave on CFN 47004⁵⁰, one might allegedly argue under unconditional surety bonds too prove of account party`s default is still a precedent condition to surety`s payment obligation in Ethiopia as neither the decision nor the NBE directive rule out the application of the civil code`s suretyship provision to unconditional bonds.

2.5 Characterization of insurance surety bonds

2.5.1 Surety bonds issued by insurance companies vis -a-vis insurance policies:

The Bewilderment and its consequent legal implication

Surety bonds issued by insurance companies are often confused with insurance policy products provided by the same. Proper characterization of these bonds has significant importance, among other things, in determining the applicable law, the parties to the contract, the rights and

⁴⁷Interview with Efreem Baraki, Senior legal officer at NBE, Addis Ababa, Feb 2020.

⁴⁸ Africa Insurance S.C vs. CBE (2012),FSC Cassation Division CFN 36935 V 13.P 383- 391

⁴⁹ Africa Insurance S.C vs. Dashen Bank S.C (2012), FSC Cassation Division CFN 40186 V13.P 402-416

⁵⁰ Cited at note11.

reciprocal duties of such parties, and the period within which these parties could bring action there under.

2.5.1.1 Insurance bonds are insurance policies: The argument

As some literature and the argument of some scholars in the field reveals, there is a strong view of taking surety bonds issued by insurance companies as an insurance policy which is used to fulfill failure of contractual commitment.⁵¹ It is said that such bonds are insurance products wherein the issuing insurer guarantees the fulfillment of a contract between two other parties.⁵² Some consider it as a branch of insurance which is much more modern in origin and development and call it an insurance guarantee.⁵³ The fact that these bonds are issued by insurance companies and the latter receive premium as a consideration are points of indication which proponents of this view forward in asserting insurance bonds are insurance policies.⁵⁴ It is further held that valid insurable interest which is a mandatory pre-requisite for any insurance contract to be legally concluded also exists in case of surety bonds as principal debtor who buys the bond as assurance for proper performance of its duty has such interest as legal and/or contractual liability follows their non performance. There is also a perception that insurance bonds are similar with liability insurance policies which debtors buy as a cover for the liability they might have towards third party, a creditor, for their contractual default or miscarriage.⁵⁵ It is said that may be it is due to this perception in Ethiopia's insurance industry that only surety insurer and account party sign bond contract as in any other insurance contract wherein only an insurer and insured are signatories.⁵⁶ Although it was finally overruled by FSC Cassation division,⁵⁷ in this case FHC and FSC had gave interpretation that surety bonds are insurance contract to be governed by the Commercial Code's insurance provisions.

⁵¹ Trade finance Global <https://www.tradefinanceglobal.com/> bonds-and-guarantees.

⁵²The complex case of surety bonding in America and Indian countries .<http://www.sba.gov/content/>

⁵³ Id (note 51)172

⁵⁴See the arguments the applicant forwarded in furtherance of this argument on CFN 47004 as cited on note 11.

⁵⁵Interview with Ato Tesfaye Gebisa, Corporate operational team leader at EIC. Addis Ababa, January 2020.

⁵⁶ Interview with Hialeab Yhadigo, Acting Legal service Director of Anbessa Insurance S.C. Addis Ababa, January 2020

⁵⁷ CFN 40186 (note 49)

Taking surety bonds issued by insurers as an insurance policy will make the question of whether a given insurer has a legal base to transact a bond business less desirable as a license to transact insurance business will automatically operate for bonds. Beyond so, it puts insurance bonds under the laws governing insurance contract wherein, among other things, the surety (insurer) will not be having indemnity claim (subrogation right) against the principal debtor for such right is not given to insurers under the law.⁵⁸ This will significantly affect profitability and even existence of insurers as the exchange of consideration in surety bond business is uneven and the sureties, unlike the case in insurance, do not have a pool from which they pay for losses. The exchange is uneven as what a surety receives as premium/commission up on issuing bond and the liability it assumes significantly varies. This aleatory nature of the exchange is balanced by the recovery the surety made from the account party through indemnity claim right. Moreover, as per the being considered position, the period to bring action for disputes arising under the bond will be two years as stipulated under the Commercial Code than the ten years default period of limitation.⁵⁹

2.5.1.2 Insurance bonds are not insurance policies: The counter argument

While surety bonds have commonalities with insurance coverage, they should not be confused for one another. What caused the confusion is the interchangeable usage of the terms “insurance surety bond,” “insurance bond,” and “surety insurance” etc. Although alike insurance, surety bonds are important risk mitigation tools, it is vital to know that the two are different.⁶⁰

With insurance policies, the insured transfers risk to the insurer⁶¹ but in case of surety bonds the risk always remains with the bonded party (account party), not an insurance company. If a surety has to pay the obligee, account party is bound to repay the surety for any damages paid out. The

⁵⁸ Id (note 14)

⁵⁹ See generally article 674 of the Comm.Code for claims under insurance contract and article 1845 for claims under suretyship.

⁶⁰ Suretybonds.Com Education Center. <http://www.Suretybonds.com/insurance>.

⁶¹ The risk, in fact, transfers indirectly to the pool of those who are exposed to typically similar risks as the insurer pays for loss out of premium collected from these clients i.e., *spreading the costs of such risk across the clients*. That is why it is often said insurance transfer risk/s of policyholders to insurance companies while the latter Also distribute it among the formers.

surety is only required to relieve obligee for the time and resources that will be used to recover any loss or damage from a principal. The claim amount is still retrieved from the principal through either collateral posted by principal or through other means.⁶² The principal, who under the contract may have an obligation to perform no matter what the cost, receives no protection from the bond's penal amount. The principal's liability therefore extends beyond that of the surety.⁶³ But in insurance, the insurer has no right to recover what it has paid to or on behalf of a policyholder from the latter; although it can subrogate against a third party who is legally liable for the cause that has made the insurer pay compensation.

The counter arguers avow that surety bonds are more about assurance than insurance. They forward that surety bonds are more like an extension of credit with the assumption that there will be no losses, such as co-signing a loan. Unlike the case of insurance, premium the bonded (account) party pays to surety is not a means of covering losses. Rather, similar to paying interest on bank loan, the premium is a fee for borrowing money, covering pre-qualification and underwriting tools.⁶⁴ The black`s law dictionary also defines suretyship bond as a security device than insurance.⁶⁵

Looking at our related laws, almost all of them consider surety bonds as a security device than as insurance policy. Financial Administration Proclamation lists bonds as one type of security.⁶⁶ The current Customs Proclamation and its predecessors explicitly consider insurance bonds as form of security whereby surety guarantees taxpayers compliance with tax and duties requirements.⁶⁷ The amended Custom Proclamation No.622/2009 under article 62/4/ clearly

⁶² Id (note 12)

⁶³T. Scott Leo, *The Construction Contract Surety and Some Suretyship Defenses*, Vol. 34/Issue 4. William. & Mary Law. Rev (1993)1231.

⁶⁴ Donald H. Rodimer, Use of Bonds in Private Construction, *The Forum* (American Bar Association. Section of Insurance, Negligence and Compensation Law), Vol. 7, No. 4 (JULY, 1972), pp. 235

⁶⁵Black`s law dictionary (8th edition,2004),Bryan A Garner. It defines it “ as a contractual arrangement between the surety ,the principal and the obligee where the surety agrees to protect the obligee if he default in performing the principal contractual obligation.

⁶⁶Art 2(20) of Proclamation No. 648/2009, A Proclamation to provide for the financial administration of federal government of Ethiopia.

⁶⁷See art, 118/1/ of custom proclamation No.859/2014 and art 60/2/ of the amended custom proclamation No.

provides that surety is jointly and severally liable with the debtor. The earlier Custom Proclamation⁶⁸ even explicitly stipulate that guarantees given by insurers or banks are to be governed by suretyship provisions of the Civil Code. Similarly the Stump Duty Proclamation defines bonds (conditional bonds) as security devices.⁶⁹ The interpretation FSC Cassation division gave on CFN 40186, 47004 and 36935⁷⁰ consider surety bonds as security devices.

2.5 Surety bonds as issued by insurance companies and banks in Ethiopia

Although the focal theme of this thesis are surety bonds issued by Ethiopian insurers, looking briefly at how bonds issued by banks gives insight on how the business of these bonds are being transacted in Ethiopia`s finance industry. Although both serve the purpose of providing assurance of performance of obligation, the making of surety bonds by banks significantly varies from the one issued by Ethiopian insurers. Insurance bonds take the form of contract wherein account parties and insurance companies are signatories, and in this contract are stipulated terms and condition with which creditor to whom the guarantee is given should comply. However the way banks issue surety bonds i.e. their making takes completely a different shape. There is even a perception of considering them as one type of a loan service provided by banks.⁷¹

Banks issue surety bonds in the form of letter of assurance/guarantee which is preceded by loan contract between debtor and issuing bank, and the banks indemnity claim against a principal debtor proceeds as a normal bank loan repayment.⁷² Taking construction contract as an instance, a contractor who wishes to be given a bank surety bond first signs a loan agreement with the bank for the amount which is equivalent to that of surety bond to be issued. As collateral for loan repayment, the debtor furnishes a mortgage or cash deposit in a blocked account or certified cheque to the bank. The bank then issues letter of guarantee to the obligee binding itself to pay an agreed sum up on employer`s demand. If the bank has to pay the obligee, it exercises

622/2009

⁶⁸Article 46 of Re establishment and modernization of custom authority Proc No 60/1997(Repealed).

⁶⁹Art2(2) of Proclamation No.110/1998, a Proclamation to Provide for the payment of Stamp duty.

⁷⁰ These Cassation decisions are analyzed under chapter 3.

⁷¹Gezu Ayele (note 10) 106

⁷²Interview with Ato Addisu Duresa, Corporate Legal Compliance Manager at CBE, and Ato Melaku Meseret, legal service Manager of CBE Northern Addis District. Addis Ababa, March 2020

its indemnity claim through the power of foreclosure sale against collaterals furnished for the issuance of the bond. However this practice is often criticized for the absence of legal base to this effect as the Property Mortgaged or Pledged with Banks Proclamation No. 97/1998) scope of application is limited to loan reimbursement and yet issuing guarantee is not recognized as a loan under the law.⁷³ If the collateral is deposited cash or certified cheque, the recovery will then simply be transferring the money to the surety's account. Though the banks' exercise of foreclosure right in such cases might be contested, the creative mechanism they are operating through is much helpful to properly safeguard their indemnity claim as it avoids the rigorous procedure which they should have had to go through for disposal of the collateral had it not been for such mechanism.⁷⁴

⁷³Yared (note 21) I

⁷⁴ ibid

CHAPTER THREE

THE MAKING OF INSURANCE SURETY BONDS IN ETHIOPIA AND PROBLEMS RELATED TO THEIR ENFORCEMENT

3.1 Introduction

Being in the category of those contracts which are mainly meant to guarantee performance of duty by another person, corporate surety bonds are one of a few solemn contracts⁷⁵ under Ethiopian legal regime which needs to be made in writing. Such written formality beyond having evidentiary value also minimizes, if not avoid, a disagreement over rights and duties of the parties under the contract. However, the actual making of surety bonds contracts in Ethiopia appears to refute the purpose written formality is believed to serve.

After the issuance of the repealed NBE Directive No.SIB/23/2002, insurers in Ethiopia can only issue conditional surety bond guarantees.⁷⁶ In these bonds, a person for whose sole benefit they are made, a creditor, is not made a signatory to the bond contract while the terms and conditions contained in such bonds are meant to bind such party. The way these bond contracts have been crafted in Ethiopia for long, probably since the commencement of this business in the country, has never been challenged in courts until recently. The terms of insurance surety bonds are standard terms crafted solely by a surety over which a requesting debtor does not negotiate but simply accedes to. In fact such debtor could have little or no interest on negotiating over such terms as the terms solely regard creditor and surety. However, in recent days, the applicability of terms and conditions in conditional surety bonds to a non signatory creditor has begun to be challenged by the latter and the position of courts of different layer has been observed to be inconsistent over the matter. There are also tendencies to consider surety bonds contracts as

⁷⁵Solemn contracts are those for which a special form of validity is prescribed by law and as such, no valid contract could be created unless made in the prescribed form. Mulugeta Mengist Ayalew, *Ethiopian Law of contracts*, Kluwer Law International BV, The Netherlands (2010) 36. See art. 1720, 1725, 1726 and 1922 of the Civil Code.

⁷⁶ As has been discussed in preceding chapters, the issue as to whether the current NBE directive and its predecessor give insurers a legal base to operate conditional surety bond business is controversial.

special contracts which need to be treated differently than requiring their formation to follow rigid formality the law prescribes for solemn contracts in general.⁷⁷

3.2 Parties to suretyship contracts in general and surety bonds in particular

In any contract of surety, be it corporate or personal; conditional or unconditional, as it is a surety who undertakes liability towards an obligee for default/miscarriage/ of the account party, the fact that sureties shall always be made party to such contracts is compulsory for it will be impossible to hold it liable unless it is a signatory to such contracts. This fact can be inferred from the Civil Code`s provisions which requires contract of surety to be made in a written form , be signed by parties to be bound and be express; in the sense that it should be the one under which surety expressly undertakes obligation.⁷⁸

However, as regards the remaining two, account party and obligee, literature shows the practice across different jurisdictions varies as to whether both or either or neither are made parties to such contracts.⁷⁹ This, in some cases, is dictated by the type of surety given. In unconditional bank letter of guarantees, it is only a bank which signs and solely bounds itself unconditionally liable towards a creditor.⁸⁰ The same is true with the recently developed FGB.

Save in such cases⁸¹, surety bonds are always either tripartite contracts signed between a surety, creditor and debtor or bipartite contracts signed between surety and creditor.

Considering the fact that suretyship is an arrangement wherein a surety bounds itself towards a creditor, some scholars maintain that parties to surety bonds are strictly only surety and obligee, although the presence of and the continuing liability of the principal debtor(account party) to a creditor, is always essential thing to make the contract one of suretyship.⁸² As such, they hold

⁷⁷Id at note 48

⁷⁸ A cumulative reading of article 1725, 1920 and 1922 of the Civil Code reveals so.

⁷⁹ Id (note 8)

⁸⁰ See the discussion made under section 2.5

⁸¹ In these types of sureties, the surety binds itself by a letter of assurance to effect payment to creditor just on call from the latter. As such, making a creditor a signatory to such letter could be said needless as no obligation is imposed on it than sending a pay me request to surety.

⁸²Albert Putney(note 29)131

that principal debtor is not a party to the contract of suretyship strictly.⁸³ On the other hand, enormous literature shows surety bond contracts are tripartite contracts involving the three parties. The most referred to dictionary for definition of legal terms, the Black's law dictionary, defines surety bonds as a contractual arrangement between a surety, a principal and obligee where the surety agrees to protect the latter against contractual default of the principal debtor.⁸⁴

Looking at our laws, one cannot find a clear provision as to who parties to suretyship and surety bond contracts are. Although the Civil Code is clear as to who parties to real securities are⁸⁵, it doesn't contain a clear provision as regards suretyship. However, article 1921 of the Civil Code which states that *a guarantee may be given without any request from the debtor for whom it is undertaken or without his knowledge*, might be taken as an indication that as per this Code, parties to a suretyship contract are surety and creditor. The fact that a certain person could give guarantee to creditor without being requested by the principal debtor or without even the knowledge of the latter portend that the undertaking of the surety towards creditor may not require the involvement of a debtor. Mulugeta Mengist⁸⁶ holds that parties to suretyship contract under Ethiopian law are surety and creditor.

However, article 1921 of the Civil Code cannot in any way be taken as applying to corporate surety bonds issued by insurers or banks as the bonds issued by these companies (the for profit companies) are always commercial wherein debtors who require issuance of bonds need to pay a required premium/commission to the surety. This provision is basically about the possible gratuitous arrangement of suretyship which is a case in personal suretyship and hence, incompatible to the very nature of corporate surety bonds; the *commercial per se* nature.

Thence, at least as far as corporate surety bonds are concerned, it could be said that it is not clear under Ethiopian law as to who signatory parties to such bond contract should be. But the fact that a surety should always be made a party to a contract of suretyship (including surety bonds) can

⁸³ id

⁸⁴ Id (note 65)

⁸⁵ See art. 2825 & 2826, a contract of pledge could be made between a creditor and debtor or between a creditor and third party depending up on the person who delivers a thing posted as a security. Same arrangement can be inferred from what is stated under art.3049 of the Civil Code.

⁸⁶ Id at note 75

be discerned from the cumulative reading of article 1725 /1/ and 1922 of the Civil Code. Article 1725 mandatorily requires all parties to be bound by a written contract to sign it. As such, as a surety is a party principally bound under bond contract, it should always be a signatory. Besides, as the latter article requires the obligation of suretyship to be undertaken *expressly* and for a surety can do so only if it is a party to such contract, its being always a signatory is discernable. As insurance bonds issued by Ethiopian insurers are conditional in form and majority of the most utilized contain terms and conditions which are applicable to the beneficiaries of such bonds (obligees), the fact that the latter be made parties to such bond contracts is vital.

3.3 The strict application of privity rule as a conundrum to obligee's claim and surety's defense

The doctrine of privity in contract denotes that a person cannot acquire rights or be subject to liabilities arising under a contract to which he/she is not a party. The rule involves two ideas. First, only a party to a contract can bear burdens from the contract enforced on them. Second, only parties to a contract can enforce the contract or terms of the contract. The second rule, however, is subject to some generally accepted exceptions wherein third parties can claim rights and the terms of the contract be enforced up on them.⁸⁷

This rule, referred also as *relative effect of a contract*, is found under article 1952 of the civil which states that "*except in the cases provided in this Code, contracts shall produce effect only as between contracting parties.*" The exceptions could be found under company Law where a contract made by a pre-incorporation company binds a post incorporation company, Agency, Trusteeship, assignment, compulsory third party insurance⁸⁸ etc. However, no where under our law is found a provision which allow a third party to suretyship contract to claim under such contract and hence suretyship is not exception to the rule of privity. But as regards a creditor to whom surety bond is given as a security, the issue as to whether such person for whose sole benefit the security is made and who accepts and acts up on it be considered as a third party to

⁸⁷ Privity of contract and third party rights, Ireland law Reform Commission, A report.(2008)5

⁸⁸ See Arts 313 & 314, 718 of comm.code, Arts 516 cum 538, 1962 to 1975 of the C.C and Proc.No.799/2005.

such bond contract by merely looking at its being not a signatory is a contentious issue whose solution as given by judicative bodies has been observed to be perplexing.

Against the application of bonds` terms and conditions on to them, creditors raise an argument purely based on strict application of privity rule and maintain that they should not be bound terms of a contract to which they are not parties/signatories. The sureties counter argue that if creditors are not to be bound by the terms in bond contract on the ground that they are not parties thereto, then they have no cause of action to claim against them. Such counter argument is also the one based on privity rule that if creditors assert they are not signatories, then they are third parties to the bond contract who cannot claim any right under a contract made between two other parties. Conversely, there are instances wherein surety has been observed to argue that arbitration clause stipulated in conditional surety bonds cannot be utilized by a creditor.

Hence, sticking to this rule to relieve creditors from the application of conditional bonds` terms and conditions will render the bond futile for strict adherence to the rule will be a conundrum both to the creditors` claim and sureties` defense. Elaborate discussion on problems related to the application of such terms and condition is made in the sections to follow.

3.4 Insurance surety bond contract: A tripartite or bipartite agreement?

The fact that creditors are non signatories to surety bonds issued by almost all insurers in Ethiopia pose a problem when it comes to the application of terms and conditions stated in such bonds. As NBE has proscribed insurers operating in Ethiopia from issuing unconditional surety bonds by a directive, the bonds contain condition and other terms which are meant to bind the beneficiary of such bonds. Some of the conditions are stipulated in the form of condition precedents which must priorly be complied with by creditors in order for them to validly claim benefit under the bonds. The stated terms also regard dispute resolution mechanism via which disputes arising under such bond are to be resolved, a period with in which legal proceedings for disputes under such bonds shall be brought and causes which bring surety`s liability to an end etc.

Beneficiaries of the bonds (creditors) often do not comply with the terms and conditions there under as a result of which sureties reject their claim for payment in cases where account party defaults under main contract. Moreover, in cases creditors bring their case against debtor and surety to ordinary courts, the latter object to jurisdictions of courts alleging the issue be brought to the ADR mechanism under the bond. Creditors often argue not to be bound by the terms and conditions of the bond as they are not signatories thereto and claim only the benefit. The sureties counter argue that if creditors are to benefit from rights under the bond, they should comply with the duties stated in the instrument which is the very source of such rights.

Courts of the same and different levels showed inconsistent approach on whether beneficiaries should be bound by terms and conditions of bonds to which they are not signatories. While some lower courts hold that creditors are bound by terms of the bond for they accept the bond as a security being aware of the terms contained therein⁸⁹, other courts of higher level relieve creditors from being bound by such terms by merely stating that one shall not be bound by terms of a contract which he/she didn't sign.⁹⁰ In the former case, the interpretation of the court in effect means that, a creditor although not a signatory, his acceptance of the conditional bond as a security, by default makes him a party to the bond contract. Hence as per this ruling, a conditional surety bond which is signed only between surety and a principal debtor is a tripartite contractual document to which a creditor is also a party as his conduct (i.e. accepting the conditional bond as a security) is a *prima facie* evidence of his expression of consent to be bound by whatever is stipulated in such bond. But in the latter case, the Cassation Bench seems to have stressed that it is only being named as a party to a given written contract and putting signature thereto could qualify a person as a party to bind him by the terms therein. However, the Cassation bench on the binding interpretation it earlier gave in relation to insurance surety bonds in CFN 47004 has stated that the terms of bond contract bind non signatory creditors.⁹¹ As opposed to the making of surety bond contracts in Ethiopia's insurance industry, this decision regards surety bonds as a bipartite contract to which a creditor and surety are the only parties.

⁸⁹ Agricultural Research Institute of Ethiopia Vs Oreks Construction PLC & Nib Insurance S.c.(2019) FHC.FN 228289 (Annexed).The FHC and FSC did also maintained similar position on CFN147506 cited on note 11.

⁹⁰ Id (note 18)

⁹¹On the Cassation decision cited on note 7, the Court stressed that "as surety bond is an assurance given to a creditor, it is effective as between the contracts i.e. between creditor and surety" (*translation mine*).

Some lawyers in the insurance industry strongly hold that creditors should be bound by the terms of the bond as it will be absurd to allow them get benefit under the bond while relieving them from the applicability of terms and condition stipulated under the same. It is held that as such terms and conditions are there to allow the sureties safeguard their interest, it will be both unfair and detrimental to the interest and profitability of the insurers to render the terms and conditions inapplicable to creditors.⁹² It is also maintained that the rule of *relative effect of contract* does not apply to surety bond contract cases as far as beneficiaries of the bonds are concerned. It is held that beneficiaries of surety bond/creditors cannot be considered as third parties to bond contracts as such contracts are mainly and solely made for their benefit. And as regards creditors` expression of consent, it is said that they express their consent to be bound by terms of the bond up on accepting them as security when delivered to them by account party and thereby either conclude the main contract or effect payments thereunder.⁹³ And, hence, the Cassation decision which rendered the terms of conditional surety bonds inapplicable to creditors on the ground that they are not signatories is unacceptable as it failed to take the very nature of such securities into account and the long established *modus operandi* in this industry in Ethiopia.⁹⁴

On the other hand, some of the insurance bonds contain ***incorporation clause*** by which they interpose the main contract into the bond contract. A sample of such incorporation clause taken from a construction performance bond reads as follows:-

*“Whereas the contractor has entered into a contract for construction of xxxx project with the employer dated xxxx which with all its covenants and conditions is hereby made part of this bond to all intents and purposes as though the contract has been incorporated herein, including any duly authorized modifications of the said contract that might be made thereafter.”*⁹⁵

⁹²Interview with Yenebeb(note 12)

⁹³ Interview with Ato Habtamu Siraj, licensed practicing lawyer at all levels of federal and Oromia Regional state courts. Formerly served as supervising senior attorney at Hibret Insurance S.c and senior attorney at Nib Insurance S.C. Addis Ababa ,March 2020.

⁹⁴ id

⁹⁵ This clause is extracted with permission from a standard performance bond issued by Hibret Insurance S.C. In fact, the same clause could be found in similar bond issued by other Ethiopian insurers.

This raises a concern which is; *could the incorporation of main contract into surety bond this way make the beneficiary of a given bond party to such bond?* It is said that such incorporation clause should be taken as making creditor (a signatory of the main contract) a party to the bond contract as it is made so by virtue of such clause. And beyond that, as creditors proceed to perform some of their duties towards account parties under the main contract only after accepting the bond security as a pre requisite to such performance, their being parties to the bond by implication (or at least their being bound by the terms stipulated in such bonds) should not be contested.⁹⁶ Besides, account parties` duty to present surety bond as a security is often clearly contained in the main contract and creditors are named in surety bonds. What remains as a matter of formality is only signature of a creditor. Hence the actions and intention of the involved parties reveal creditors are the one to be bound by the terms of the bond contract.⁹⁷ This raises an issue as to what qualifies a person to be a party to a written contract or as to whether it is only being a signatory to a written contract that qualifies a person to be a party to such contracts.

3.5 Contentious terms and conditions in conditional insurance bonds

The general review of relevant literatures show that the main distinction between conditional and unconditional surety bonds is a trigger of claim for payment i.e. whether beneficiary`s claim is conditioned only up on making a call for payment on a surety or whether on a proof of account party`s default. A surety bond is unconditional if its beneficiary has an entitlement to get payment on just demanding payment from the surety. Under such bond neither the beneficiary is required to prove nor the is a surety expected to require proof of account party`s default and the resultant damage. And the bond is conditional if the beneficiary`s right is preceded by proof of account party`s default and extent of damage.

As issuing unconditional surety bonds is legally proscribed, insurers in Ethiopia issue only conditional bonds. However, unlike the conventional conceptual understanding of conditional surety bonds, the surety bonds issued by Ethiopian insurers add extra *condition precedents* which a beneficiary should comply with in order to validly claim under the bond. This can be inferred from the wording in most insurance surety bonds which reads *“this bond shall be executed by the*

⁹⁶Interview with Aron Kasaye, Legal service team leader at EIC. Addis Ababa, April 2020.

⁹⁷ Interview with Habtamu(note 93)

surety up on the following express conditions which shall be condition precedent to the right of the employer/buyer to recover hereunder.”⁹⁸In fact as per the industry’s conception, it is such conditions stated in a given bond that makes it conditional. Coupled with the fact that creditors are not signatories to the bond contracts, the inconsistency of some of the terms/clauses of a given bond with that of underlying contract, has made the application of the terms and conditions a source of disagreements. The following terms and conditions are major sources of disagreement which are mostly found in performance bond and advance payment guarantees.

3.5.1 Surety Bond’s arbitration Clause and related practical problems

Majority of the bonds stipulate arbitration as ADR mechanism for disputes to arise under such bonds. As such, securities are made for their sole benefit, it is only creditors who claim under the bonds against surety. So if disputes are to arise under the bond, it is between a creditor and surety. Hence it is logical to conclude the arbitration clause regards disputes arising between creditor and surety.

In cases account party defaults and surety refuse to make the default good, creditors often bring their suit against both parties, under main contract and the bond respectively, to ordinary courts disregarding the bond’s arbitration clause. The usual argument creditors forward in not complying with the bond’s arbitration clause is that they should not be obliged to bring their claim to the avenue which they didn’t choose; an argument based on strict application of privity rule. The sureties counter argue that, if creditors are not to be bound by the terms in the bond contract on the ground that they are not parties, then they have no cause of action to claim against them as third parties cannot claim under a contract made between two other parties. In fact creditors’ unwillingness might also relate to the costly nature of the arbitration proceeding i.e. a fee to be paid to appointed arbitrators is significantly higher than court fees.

Moreover the dissimilarity of dispute resolution mechanisms adopted under the underlying contract and the surety bond might be taken as practical ground justifying creditors’ unwillingness to submit their case against sureties to arbitration. The underlying contract might be silent on a dispute resolution mechanism for disagreements arising there under in which case any dispute under such contract will fall under the natural jurisdiction of ordinary courts. Or such

⁹⁸ Id(note 95)

contract may stipulate other ADR mechanism other than arbitration. In such cases, obliging creditors to submit their suit against the surety to arbitration in effect means that creditors have to institute their case for the same cause in front of two different avenues i.e. for their claim against principal debtors under the main contract to ordinary court or to the specified ADR stipulated under the contract (which is different from arbitration), and for their claim against sureties to arbitration. Both suits are for the same cause because under conditional surety bonds, a surety's liability usually follow the account party's default. Then to which avenue should creditors have to institute their suit in such cases? Expecting creditors to institute their case against each allegedly liable party to two different avenues will beyond exposing creditors to much cost (in terms of money, time and other resources) might result in incompatible outcomes/judgments. The arbitration panel might hold the surety not liable while a court finds the account party liable or the vice versa. This will create an obvious practical quandary of execution as in conditional surety bonds surety's liability strictly follows proof of account party's default.

If the creditor brings its suit against both to arbitration as per the clause in a surety bond, the account party may object arguing that a case against it should be brought to ordinary court or to the agreed other ADR tribunal.

The way courts of different level solved such enigma have been varying and subject to exegesis. In the unpublished Cassation decision⁹⁹ although the trial and the appellate courts accepted the objection the surety plead maintaining the case against it is to be seen by arbitration, the Cassation bench ruled that the creditor can bring its case against both debtor and surety to ordinary courts, and it relieved creditor from the application of the bonds arbitration clause on a reasoning that the creditor is a non signatory who should not be bound by the bond's arbitral clause. This case is briefly analyzed under section 3.4.

In another case tried by FHC¹⁰⁰ wherein the creditor jointly sued principal debtor and surety, the latter objected to the court's jurisdiction basing bond's arbitration clause and the court sustaining the objection, struck the suit against the surety and continued to entertain the one against a

⁹⁹ Id (note 112)

¹⁰⁰ Id (note 89)

principal debtor as the underlying contract didn't incorporate the same clause. The court finally found the principal debtor fully liable, and holding this judgment as evidence the creditor instituted a suit against a surety to arbitration panel. This case too is analyzed under section 3.4.

In conditional surety bonds, as regards liability, sureties often plead in two ways. The first is based on the absence of account party's liability towards a creditor as their liability under such bonds strictly follow the former's performance default. To this end, they are required to plead every defense available to the account party except those excluded by the nature of guarantee given under the pain of losing their indemnity claim.¹⁰¹ The second is based on non compliance by creditor with terms and conditions of given surety bond. They plead the absence of liability on their part based on the bond's provision irrespective of the account party's liability.

In the HC case mentioned above, as the surety was excluded from the court proceeding, in fact based on its own objection, it hasn't got the opportunity to plead the first option(if any), which is defending account party's liability. This raises an issues as to whether the surety has a right to defend account party's liability and the extent thereof as afresh in the arbitral proceeding once such has been established by the court's ruling.It could validly be argued that the court's judgment which held the account party liable cannot (fairly) be taken as a conclusive evidence in the arbitration proceeding to establish the consequent surety's liability as the latter's was not given the right to be heard in the trial court. And it cannot be said that the account party was there to defend its liability because the surety would have defended such liability far more better than the account party did and free the latter and thereby itself from liability, had it been there in the trial proceeding. This is so because being held liable in a judgment much depends on the way a given party present its argument and evidences.¹⁰² So then, in the arbitration proceeding the creditor might be validly expected to establish account party's liability as anew so as to establish surety's liability under surety bond. If so, the creditor is to be obliged to plead over the same matter for the second time in addition to the unnecessary extra cost it is already exposed to. Besides, apart from defending account party's liability, the surety might also plead not liable based on the terms of bond's provisions. In fact, the surety might even plead *res judicata* on ground that, as in conditional surety bonds surety's liability cannot be separately entertained

¹⁰¹See art 1942 of the C.C.

¹⁰²In fact as this case proceeded ex parte, the account party didn't present its defense.

from that of the account party's liability due to the co-extensiveness of such liabilities, creditor should have appealed on the court ruling which excluded the surety from the proceeding and have the case against both seen together.¹⁰³ If the surety happens to plead this way and the arbitrators might accept the surety's objection and close the case against the surety, one can imagine how the creditor's right could be prejudiced. These discussed real cases reveal how the making of insurance bonds in Ethiopia's insurance industry sources complicated enforcement puzzles on rights of stakeholders and the way disputes arising there under are to be resolved.

3.5.2 Condition of early notice

Surety bonds, mostly performance and advance payment bonds require creditors to give an early written notice of actions and omissions which might involve a loss under the bond. Such condition is standard term under such bonds and is expressly stated as precedent condition to creditors' right to recover under the bonds. Sureties often reject creditors' claim for payment basing creditors' non compliance with such condition. This standard condition often reads as follows:-

*“Upon discovery by the employer or its agent or representative, of any act or omission that shall or might involve a loss hereunder, the employer shall give immediate written notice hereof with the fullest information obtainable at the time to the surety at its head office.”*¹⁰⁴

However, it is not clear from the wording of the provision, as to whose actions and omissions creditor/employer is required to bring to surety's attention to and what constitutes loss involving action/omission. These could be source of possible disagreement over the provision's construction. It could be said, for instance, that what is considered loss under a given surety bond is the loss which surety guarantees/undertakes to pay for or the loss for which the bond is issued to cover. As such, loss under surety bond is account party's default under the underlying contract. Hence, loss involving *action/omission* is the action/omission of principal debtor which is contrary to the terms of the underlying contract that might finally bring about its default under such contract.

¹⁰³ Interview with Habtamu (note 93)

¹⁰⁴ The clause is extracted with permission from standard performance bond issued EIC.

Sureties are much interested in the obligee`s compliance with such condition as it`s incorporated in bonds to help them take necessary early actions to either prevent the possible default of the account party or at least preserve effective indemnity claim they will be having against principal debtors. So it is believed that some actions/omissions of principal debtor in the course of performing its duty are indicative of its probable default in future date which ensue loss.

As far as its indemnity claim against account party is concerned, surety assumes position of creditor against debtor for the amount it pays or it might be obliged pay to obligee. Hence, surety is entitled to take preservatory measures as per article 1992 and 1993 of the Civil Code in order to conserve its effective subrogation against account party in case it might be held liable on behalf of the latter. So the fact that account party`s improper actions/omissions comes to the attention of surety before it is too late, will help it take necessary measures that will help it ensure its executable/meaningful subrogation. The fact that such surety comes to know the account party`s actions/omissions which presupposes its probable default will enable it to priorly require, amid the contract period, from the account party to post collateral which will ensure the surety`s indemnity claim.¹⁰⁵Per article 1925/2/ of the civil code, sureties have also a right to put an end to its undertaking so long as the primary undertaking is not due in cases the time for which surety is to be bound under suretyship contract is not specified. Sureties might also, arguably, resort to such remedy if timely given early notice of loss involving actions/omissions.

However, besides the unclarity as to whose action/omission creditor is required to notify surety, the phrase *under discussion* has also been understood differently between surety and creditor. Thus, in addition to their disputed applicability to non signatory creditors, the ambiguity of the way extra conditions are incorporated in conditional surety bonds makes the application of such bonds very problematic. As surety bond contracts are standard terms crafted solely by insurers, the possibility that ambiguities/ vagueness of the bonds` terms be interpreted in favor of creditors` by virtue of *contra preferentume* canon of contract interpretation as stated under article 1738/2/ of civil code is high.

¹⁰⁵ As per art.1948 of the C.C, a surety even before paying creditor has right to require security from account party if there are situations indicative that its interest is being endangered.

3.5.3 Contractual abbreviation of statutory limitation period

Conditional insurance bonds often contain provision which stipulates the period within which legal proceeding for claim under the bonds should be brought is twelve months from discovery of the action/omission of account party which gives raise to such claim. Per the interpretation the FSC Cassation Bench gave on CFN41086 and 47004,¹⁰⁶ insurance surety bonds are to be governed by the suretyship provisions of the Civil Code and the period for instituting a claim under such bonds is the ten years GPoL stated under article 1845 of the Civil Code. This raises a concern which is: can a statutory limitation period be truncated by a contractual agreement? As obviously the one who does have and could make claim under surety bonds is a creditor for whose benefit they are made, such provision definitely concerns it. As has been said, creditors are not signatories to bond contracts issued by Ethiopian insurers. Hence the related significant concern will then be; can signatory parties to a surety bond prescribe a period within which a non signatory beneficiary could bring its claim under such contract?

The practice of contractually stipulating period of limitation other than the one fixed by law might be due to the fact that majority of insurance products sold in Ethiopia are transplanted from the UK. Case laws in UK and US show the possibility of shortening statutory limitation period by contract in civil cases.¹⁰⁷In our case, although it doesn't yet have the affirmation of FSC Cassation decision, some lower courts to which objection is presented based on the twelve month limitation period stated in surety bonds did accept the objection and dismiss a creditors` claim filed after the stated period.¹⁰⁸

However, apart from the disputed applicability of surety bond terms and conditions to non signatory creditor, the contractual stipulation of limitation period than the one fixed by law does not have a legal base in our legal system as there is statutory prohibition to modifying legally stipulated limitation by agreement.¹⁰⁹ The abbreviation of statutory limitation period in insurance

¹⁰⁶ Cited at note 111 and 112

¹⁰⁷ Pinsent Masons, *Limitation Period under English law*, out - law guides. <https://pinsentmansons.com/> See also Foster swift construction law news, *The Statue of limitation may be shortened by contractual provision*.www.fosterswift.com

¹⁰⁸ Interview with Habtamu (note 93)

¹⁰⁹ Article 1855 of the C.C explicitly proscribes fixing period of limitation other than those fixed by law.

surety bonds in Ethiopia could then be judged to be due to unexamined transplantation which does not take domestic legal compatibility into account.

3.5.4 Incompatible use of basic terms under conditional insurance bonds

3.5.4.1 Surety`s assumption of joint and several liabilities under conditional surety bonds

In conditional insurance bonds they issue, Ethiopian insurers usually bound themselves as joint and severally liable party with principal debtor towards creditors for the guaranteed amount. Assumption of liability this way in conditional bonds creates confusion when it comes to enforcing surety`s liability. As has been discussed, the liability of surety under conditional bond usually follows proof of account party`s default. The practice in Ethiopia`s case reveals that beyond proving account party`s default, creditor needs to also comply with other precedent conditions stipulated in such bonds in order to validly claim against surety. Hence, under conditional surety bonds, the status of surety`s liability is strictly secondary obligor wherein creditors cannot directly claim payment from surety before claiming it from the primary obligor, the account party.

However, in an apparent contradiction to the very nature of the liabilities under conditional bonds, Ethiopian insurers assume *liability in solido* towards creditors under such bonds. Conceptually, liability in solido is the one which might be apportioned either among two or more parties or to only one or a few selected members of group at adversary`s discretion. And several obligation is independent obligation which is not affected by the obligation of the other party.¹¹⁰ Thus, as surety and account party assume liability in solido under the bond, creditors may claim the amount specified in the bond either jointly from both or directly only from surety at their discretion. As several obligation, by definition, is a standalone obligation, a person assuming it is in the front line for discharge of the obligation on equal footing with the other party/parties similarly liable.

¹¹⁰ Sue Wright, the handbook of international loan documentation ; some English law concepts (Annex).2nd.ed (2014)141

It is clearly stated under article 1933 of the Civil Code that where a person undertaking guarantee described himself as joint guarantor, co-debtor, or used equivalent terms, creditor may sue him *without previously demanding payment from the debtor* or realizing his securities. Hence, a surety who assumed liability in solido is primary obligor for the amount it undertakes to guarantee. If surety is a primary obligor itself, it can be said that its liability towards creditor is not dependent on default of account party, the other primary obligor. A creditor who has right to claim from surety without demanding payment from the account party cannot be expected to prove the default of the latter as one cannot know the failure in performance of the other without claiming performance from the same.

The fact that surety assumes liability towards creditor as primary obligor resembles the basic feature of unconditional surety bonds which Ethiopian insurers are legally proscribed from issuing. Under conditional bonds, wherein surety assumes a solido liability, creditor can directly demand payment from surety without previously demanding it from account party and proving the latter's default under the main contract.

On the other hand, if creditor happens to claim this way, a surety may refuse payment or require the former to first claim payment from account party as a surety's liability under such bonds is secondary. This creates an obvious contradiction which might require interpretation as to what triggers surety's liability under conditional bonds wherein liability is assumed in solido.

The apparent contradiction which exist between the trigger of surety's liability under conditional bonds and the liability surety undertakes as a primary obligor by assuming joint and several liability is a possible source of dispute. Should such dispute arise, the possible rule of construction to resort to might be *contra preferuntum rule* which is applicable for interpretation of contracts crafted only by one party. *Contra preferuntum* ("*against the offerer*") refers to interpretation of ambiguous language of contract against the bonding company.¹¹¹ Per this rule of construction, the contradiction over the trigger of surety's liability might be interpreted in favor

¹¹¹Larry D. Dingus & Peter C. Haley, *The doctrine of contra preferuntum in fidelity coverage cases*, American Bar Association Section of Insurance, Vol.10(1974)75.

of the other party who is not involved in drafting of the bond contract as surety bonds are standard in nature which are usually crafted by an insurer and acceded to by the other party. But in case of insurance surety bonds issued in Ethiopia, as creditors are not signatories to bond contracts, it could be challengeable for them to claim the benefit of such interpretation.

3.6 Analysis of Relevant court Cases

Case One (*Annexed*)

FSC CFN 147506¹¹²

The obligee sued the account party for failing to deliver products as agreed jointly with a surety who issued an *advance payment bond* as a security for the advance payment the account party took from the obligee. The surety objected to the material jurisdiction of the trial court based on the bond's arbitration clause. The trial court closed the suit against both defendants based on the objection and the decision was affirmed by FSC. However, the Cassation Bench of FSC overruled both decisions reasoning that as the obligee is not a party/signatory to the surety bond signed between the principal and the surety, it is not bound by such bond's arbitration clause. It held that as the bond's arbitration clause uses a phrase *'a disagreement arising under the bond'* that could only concern the signatories and *not the obligee who is a third party to the contract*. The bench also stressed that contracting parties cannot restrict third party's access to justice which is guaranteed under article 37 of the FDRE constitution.

However, the trial and appellate courts were completely ignorant of the fact that the dispute between the obligee and account party under the main contract falls under the jurisdiction of ordinary courts as the contract didn't incorporate specific dispute resolution mechanism. They closed the suit against both by virtue of the objection the surety raised. On the other hand, the interpretation of the Cassation Bench could in effect mean that not only the arbitration clause but also other terms and conditions of the surety bond are not to bind the creditor as the *ratio decidendi* of the decision dwells on the rule of privity of contract that as the creditor was not a signatory of the bond contract it should not be bound by its terms. The court wrongly considered creditors for whose benefit the guarantee is given as third party. It is inconsiderate of the very fact that a creditor while accepting the bond as a security has impliedly consented to be bound by

¹¹² MIDROC Gold Mining vs. Ethiopian Insurance Corporation [2018] Federal Supreme Court Cassation Decision CFN 147506 (Unpublished)

terms stated therein. The decision could be criticized for wrongly applying strict privity rule which cannot apply to the relation A creditor, a surety and A principal debtor have under suretyship arrangement. The decision is not judicious and well researched as it failed to take into account a long established way of doing the bond business in Ethiopia. The court, while basing privity rule as a *ratio decidendi* of the decision, it confusingly stated in *obiter dictum* that "it should be noted that as the creditor is the beneficiary of the bond, other duties stated in the bond as a precondition applies to it." This makes the decision unclear as to whether it means other terms and conditions of the bond binds the creditor except the arbitration clause. The court also erred in taking the arbitration clause in the bond as the one stated only for a dispute between the surety and account party while the bond vividly states that `any dispute under the bond.` Besides, under surety bonds if disputes are to arise they arise essentially between a party who undertakes the duty (the surety) and the party to whom such duty is to be performed (creditor).

The Cassations decision could, however, be taken as acceptable for one practical reason in such cases. That is, as the dispute between the creditor and account party under the main contract are subject to power of ordinary courts, rendering the bond's arbitration clause applicable to a creditor means obliging the creditor to submit its claim against each to two avenues which would be both costly to a creditor and might result in different judgments which might be much difficult to execute. This case and case two discussed here under show the practical problems which the making of surety bonds in Ethiopia undergo in relation to the contested applicability of terms and conditions of surety bonds to non signatory creditors as raised under research questions one & three of this thesis.

Case Two (Annexed)

FHC FN 228289¹¹³

Here the obligee sued the surety under advance payment bond jointly with contractor at the FHC. The surety objected to the court's jurisdiction based on the bond's arbitration clause. The trial HC, unlike the one under case one above, closed the suit against the surety based on the objection and continued to entertain the case against the account party where it finally found it

¹¹³ Agricultural Research Institute of Ethiopia Vs Oreks Construction PLC & Nib Insurance S.c.(2019) FHC FN 228289(Annexed)

fully liable. Holding the court judgment, the obligee sued the surety in front of an arbitration panel. Although the outcome of this case is yet to be known as the case is still pending, the procedural complication this sort of interpretation will create could be imagined. On its face value, the judgment of the court looks proper as it positively enforced the clear provision of the bond contract. But in effect, it could be criticized for failing to consider the very nature of conditional surety bonds and surety's liability which is accessory in nature. Holding account party alone liable excluding a surety from such suit might significantly impact surety's interest as such procedure devoid it of the opportunity to defend account party's liability and its extent. Such procedure is also so cumbersome (costly and time consuming) for the obligee as it is made to institute its suit to two different avenues for the same cause i.e. defaults of the account party. The encumbrance on the creditor could excel if both cases are to continue by appeal through to Cassation. The procedural complication this sort of cases create is detailed under section 3.3.1. This case further reveals how the absence of adequate laws governing the indivisible triangular relationship among a surety, creditor and account party under bond arrangements is sourcing problems on execution of surety bonds as stated under research question one and two of the thesis.

Case Three

FSC CFN 41086¹¹⁴

In this case, the surety argued the voidness of the bond on grounds that Ethiopian insurers have no legal base to issue surety bonds, the bond was issued by its manager in *ultra vires* and for not complying with the form requirement (not signed by two witnesses) as per Article 1725/a/, 1727/2/ and 1720 of the Civil Code. The surety also alternatively pleaded that the suit is barred by limitation for not have been brought within two years period under Article 674 of the Commercial Code. The FHC and the appellate FSC gave an *interpretation that surety bonds are insurance policies which insurers can legally vend and are governed by provisions of the Commercial Code*. However, the Cassation Bench clearly overruled the lower courts`

¹¹⁴Africa Insurance S.C vs. Dashen Bank S.C (2012), FSC Cassation division CFN 40186 V13

interpretation which considered surety bonds as insurance policies and gave binding interpretations that:-

- ✓ Surety bonds are security devices/guarantees which are governed by the Civil Code provisions and the applicable statute of limitation is the 10 years GPOL under Article 1945 of the Civil Code.
- ✓ As there is no law which proscribes insurers from issuing surety bond, and for issuing such bonds is inherently part of insurance business, insurers in Ethiopia can normally run such business and
- ✓ As surety bonds are special contracts, their making is not required to follow a strict formality which the law states for solemn contracts. Hence the fact that the bond was not signed by witness doesn't make it void.

As almost all insurance bonds in Ethiopia's insurance industry are not signed by witnesses probably since the commencement of the business in the country, rendering them void for not complying with such formality will ruin the long established way of doing the business and thereby put in high risk various mega projects and transaction which on the faith of the assurance given by bonding insurers are already in process. In this regard, the Cassation's interpretation could be taken as acceptable and positive for it maintains the business efficacy.

However, given the fact that bond contracts are not signed by creditors in Ethiopia, it is not clear if the decision also relieved compliance with mandatory requirement of creditors' signature as required under Article 1727/1/ of the Civil Code by virtue of the specialty nature the interpretation conferred up on such contracts like the one the bench did for insurance contracts in CFN 24703 and 24704 in Volume 13. The interpretation the lower courts gave shows how the absence of clear and adequate governing laws on surety bonds has been resulting in mischaracterization as to the nature of these devices and inconsistent position the courts are holding on issues arising thereunder. This court case regards particularly research question number two of the thesis as to the applicability of Civil Code's suretyship provisions to insurance bonds although it reveals the associated legal and practical problems as raised under research question one.

Case Four

FSC CFN 47004¹¹⁵

The surety rejected obligees claim for payment under *performance bond* given in respect of construction project. The basis of the rejection was lodging of the claim after the lapse of two year under Article 674 of the Comm.Code. The arbitration panel which first saw the case ruled that *surety bonds are insurance contract to be governed by the commercial code* and the surety has no liability due to the lapse. The appellate FSC overruled the panel`s decision stating surety bonds are security devices which are subject to the Civil Code`s suretyship provisions and the applicable period of limitation is the 10 year GPoL.

FSC Cassation affirmed the appellate decision and gave additional interpretation that *surety bonds are tripartite contract to be signed between a surety, obligee and account party*. However the interpretation did not state the fate of such contract if one of such parties is not made a signatory, as is the case in Ethiopia`s insurance industry. This case regards the contested applicability of the Civil Code`s suretyship provision to surety bonds as raised under research question two, and how judicative bodies gave varying interpretation on the issue thereby depicting one of the consequent legal and practical problems in relation to surety bond business.

Case Five

FSC CFN 36935¹¹⁶

The insurer which gave FGB pleaded that as issuing surety bonds is not within the list of activities which insurers in Ethiopia are legally authorized to operate, the bond which is the cause of action for the suit against it be rendered void. Here the trail FHC and the appellate division of the FSC, contrary to the interpretation they give under case one above, held that, *surety bonds are security devices*, and running such venture is inherently part of insurance business. The Cassation endorsed the lower courts position. This and case one above portrays one of the legal and practical problem which the business of insurance surety bond has been

¹¹⁵EICVs Bale Rural Development organization [2012] FSC Cassation Decision CFN 47004V.13

¹¹⁶Africa Insurance S.C vs. Commercial Bank of Ethiopia (2012), FSC Cassation division CFN 36935 V.13

enduring due to the absence of a clear enabling legal base for Ethiopian Insurers to run this business as stressed under research question one.

Although considering insurance bonds as security devices is acceptable as that is what properly describes their nature, bestowing the right to run this business on insurers either by *argumentum a contrario* or by express acknowledgement of the bonds as insurance policies or by considering bond business as the one inherent in insurance activity is not legally apt and could pave a way for erroneous trends. This is so because as financial industry is very sensitive sector, unscrutinized introduction of financial products into the financial market without a clear enabling legal base and a license to operate simply for absence of a legal proscription could significantly impact the national economy.

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION

This thesis has demonstrated that the execution of insurance bonds in Ethiopia is being seriously challenged in a way it endangers the stake of the main stakeholders (obligees and sureties) and might be further challenged in the future relation to the existence or not of enabling legal base for Ethiopian insurers to run surety bond business. Although the problem majorly stem from the very making of the bond contract, it has also much do with the inadequacy of the existing laws to regulate the same. The absence of a law dedicated to the regulation of surety bonds which is considerate of the peculiarity they possess, is believed to have resulted in the industrial mischaracterization of these security devices which in turn has led to the exclusion of a party which should have mandatorily been made signatory to such contract, the obligee. The absence of clear enabling legal base for Ethiopian insurers to run such business has also happened to source a challenge as to whether bonds issued by these companies are valid financial devices to capably cause rights and duties.

In Ethiopian insurance industry, the tendency of perceiving insurance surety bonds as insurance policies seems to have resulted in making bond contracts the one to be signed only between an insurer (a surety) and an account party who thence is taken as a policyholder(insured). Although the inclusion of the latter as a party to the bond contract entails no problem as that would rather give a pedestal for the surety to demand the required premium/commission from such party as a return for issuing the security, the failure to enfold creditors as a party to such contract unfolded problems to which courts of the same and different level have been observed to give diametrically contrarious solution.

As data collected through interview and document observation in this thesis have revealed, unlike the case in other jurisdictions, signatory parties to surety bond contracts issued by Ethiopian insurers are only insurance companies and account parties, and majority of such bonds contain terms, conditions and exclusions. The basic problem gyrating around such delinquent contractual making is whether creditors for whose benefit the bond contracts are made be bound by provisions of such contracts whilst they are not signatories. In dealing with this problem, the

rule of privity of contract has been a battle battleground to creditors` claim and sureties` defense thereto. The court cases analyzed in this thesis have revealed that while lower courts (FHC and FSC) have shown consistent stand that creditors should be bound by terms and conditions of bond contracts irrespective of their being non signatories for they gave implied consent up on accepting it as a security, the Cassation bench of the FSC showed inconsistent approach over the matter. While in its earlier decisions it maintained that surety bond contract is a special contract which is not expected to rigorously follow the formalities legally stated for other solemn contracts and such contract is binding between surety and creditor, in its recent unpublished decision ruled, without however overruling its earlier interpretation, that a creditor should not be bound by terms and conditions of a bond contract to which it is not a party.

The inconsistent interpretations the Cassation bench rendered over the matter beyond sourcing uncertainty, is partly inconsiderate of the long established way of doing such business in Ethiopia. Probably since the commencement of this business in the country, conditional insurance bonds are signed only between a surety and a requesting account party, and terms and conditions stipulated in such bonds are meant to bind a surety and the beneficiary of such bond. Given the fact that the financial risk insurance companies shoulders upon undertaking liability as a surety in return for a significantly disproportionate premium, some of the terms and conditions contained in such bonds are basically there to help them to maintain their effective indemnity claim up on paying beneficiaries. Besides, the fact that creditors accept term and conditions containing surety bond as security when presented to them by bonded parties and on faith of it proceed to perform towards the latter under the main contract should be taken as a manifestation of creditors` consent to be bound by the terms of a given surety bond which they in fact didn` t sign.

The problems of the industrial misperception as to the is (nature) of surety bonds, the delinquent contractual making and non uniform interpretation across courts are mainly attributable to the absence of adequate laws governing the relationship of the involved parties emanating from these security devices. As far as these devices are concerned, the applicable laws one could possibly talk of are the Civil Code`s general contract provisions, suretyship provisions and the NBE Directive No.SIB/24/2004.To begin with the last, the directive is only a prohibitive law which inadequately define the proscribed unconditional bonds. As such, let alone governing the

relationship which emanate from the being issued conditional insurance bonds, it does not even define such bonds and give insurers a clear enabling legal base to run such business. Although the law of general contract is applicable to surety bond contracts as is the case for other contracts, it does not suffice to regulate the special nature of relationship these bonds could give rise to between involved parties. As regards the Civil Code`s suretyship provisions, the FSC Cassation have ruled on their analogical application to corporate surety bonds. However, the analogical application option cannot be a long lasting reliable solution for such provisions are inadequate to govern the special commercial nature such bonds and cannot cope with the ever increasing complexity which such financial instruments often undergo.

4.2 RECOMMENDATIONS

I. Surety bonds issued by insurers are security devices and strictly are not insurance policies. As such, a license to operate insurance business cannot be validly implicated as also enabling to run surety bond business. As the relevant laws stand now, insurance companies in Ethiopia are principally established to run insurance business and this is not inclusive of surety bonds. Hence to operate surety bond business they need a clear enabling legal base. This would avoid possible disputes over legality issue which is whether a given surety bond is the one issued by an organ legally permitted so that it could validly source rights and duties. An attempt to establish such legal base through implied interpretation of *what is not prohibited is permitted* could not be an enduring solution. The NBE Directive No.SIB/24/2004 and its predecessor are prohibitory laws which only proscribe insurance companies from issuing unconditional surety bonds. Although applying *argumentum a contrario* in search for a legal authority might be taken as a wise approach as it maintains the efficacy of the long established business of surety bonds and safeguard the interest of the parties already involved, to continue doing the same cannot be apposite indefinitely. Hence a legislative measure which provides clear legal base for insurers to run the bond business is essential. This could be either through amending the insurance business Proclamation No 746/2012(as amended by proc.No1163/2019) to broadly define insurance business as inclusive of surety bond business or issuance of Directive by NBE which explicitly permit insurers to run conditional bond business per the mandate it has under article 6/1/ of the insurance business Proclamation No.746/2012.

II. Surety bonds whether issued by insurers or banks are *always commercial* security devices which involve commercial engagement and are archetypical trade activities as per Article 5/21/ and /22/of the Commercial Code. As such, alike documentary credits which serve as a securities for payment in international transaction and business mortgage which are typically real securities, surety bonds fits in to be regulated under the Commercial Code. Hence in order to curb the in adequacy of a law governing corporate surety bonds, a section dedicated to their regulation which regards the making of surety bond contract, the rights, duties and possible defenses available to the involved parties, among others, need to be incorporated in the forthcoming commercial code.

III. As the way the contract of surety bonds have long been made in Ethiopia`s insurance industry has now begun to be challenged in a way that renders terms and conditions incorporated in such bonds non applicable to non signatory obligees, Ethiopian insurers needs to change the making of these bonds so that they could undisputedly safeguard their interest inherent the application of such conditions to creditors. Although creditors` contention not to be bound by terms of bond contract which impose duties up on them while they are not signatories to, and FSC`s Cassation acceptance of this argument could be criticized on different grounds, such position could be also argued to have a merit if austere adherence to the rule of privity of contract is to be followed. Moreover, as Article 1725/1/ of the Civil Code requires all parties bound by a written contract to be made signatories to such contract, making obligees sign conditional surety bonds is imperative for such bonds contain terms and conditions which are meant to truss them.

Hence making creditors signatories to conditional bond contracts along with surety and account party could avoid the disputed application of the terms to creditors. Besides, as surety bonds are in most cases standard term contracts crafted solely by insurers, the latter should carefully and clearly draft the bonds as inconsistent and ambiguous terms will be interpreted against the surety by the operation of *contra preferentume* canon of contract construction.

IV. Being of comparatively recent origin, many legal problems might be expected in relation to the enforcement of surety bond contracts. So when disputes in relation to the application and construction of surety bonds are brought to their attention, courts and other judicative bodies like arbitration panels need to give interpretation which takes into account the long established *modus*

operandi of bond business in Ethiopia, the intention of the parties and the absence of adequate legal regime governing the matter. Most importantly, the Cassation bench of the FSC, beyond being considerate of such facts, is recommended to give uniform, judicious and well researched interpretations which are capable of maintaining the efficacy of the long established way of doing the bond business in Ethiopia.

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- Anbessa Insurance Share Company Advance Payment Bond
- Awash Insurance Share Company Performance bond
- Nib Insurance Share Company Performance bond
- Nib Insurance Share Company Advance Payment bond
- Nile Insurance Share Company Advance Payment bond
- Nile Insurance Share Company Performance bond
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- Interview with Hialeab Yhadigo, Acting Legal service Director of Anbessa Insurance S.C
- Interview with Ato Habtamu Siraj, a licensed practicing lawyer at all levels of federal and Oromia Regional state courts. Formerly served as supervising senior attorney at Hibret Insurance S.c and senior attorney at Nib Insurance S.C.
- Interview with Ato Addisu Duresa, Corporate Legal Compliance Manager at Commercial Bank of Ethiopia, .
- Interview with Ato Melaku Meseret, legal service Manager of CBE Northern Addis District
- Interview with Aron Kasaye, Legal Service Team leader at Ethiopian Insurance Corporation

List of Annexes

Annex 1 (Case)

- MEDROC Gold Mining vs. Ethiopian Insurance Corporation [2018] Federal Supreme Court Cassation Decision CFN 147506 (Unpublished)

Annex 2 (Case)

- Agricultural Research Institute of Ethiopia Vs Oreks Construction PLC & Nib Insurance S.c. (2019) Federal High Court. FN 228289

Annex 3 (Surety Bond Contracts)

- Standard insurance surety bond contracts of three Ethiopian insurance Companies.

Annex One (Court Case)



- ዳኞች:-
1. ዳኝ መላኩ
 2. ተክሊት ይመሰል
 3. ተፈሪ ገብሩ (ዶ/ር)
 4. ቀነዓ ቂጣታ
 5. አብዬ ካሳሁን

አመልካች:- ሜድሮክ ወርቅ ማዕድን ኃ/የተ/የግ/ማህበር - ነ/ፈ.ጅ አቶ አብዮት ቆቀራ ቀርቦዋል

- ተጠሪዎች:-
1. የአልናህዳ ትሬዲንግ
 2. የኢትዮጵያ መድን ድርጅት
- } የቀረበ የለም

ይህ መዝገብ የተቀጠረዉ ለምርመራ ሲሆን ተመርምሮ የሚከተለዉ ፍርድ ተሰጥቷል፡፡

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ይህ ክርክር የተጀመረዉ በፌዴራል ከፍተኛ ፍ/ቤት ሲሆን፣ የአሁን አመልካች ከሰነ፣ የአሁን ተጠሪዎች ደግሞ ተከላሾች ሁኖ ሲከራከሩ ነበር፡፡ ጉዳዩ ለዚህ ችሎት ሊቀርብ የቻለዉ የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ.135232 በ30/10/2009 ዓ.ም የሰጠዉ ወሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ እንዲታረምልን በማለት አመልካች ያቀረበዉን የሰበር አቤቱታ መርምሮ ለመወሰን ነዉ፡፡

የጉዳዩ አመጣጥ ሲታይ ከሳሽ ባቀረበዉ ክስ ከሳሽ አንድ ሲኖ ዳም ትራክ ተሽከርካሪ ከወጭ እንዲያስመጣልን ከ1ኛ ተከላሽ ጋር ተዋወላን ተከላሽ የቅድሚያ ክፍያ ብር 600000 (ስድስት መቶ ሺህ) የወሰደ ሲሆን፣ 2ኛ ተከላሽ የቅድሚያ ክፍያ ዋስትና ቦንድ ፈርሞ ሰጥቷል፡፡ ስለዚህ 1ኛ ተከላሽ በወሉ መሰረት ስላልፈጸም ተከላሾች በአንድነት በተናጠለ ብር 600000 (ስድስት መቶ ሺህ) እንዲከፍሉኝ በማለት ከሷል፡፡

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ትዝብል ግልጽ

ፊርማ *[Signature]* ቀን *[Date]*
ገ/ሪ/ዳ



አመልካች በቦንዱ ተጠቃሚ ለመሆን የተለያዩ ቅድመ ሁኔታዎች መሟላት እንዳለባቸው በሰነዱ ተመልክቷል። ከእነዚህ ቅድመ ሁኔታዎች መካከል በቦንዱ አንቀጽ 5 ሥር የተመለከተው ቅድመ ሁኔታ ሲሆን፣ ይህም ከቦንዱ ጋር በተያያዘ የአለመግባባት ሲፈጠር የሚፈታበት አግባብ ነው። የዚህ ድንጋጌ ሲታይ «ከዚህ ዋስትና ጋር በተያያዘ የሚነሱ ማናቸውም ዓይነት አለመግባባቶች በተዋዋይ ወገኖች በጽሑፍ ለሚሾም ገላጋይ እንዲቀርብ ይደረጋል።...» በዚህ ድንጋጌ መሰረት ከቦንዱ ጋር በተያያዘ በተዋዋይ ወገኖች መካከል ለሚነሳው አለመግባባት በግልግል ዳኝነት ታይቶ ወላኔ ሊሰጥበት እንደሚገባ ያሳያል። የግልግል ዳኞች አጃጂም ሂደትም በዝርዝር ተመልክቷል። የዚህ ድንጋጌ ግዴታ በአመልካች ላይ ተፈጻሚነት አለው ወይስ የለውም? የሚለው ነጥብ መታየት ያለበት ጉዳይ ነው።

እንደሚታወቀው ተዋዋይ ወገኖች በሕግ አስከሬናተክሰክሰ ድረስ በመካከላቸው ለሚነሱ አለመግባባቶች ጉዳዩን በግልግል ዳኝነት ታይቶ አልባት እንዲሰጠው መስማማት እንደሚችሉ የፍ/ብ/ሕ/ቁ.3318 እና ተከታዮቹ ድንጋጌዎች እና የፍ/ብ/ሥ/ሥ/ሕ/ቁ.315 እና ተከታዮቹ ድንጋጌዎች ሥር ተመልክቷል። በመሆኑም በሕግ የተመለከተውን አስከሬናተክሰክሰ ተዋዋይ ወገኖች በመካከላቸው የሚፈጠረውን ክርክር በግልግል ዳኝነት እንዲታይ መስማማት እንደሚችሉ ያስገነዝባል።

አሁን ወደ ተያዘው ጉዳይ ስንመለስ የቦንዱ አንቀጽ 5 ይዘት እንደሚያመለክተው ከቦንዱ ጋር በተያያዘ «በተዋዋይ ወገኖች» የሚነሳ ክርክር በግልግል ዳኝነት ሊታይ እንደሚገባው ነው። ነገር ግን ከድንጋጌው በግልጽ እንደሚታየው በግልግል ዳኝነት እንዲታይ የተመለከተው ከተዋዋይ ወገኖች መካከል የሚነሳ አለመግባባት እንጂ ከሶስተኛ ወገን ጋር በተያያዘ ክርክር ላይ ተፈጻሚነት አለው ለማለት ያዳግታል። ከዚህ ድንጋጌ መገንዘብ እንደሚቻለው በቦንዱ አንቀጽ 5 ሥር የተመለከተው አለመግባባት የሚፈታበትን አግባብ ሲያስተምጥ በተዋዋይ ወገኖች መካከል ብቻ እንደሆነ መግለጹ፣ አለመግባባትን ከመፍታት አንጻር የፍ/ብ/ሕ/ቁ.1731 (1) ሥር የተመለከተውን ወል ባቋቋሙት ወገኖች መካከል ሕግ ነው የሚለውን መርህ የተከተለ መሆኑን ያስገነዝባል። ሌላው በኢ.ፌ.ዴ.ሪ.ሕገ መንግስት አንቀጽ 37 መሰረት ፍትሕ የማግኘት መብት በሕገ መንግስቱ የተጠበቀ መብት እስከሆነ ድረስ እንደ ሰው ባልተስማመበት ሁኔታ ሌሎች ሰዎች በመካከላቸው በሚያደርጉት ስምምነት ይህን መብት መገደብ ወይም መሸራረፍ የሚችሉበት የሕግ አግባብ የለም።

ስለሆነም የአሁን አመልካች የዋስትናው ተጠቃሚ ይሁን እንጂ የዋስትናው ፈራሚ አስከሬናተክሰክሰ ከቦንዱ ጋር በተያያዘ በግልግል ዳኝነት እንዲታይ የማድረግ



ግዴታ አለበት ለማለት አይቻልም። በመሆኑም የአሁን አመልካች ከሶንዱ ጋር በተያያዘ የሚነሳውን ክርክር ለግልግል ዳኝነት ለማቅረብ ሳይገደድ ለመደበኛ ፍ/ቤት ክስ ከማቅረብ የሚከለክለው ነገር የለም። መደበኛ ፍ/ቤትም አመልካች ያቀረበውን ክስ ተቀብሎ ከማየት ስልጣን የሚያሳጠው ነገር የለም ብለናል።

ሲጠቃለል የሥር ፍ/ቤቶች ይህን ጉዳዩ የማየት ስልጣን እያላቸው ይህን ጉዳይ ለማየት ስልጣን የለንም በማለት የሰጡት ዉሳኔ መሰረታዊ የህግ ስህተት ስለሆነ የሚከተለው ተወስኗል።

ዉ ሳ ኔ

1. የፌዴራል ከፍተኛ ፍ/ቤት በመ.ቁ. የሰጠው ዉሳኔ እና የፌዴራል ጠቅላይ ፍ/ቤት የመ.ቁ.135232 በ30/10/2009 ዓ.ም የሰጠው ዉሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመባቸው ስለሆነ በፍ/ብ/ሥ/ሥ/ሀ/ቁ.348 (1) መሰረት ተሸሯል።
2. የአሁን አመልካች የቅድሚያ ክፍያ ዋስትና ተዋዋይ ወገንና ፈራሚ አስከሬምን ድረስ ከሶንዱ ጋር በተያያዘ ለሚነሳው ክርክር ለግልግል ዳኝነት ለማቅረብ አይገደድም፤ ክሱን ተጥታ ለፍ/ቤት የማቅረብ መብት አለው፤ ፍ/ቤትም ይህን ክስ ተቀብሎ የመወሰን ስልጣን አለው ብለናል።
3. የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት የተዘጋጠነ መዝገብ በማንቀሳቀስ በዋናው ጉዳይ ላይ ግራ ቀኞቹውን በሕጉ አግባብ በማክራከር ተገቢ ነው ያለውን ዉሳኔ እንዲሰጥበት በፍ/ብ/ሥ/ሥ/ሕ/ቁ.341 (1) መሰረት ተመልሶለታል።
4. የዚህ ዉሳኔ ግልባጭ ለሥር ፍ/ቤት ይደረስ።
5. ግራ ቀኞቹው በዚህ ችሎት የደረሰባቸውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ።

መዝገቡ ተዘግቷል።

በ/ይ. የወጣት የአምስት ዳኞች ፈርማ አለበት

ፌዴራል ጠቅላይ ፍርድ ቤት
ገጠባ ግልባጭ ቤት
ቀን 4/10/2010
ብርሃን



Annex Two (Court Case)



መ/ቁ 228289

ቀን 11/11/2011

ዳኛ፡- ያዕቆብ መኩሪያ

ከሳሽ፡- የኢትዮጵያ ግብርና ምርምር ኢንስቲትዩት ነ/ፈጅ ሰላማዊት ሽፈራው ቀረቡ

ተከሳሾች፡- 1ኛ. ኦሪክስ ኮንስትራክሽን ኃላፊ/የተ/የግ/ማ አልቀረቡም

2ኛ. ንብ ኢንሹራንስ ኩባንያ ነ/ፈጅ ሀብታሙ ምንውየለት ቀረቡ

መዝገቡ ለዛሬ የተቀጠረው ክስ ለመስማት በሚል ሲሆን ክስ ከመሰማቱ በፊት 2ኛ ተከሳሽ የካቲት 27/2011 ዓ/ም በተጻፈ መከላከያ መልስ የመጀመሪያ ደረጃ መቃወሚያ ያቀረበ ሲሆን የመጀመሪያ ደረጃ መቃወሚያውም ይህ ፍ/ቤት ይህንን ጉዳይ ተቀብሎ ለመዳኘት የስራ-ነገር ስልጣን የለውም የሚል ነው በመሆኑም ችሎቱ የቀረበውን መቃወሚያ እንደተመለከተው 2ኛ ተከሳሽ ለ1ኛ ከሳሽ የሰጠው የቅድመ ክፍያ ዋስትና ቦንድ በተራ ቁጥር 5 ላይ በግልጽ እንደሰፈረው ከዚህ የዋስትና ቦንድ ጋር ተያይዞ የሚነሳ ማንኛውም አለመግባብት በግልጽ ዳኝነት ባለጉዳይ ይፈታል የሚል በመሆኑ እና 1ኛ ተከሳሽ ከከሳሽ አቅርቦ የቅድመ ክፍያ የወሰደው ከዚህ የዋስትና ወረቀት ላይ የተመለከተውን ግዴታ ተቀብሎ በመሆኑ ይህም በፍ/ስ/ስ/ሀ/ቁ 1731 መሰረት በግራቀኝ መካከል ህግ በውላቸው መሰረት የመዳኘት መብትም ያላቸው በመሆኑ የፍ/ቤቱን ስልጣን በራሳቸው ጊዜ ወስነው የቀነሱ በመሆኑ ይህ ፍ/ቤት የ2ኛ ተከሳሽ ጉዳይን እስመለከተው ክስ መስማት ሳያስፈልግ በፍ/ስ/ስ/ሀ/ቁ 231 መሰረት ስልጣን የለኝም በማለት ተከታዩን አሟል።

ት ዕ ዛ ዝ

- ይህ ፍ/ቤት በግራቀኝ በተደረሰው ስምምነት መሰረት የ2ኛ ተከሳሽን ጉዳይ ተመልክቶ የመወሰን ስልጣን የሌለው በመሆኑ 2ኛ ተከሳሽን ከዚህ ክስ በፍ/ስ/ስ/ሀ/ቁ 231 መሰረት አስናብተዋል።
- የ1ኛ ተከሳሽ እና የከሳሽን ክስ ለመስማት ቀጠሮ ለ9/12/2011 (4:30) ተሰጠ።

የዳኛ ፊርማ፡- ያዕቆብ መኩሪያ

ሰ/ዩ.
17/11/2011 ዓ/ም





የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት
THE FEDERAL DEMOCRATIC REPUBLIC
OF ETHIOPIA
FEDERAL HIGH COURT

ቁጥር.....
No.....
ቀን..... 9.9^ኛ
Date.....

አዲስ አበባ - Addis Ababa
የክ/መ/ቁ 228289

ታህሳስ 09 ቀን 2012 ዓ.ም

ዳኛ፡- ያዕቆብ መኩሪያ

ከላሽ፡- የኢትዮጵያ ግብርና ምርምር ኢንስቲትዩት ነ/ፊጅ ሰላማዊት ሽፈራው ቀረቡ
ተከላሽ፡- 1ኛ.አፊክስ ኮንስትራክሽን ኃላፊነቱ የተወሰነ የግል ማህበር በሌሉበት
2ኛ.ንብ ኢንሹራንስ ኩባንያ ከክሱ ተሰናብተዋል።

ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል

ፍርድ

ከላሽ በተከላሽ ላይ የካቲት 06 ቀን 2011 ዓ.ም ጽፈው ባቀረበው የክስ አቤቱታ 1ኛው ተከላሽ የውል ግዴታቸውን ባለመፈፀማቸው እና 2ኛ ተከላሽ ለ1ኛ ተከላሽ በገቡት የቅድመ ክፍያ ዋስትና መሰረት ለግንባታ ሥራ የተከፈለ የተጨማሪ እሴት ታክስን ጨምሮ ብር 2,466,441.88 (ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር ከሰማንያ ስምንት ሳንቲም) ለማስከፈል ክስን በፍ/ሥ/ሥ/ሕግ ቁጥር 222 እና 223 መሰረት አቅርበዋል። በክሱ ዝርዝርም እንደተገለጸው ከሣሽ መስሪያ ቤት በሥሩ ከሚያስተዳድርቸው የምርምር ማዕከላት አንዱ በሆነው የጅማ ግብርና ምርምር ማዕከል ውስጥ ለሠራተኞች አገልግሎት የሚሆን ሁለገብ አዳራሽ ለማሰራት ባወጠው ግልፅ ጨረታ 1ኛው ተከላሽ ከሌሎች ተጫራቾች ጋር ተወዳድሮ በማሸነፍ ሚያዝያ 20 ቀን 2009 ዓ.ም (እ.ኤ.አ ሚያዝያ 28/2017) በተፈረመ የኮንትራት ስምምነት መሰረት ጠቅላላ የግንባታ ዋጋው ብር 25,649,256.15 (ሃያ አምስት ሚሊዮን ስድስት መቶ አርባ ዘጠኝ ሺህ ሁለት መቶ ሃምሳ ስድስት ብር ከአስራ አምስት ሳንቲም) የሆነውን የግንባታ ሥራ ለመስራት የውል ስምምነት ፈርመዋል።

1ኛው ተከላሽ በተወካዩ አማካይነት የውል ስምምነቱን ተፈራርሞ ሥራውን ለመጀመር ከከላሽ መ/ቤት የምህንድስና ባለሙያዎች ጋር የስራ ቦታውን (ሳይት) ርክክብ የፈፀመ ሲሆን ሥራውንም ለመጀመር በውል ስምምነቱ አንቀፅ 60.2 መሰረት ከጠቅላላው የግንባታ ዋጋ



የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ክፍተኛ ፍርድ ቤት
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
FEDERAL HIGH COURT

ቁጥር.....
No.....
ቀን..... 9.9
Date.....

አዲስ አበባ / Addis Ababa

ከሚከፈለው የቅድመ ክፍያ ውስጥ የመጀመሪያውን ዙር የቅድመ ክፍያ ብር 2,144,732.08 (ሁለት ሚሊዮን አንድ መቶ አርባ አራት ሺህ ሰባት መቶ ሰላሳ ሁለት ብር ከዜሮ ስምንት ሳንቲም) 2ኛው ተከላሽ የሰጠውን የቅድመ ክፍያ ዋስትና በማቅረብ እንዲሁም የተጨማሪ እሴት ታክስ ብር 321,709.81 (ሶስት መቶ ሃያ አንድ ሺህ ሰባት መቶ ዘጠኝ ብር ከሰማን አንድ ሳንቲም) ህጋዊ የተጨማሪ እሴት ታክስ ክፍያ ደረሰኝ በማቅረብ በጠቅላላው ብር 2,466,441.88(ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር ከሰማንም ስምንት ሳንቲም) ከከላሽ ላይ ወስዷል።

1ኛው ተከላሽ የውል ስምምነቱን ፈርሞ የሥራ ቦታውን ተረክቦና በግንባታ ውሉ መሰረት የቅድመ ክፍያውን የተጨማሪ እሴት ታክስ ክፍያውን ጨምሮ ከከላሽ መስሪያ ቤት የወለደ ቢሆንም ከተወለነ ቁፋሮ ስራ ውጪ በውሉ ላይ በተቀመጠው ጊዜ ውስጥ ሥራውን ጀምሮ ማጠናቀቅ በሚችልበት ጊዜ ውስጥ የግንባታ ስራውን ባለመስራቱ የግንባታ አማካሪ ድርጅቱ ማለትም ኦ.ቲ.ቲ የተባለው ኩባንያ በቁጥር 8434/18 በ18/07/2010 ዓ.ም በፃፈው ደብዳቤ 1ኛው ተከላሽ ሥራውን በተፈለገው ፍጥነት ባለማከናወኑና በግንባታ ቦታውም ላይ ምንም ዓይነት እንቅስቃሴ ባለመኖሩ በወሰደው የቅድመ ክፍያ ዋስትና ላይ አስፈላጊውን እርምጃ እንዲወስድ ለከላሽ ማሳሰቢያ ሰጥቷል።

1ኛው ተከላሽ በውል ስምምነቱ መሠረት ሥራውን ባለማከናወኑና በአማካሪው ድርጅት በተሰጠን ምክረ ሀሳብ መሰረት 1ኛው ተከላሽ የቅድመ ክፍያውን ሲወስድ 2ኛው ተከላሽ ሰኔ 13 ቀን 2009 ዓ.ም (እ.ኤ.አ ሰኔ 20/2017) የሰጠውንና ለ540ቀናት የሚያገለግለውን የቅድመ ክፍያ ዋስትና ሰነድ አቅርቦ በመሆኑ 1ኛ ተከላሽ ባቀረበው የቅድመ ክፍያ ዋስትና መሰረት 2ኛው ተከላሽ ገንዘቡን ገቢ እንዲደርግልን በተደጋጋሚ በደብዳቤ ብንጠይቅም ይህ ክስ እስከቀረበበት ጊዜ ድረስ ገንዘቡን ገቢ ሊደርጉልን አልቻለም።

ስለሆነም ተከላሹ፡-

1. 1ኛው ተከላሽ በውል ስምምነቱ መሠረት ስራውን ለማከናወን የቅድሚያ ክፍያ ወሰዶ ያለምንም በቂ ምክንያት ሥራውን ባለማከናወኑ የወሰደውን የቅድመ ክፍያ ብር 2,144,732.08 (ሁለት ሚሊዮን አንድ መቶ አርባ አራት ሺህ ሰባት መቶ ሰላሳ ሁለት ብር ከዜሮ ስምንት ሳንቲም እና የተጨማሪ እሴት ታክስ ብር 321,709.81 (ሶስት መቶ





ትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
 የፌዴራል ዲሞክራሲያዊ ጥቅም ስርዓት
 FEDERAL DEMOCRATIC REPUBLIC
 OF ETHIOPIA
 FEDERAL DEMOCRACY

ቁጥር.....
 No.....
 ቀን..... 2009
 Date.....
 አዲስ አበባ / Addis Ababa

ሃያ አንድ ሺህ ሰባት መቶ ዘጠኝ ብር ከሰማን አንድ ሳንቲም) በጠቅላላው ብር 2,466,441.88(ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር ከሰማንም ስምንት ሳንቲም) ገንዘቡን ከወሰደበት ጊዜ ጀምሮ ከሚታሰብ ህጋዊ ወለድ ጋር ጨምሮ እንዲከፍል እንዲወሰን፤

2. ከሳሽ ለ1ኛው ተከላሽ በውል ስምምነት መሠረት የቅድሚያ ክፍያውን የከፈለው በ2ኛው ተከላሽ የቅድመ ክፍያ ዋስትና በመሆኑና 2ኛው ተከላሽ ገንዘቡን ገቢ እንዲደርግልን በተደጋጋሚ ጊዜያት ብንጠይቅም 2ኛው ተከላሽ ያለምንም ምክንያት ገንዘቡን ገቢ ለማድረግ ፈቃደኛ ባለመሆኑ በቅድሚያ ክፍያ ዋስትና ሰነዱ መሰረት ለ1ኛው ተከላሽ የከፈለውን ብር 2,144,732.08 (ሁለት ሚሊዮን አንድ መቶ አርባ አራት ሺህ ሰባት መቶ ሰላሳ ሁለት ብር ከዜሮ ስምንት ሳንቲም)1ኛው ተከላሽ ከወሰደበት ጊዜ ጀምሮ ከሚታሰብ ህጋዊ ወለድ ጋር ጨምሮ እንዲከፍልን እንዲወሰንና ወጪና ኪሳራ የመጠየቅ መብታችን ይጠበቅልን በማለት ዳኝነት ጠይቀዋል።

በፍ/ሥ/ሥ/ሕግ ቁጥር 223 መሰረትም የሰውና የሰነድ ማስረጃ ዝርዝር ያቀረቡ ሲሆን የሰነድ ማስረጃዎችም፡-

1. በከላሽና በ1ኛው ተከላሽ መካከል የተደረገ የግንባታ ውል ስምምነት ከአማርኛ ትርጉም ጋር በድምሩ ሃያ አምስት /25/ ገፅ፤
2. ከክፍያ ላይ ለተቀነሰ የተጨማሪ እሴት ታክስ የተሰጠ ደረሰኝ፣ የቅድመ ክፍያ መልቀቂያ መርሃ ግብር ፣ የግንባታ ቦታ የርክክብ ሰነድ፣ የመጀመሪያ ቅድመ ክፍያ ዝርዝር፣ 1ኛው ተከላሽ ክፍያውን ፈርሞ የተቀበለበት ሰነድና ሌሎችም ልዩ ልዩ ሰነዶች ከአማርኛ ትርጉማቸው ጋር አስራ ስምንት /18/ ገፅ፤
3. 2ኛው ተከላሽ ለከላሽ የሰጠው የቅድመ ክፍያ ዋስትና ሰነድ ከአማርኛ ትርጉሙ ጋር ሶስት/3/ ገፅ፤
4. ግንቦት 7 ቀን 2009 ዓ.ም ከፌዴራል የሰነዶች ማረጋገጫ የተሰጠ የውክልና ማስረጃ አንድ /1/ ገፅ፤
5. በቁጥር 8434/ በ14/07/2010 ከአማካሪው ኩባንያ የተፃፈ ደብዳቤ አንድ /1/ ገፅ፤





ኢትዮጵያ ዲሞክራሲያዊ ዲሞክራሲያዊ ሪፐብሊክ
 የፌዴራል ከፍተኛ ፍርድ ቤት
 THE FEDERAL DEMOCRATIC REPUBLIC
 OF ETHIOPIA
 FEDERAL HIGH COURT

ቁጥር.....
 No.....
 ተን.....
 Date.....

ሕግ/ሕዝብ - Adhiv Abat

6. 2ኛው ተከላሽ በቅድመ ክፍያ ዋስትናው መሰረት ገንዘቡን ገቢ እንዲያደርጉና በፍ/ሥ/ሥ/ሕግ ቁጥር 1772 መሠረት ከላሽ በቁ.8.1/8426/2010 በ24/07/2010፣ በቁ.8.1/9837/2010 በቀን 06/09/2010 እና በቁ.8.1/11688/2010 በቀን 28/10/2010 የፃፉት ደብዳቤዎችና በቁ.2.10/1874/2010 በ01/12/2010 ዓ.ም የሰጠው ህጋዊ ማስጠንቀቂያ አራት /4/ገፅ፣ እና

7. 2ኛው ተከላሽ በቅድመ ክፍያ ዋስትና መሰረት ገንዘቡን ገቢ ለማድረግ ፍቃደኛ ያለመሆኑን የገለፅበት በቁ.ንኢ/ምተካኒ/1781/11 መስከረም 30 ቀን 2011 ዓ.ም የተፃፈ ደብዳቤ አንድ /1/ ገፅ በድምሩ ሃምሳ ሶስት /53/ ገፅ የፅሁፍ ማስረጃ አቅርቦል። ከመዝገቡም ጋር ተያይዞ ይገኛል።

ይህ የተከላሽ ክስ ከፍርድ ቤታችን መጥሪያ ጋር ለተከላሽ በአድራሻው ተልኮለት 2ኛ ተከላሽ መጥሪያ ደርሶት የካቲት 27 ቀን 2011 ዓ.ም በተጻፈ መከላከያ መልስ እና የመጀመሪያ ደረጃ የክስ መቃወሚያ ያቀረበ ሲሆን የ2ኛ ተከላሽ የዋስትና ውሉ ላይ ጉዳያቸውን ከፍርድ ቤት ውጪ የግልግል ዳኝነት ለመጨረስ የተስማሙ በመሆኑ ክሱ ተቋርጦል። 1ኛ ተከላሽ በአድራሻው ሊገኝ ባለመቻሉ ምክንያት ከላሽ የፍርድ ቤቱን መጥሪያና የክሱን ኮፒ ለፍርድ ቤቱ በቃለ መጋላ በመመለሱ ምክንያት ፍርድ ቤቱ በምትክ በመጥሪያ አደራረስ ስርዓት መጥሪያው በአዲስ ዘመን ጋዜጣ 78ኛ ዓመት ቁጥር 220 ገጽ 20 ሐሙስ ሚያዚያ 10 ቀን 2011 ዓ.ም በወጣው ጋዜጣ ጥሪ ተደርጎለትም 1ኛ ተከላሽ አልቀረም።

ክስ ሊሰማ በተቀጠረበት ሐምሌ 11 ቀን 2011 ዓ.ም ቢሆንም መክከሉን አውቆ ያልቀረበ በመሆኑ 1ኛ ተከላሽን እስመልክቶ ክሱ በፍ/ሰ/ሰ/ህ/ቁ 70(ሀ) እና 241 መሰረት ተሰምቷል። ከላሽ ክሱ በሚሰማበት በዚያው ቀን አንዳንድ በፍርድ ቤቱ እንዲብራሩ የተፈለጉ ጉዳዮች አብራርቷል። ከመዝገቡ ላይም ሰፍሮ ይገኛል።

የጉዳዩ አመጣጥ በዚህ ሲጠናቀቅ ፍርድ ቤቱም 1ኛ ተከላሽ በውል ስምምነቱ መሠረት ስራውን ለማከናወን የወሰደውን የቅድመ ክፍያ ብር ከተጨማሪ እሴት ታክስ ጋር ታስቦ ብር 2,466,441.88(ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር ከሰማንያ ስምንት ፋንቲም) ከወሰደበት ጊዜ ጀምሮ ከሚታሰብ ህጋዊ ወለድ ጋር ጨምሮ ሊከፍል ይገባል አይባልም የሚለውን ነጥብ በመያዝ መዝገቡን መርምሮታል።





የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ከፍተኛ ፍርድ ቤት
FEDERAL DEMOCRATIC REPUBLIC
OF ETHIOPIA
FEDERAL HIGH COURT

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No.....
ቀን..... 9.9
Date.....

አዲስ አበባ / Addis Ababa

እንደተመረመው በከላሽና በ1ኛ ተከላሽ መካከል ሚያዝያ 20 ቀን 2009 ዓ.ም የተደረጉ የግንባታ ውል ስምምነት መሰረት ከላሽ ለ1ኛ ተከላሽ የቅድመ ክፍያ ብር ከተጨማሪ አሴት ታክስ ጋር ታስቦ ብር 2,466,441.88 ሳንቲም ፈርሞ መቀበሉን የሚያሳይ ከክፍያ ላይ ለተተነሰ የተጨማሪ አሴት ታክስ የተሰጠ ደረሰኝ የቅድመ ክፍያ መልቀቂያ መርሃ ግብር የግንባታ ቦታ የርክክብ ሰነድ የመጀመሪያ ቅድመ ክፍያ ዝርዝር፣ 1ኛው ተከላሽ ክፍያውን ፈርሞ የተቀበለበት ሰነድና ሌሎችም ልዩ ልዩ ማስረጃዎች እንደሚያሳዩው 1ኛ ተከላሽ ከከላሽ ቅድመ ክፍያ ወስዶ ምንም ዓይነት ስራ አለመስራቱን ነው። ቅድመ ክፍያ ገንዘብ የሚሰጠው ደግሞ ተከላሽ ስራውን እንዲሰራበት ከከላሽ ለተከላሽ የሚሰጥ ብድር እንደማለት ነው። ተከላሽ ስራውን እየሰራ ለከላሽ የሚመልሰው ገንዘብ ሲሆን ምንም ሳይሰራ ይዞ መጥፋቱ በውል የተመለከተውን ግዴታ አለመወጣቱን ያሳያል። እንደሚታወቀው በህግ አግባብ የተደረጉ ውሎች በተዋዋይ ወገኖች መካከል ህግ ሲሆኑ ተዋዋይ ወገኖችም በገቡት የውል ስምምነት መሰረት በየበኩላቸው መፈጸም ያለባቸው ተግባራት የመፈጸም ግዴታ አለባቸው። እንደኛው ወገን በውሉ መሰረት መፈጸም ያለበት ተግባር ሲፈጸም እና ሌላኛው ወገን መፈጸም ያለበትን ተግባር ሳይፈጸም ከቀረ ይህ በውሉ መሰረት ግዴታውን የፈፀመው ወገን ውሉን መሰረት በማድረግ ሌላኛውን ወገን መፈጸም ያለበትን ተግባር እንዲፈጸምለት መጠየቅ ይችላል። ይህንም ክፍ/ስ/ስ/ህ/ቁ 1731(1)፣ 1733፣ 1757፣ 1771 ተመልክቷል። ከላሽ ሳይቱን በማስረከብ ስራው እንዲሰራ ቅድመ ክፍያ ገንዘብ ብር 2,466,441.88 ሳንቲም ክፍሉ በመክፈል ግዴታውን ተወጥቶ ሳለ ተከላሽ ሳይቱንና የቅድመ ክፍያ ገንዘብ ፈርሞ ተረክቦ ግንባታውን ሳይገነባ የከላሽን ገንዘብ ሳይመልስ መቅረቱ በውሉ የተመለከተው ግዴታ አለመወጣቱን በግልጽ የሚያሳይ ስለሆነ 1ኛ ተከላሽ ከከላሽ የወሰደውን ሙሉውን የቅድመ ክፍያ ከተጨማሪ አሴት ታክስ ጋር በድምሩ ብር 2,466,441.88 (ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር አሰማንያ ስምንት ሳንቲም) ከላሽ በመብቱ ለመገልገል ይህንን ክስ ካቀረበበት ክፍያ ተቀባይነት 06 ቀን 2011 ዓ.ም ጀምሮ ተከፍሎ እስከሚያልቅ ጊዜ ድረስ ከሚታሰብ ከ9% ህጋዊ ወለድ ጋር ለከላሽ እንዲከፍል ፍርድ ተሰጥቷል።



ትላንጽያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
የፌዴራል ኢኮኖሚ ፍርድ ቤት
THE FEDERAL DEMOCRATIC REPUBLIC
OF ETHIOPIA
FEDERAL HIGH COURT

ቁጥር.....
No.....
ቀን.....
Date.....
አዲስ አበባ Addis Abab

ውሳኔ

1/ 1ኛ ተከላሽ ከከላሽ የወሰደውን የቅድመ ክፍያ ከተጨማሪ እሴት ታክስ ጋር በድምሩ ብር 2,466,441.88(ሁለት ሚሊዮን አራት መቶ ስልሳ ስድስት ሺህ አራት መቶ አርባ አንድ ብር ከሰማንያ ስምንት ሳንቲም) ከላሽ በመብቱ ለመገልገል ይህንን ክስ ካቀረበበት ከየካቲት 06 ቀን 2011 ዓ.ም ጀምሮ ተከፍሎ እስከሚያልቅ ጊዜ ድረስ ከሚታሰብ ከ9% ህጋዊ ወለድ ጋር ለከላሽ እንዲከፍል ተወስኗል።

2/ ከላሽ የወጪና ኪሳራ ዝርዝር በተከላሽ ላይ በማቅረብ የወጪና ኪሳራ መጠየቅ ይችላል።

ትዕዛዝ

- ይግባኝ ለሚጠይቅ መዝገቡ ተገልብጦ ይሰጣቸው።
- መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ ብለናል።



Annex Three (Standard Surety Bond Contracts of three Ethiopian Insurance Companies)



የኢትዮጵያ መድን ድርጅት

ETHIOPIAN INSURANCE CORPORATION

P.O.BOX 2545

Addis Ababa

☎ 51 24 00, 51 90 77
Fax No. 517499

E-mail: eic.md@telecom.net.et
Telex 21120

PERFORMANCE BOND(Extension Period)

BOND NO. 501321502004511 AMOUNT 61,777,175.40

KNOW ALL MEN BY THESE PRESENT that M/S Yefeng Construction(hereinafter called the "CONTRACTOR") and M/Ethiopian Insurance Corporation Western Addis District (hereinafter called the "SURETY")are held and firmly bound unto M/S Ethiopian Airlines (hereinafter called the "EMPLOYER") in the full and just sum of Birr.61,777,175.40for the payment of which sum well and truly to be made, the CONTRACTOR binds itself, its successors and assigns and the SURETY binds itself, its successor and assigns jointly and severally firmly by these presents.

WHEREAS THE CONTRACTOR has entered into a certain CONTRACT in writing with the EMPLOYER dated September 02nd, 2009related to the Construction of 2502 house units & Infrastructure For Ethiopian Airlines, on behalf of its Employees which contract with all its covenants and conditions, except those conditions which render this BOND in any way unconditional, is hereby made a part of this BOND to all intents and purposes as though the CONTRACT had been incorporated herein, including any duly authorized modifications of the said CONTRACT that may be made hereafter.

NOW THEREFORE, the conditions of the foregoing obligations are such that if the CONTRACTOR shall well and truly and faithfully comply with all terms, covenants and conditions of the said ADVANCE PAYMENT, on its part to be kept and performed according to the ADVANCE PAYMENT AGREEMENT or if in default by the CONTRACTOR, the SURETY shall satisfy and discharge the damage sustained by the EMPLOYER thereby up Birr 61,777,175.40 then this obligation shall be null and void otherwise it shall remain in force virtue for a period of effective from October 18th,2013 To October 17th,2015.

THIS BOND is executed by the SURETY upon the following express conditions which shall be conditions precedent to the right of the EMPLOYER to recover hereunder.

PROVIDED ALWAYS THAT:

1. Upon the discovery by the EMPLOYER or by the EMPLOYER'S agent or representative, of any act or omission that shall or might involve a loss hereunder, the EMPLOYER shall give immediate written notice hereof with the fullest information obtainable at the time to the SURETY at its Head office or Branch Office concerned.

2. If the CONTRACTOR shall fail to comply with the provisions of the CONTRACT to such an extent that the CONTRACT shall be forfeited, the SURETY shall have the right and opportunity to assume the remainder of the CONTRACT and at its option, to perform or subcontract the same.
3. In the event of any breach of the provisions of the CONTRACT, the SURETY shall be subrogated to all the rights and properties of the CONTRACTOR arising out of the CONTRACT. All deferred payments and any and all monies and properties, that are then, or that may thereafter, become due to the CONTRACTOR under or by virtue of the contract shall be credited upon any claim that the EMPLOYER may make upon the SURETY.
4. Legal proceedings for recovery hereunder may not be brought unless begun within twelve months from the time of the discovery of the act or omission of the CONTRACTOR on account of which claim is made; but if the SURETY shall assume the performance of the contract the period within which legal Proceedings for recovery hereunder may be brought shall be deemed to be extended twelve months beyond the date of failure of the SURETY to perform the said contract.
5. The SURETY shall not be liable for any damage resulting from Strikes, or labour difficulties, or from Mobs, Riots, Fire, the Elements, or Acts of God or for the repair or reconstruction of any work or material damaged or destroyed by any such causes, nor for damages for injury to persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.
6. No change shall be made in the plans and specifications forming part of the contract that shall increase the amount to be paid to the CONTRACTOR by more than 5% unless the SURETY's consent thereto shall be secured in writing.
7. With the exception of the instances where differences may not be submitted to arbitration according to Article 315 (2) of the Code of Civil Procedure, all differences arising out of this Bond Guarantee shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been requested in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and making of an award shall be a condition precedent to any right or action.

IN WITNESS WHEREOF the CONTRACTOR and the SURETY have duly executed this Bond, this day of October 20th, 2013.

THE CONTRACTOR



 (seal)
 Witnessed by

 1. _____
 2. _____

THE SURETY



 (seal)
 Signature



ETHIOPIAN INSURANCE CORPORATION

ዋና መ/ሥራያ ቤት HEAD OFFICE

P.O.BOX 2545 አዲስ አበባ

ADDIS ABABA

TELEPHONE 15 50 55 PBX 5 LINES TELE X 21120

ADVANCE PAYMENT BOND

APB NO. 100001315535

IN THE SUM OF BIRR 7,421,339.98

KNOW ALL MEN BY THESE PRESENTS THAT M/S Ethiopian Construction Works Corporation (ECWC) Addis Ababa (hereinafter called the "Contractor") and ETHIOPIAN INSURANCE CORPORATION, SOUTHERN ADDIS DISTRICT , P.O.BOX 1167 A.A Ethiopia (hereinafter called the "SURETY") are held and firmly bound unto M/S Ethiopian Road Authority. hereinafter called the "Employer ") in the full and just sum of Birr 7,421,339.98 (*Seven Million Four Hundred Twenty One Thousand Three Hundred Thirty Nine & Cents 98/100 Only*) for the payment of which sum well and truly to be made, the CONTRACTOR binds itself ,its successors and assigns and the SURETY binds itself, its successors and assigns jointly and severally firmly by these presents

WHEREAS THE CONTRACT has entered in to a certain CONTRACT in writing with the EMPLOYER dated 09-05-2019 relating to Construction Works Of Yabello Town Bypass Road Project. for which and only purpose the EMPLOYER has agreed to pay to the CONTRACTOR a sum of Birr 7,421,339.98 (Seven Million Four Hundred Twenty One Thousand Three Hundred Thirty Nine & Cents 98/100 Only) for the payment of which sum well and upon presentation of an ADVANCE PAYMENT BOND for the same amount which agreement with all its covenants and conditions is hereby made a part of this BOND to all intents and purposes as though the ADVANCE PAYMENT AGREEMENT had been incorporated herein.

AND WHEREAS the validity of this Bond is for 367 days from 17-12-2019. NOW THEREFORE, the conditions of the foregoing obligations are such that if the CONTRACTOR shall well and truly and faithfully comply with all terms, covenants and conditions of the said ADVANCE PAYMENT on its part to be kept and performed according to the ADVANCE PAYMENT AGREEMENT or if in default by the CONTRACTOR the SURETY shall satisfy and discharge the demand by the CONTRACTOR thereby up to the sum of Birr 7,421,339.98 (Seven Million Four Hundred Twenty One Thousand Three Hundred Thirty Nine & Cents 98/100 Only) then this obligation shall be null and void otherwise it shall remain in force and virtue. THIS BOND is executed by the SURETY upon the following express conditions which shall be conditions precedent to the right of the EMPLOYER hereunder.



A



Q

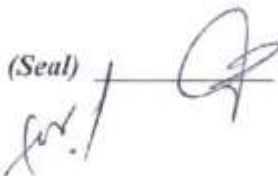
PROVIDED ALWAYS THAT:

11. *This original Bond shall be returned to the Surety after the expiry date. Where no claim hereunder is received by the Surety from the "EMPLOYER" on or before the expiry date, this Bond will automatically become null and void irrespective of its being returned to the Surety or not.*
12. *Upon the discovery by the EMPLOYER or by the EMPLOYER agent or representative, of any act or omission that shall or might involve a loss hereunder, the EMPLOYER shall give immediate written notice hereof with the fullest information obtainable at the time to the SURETY at its Head Office.*
13. *In the event of any breach of the provisions of the contract, the SURETY shall be subrogated to all the rights and properties of the CONTRACTOR arising out of the CONTRACT. All deferred payments and any and all monies and properties, that are then, or that may thereafter, become due to the CONTRACT under or by virtue of the contract shall be credited upon any claim that the EMPLOYER may make upon the SURETY.*
14. *The Surety shall not be liable under this Bond for any occurrence whether Directly or indirectly caused by or arising out of*
 - ❖ *War, invasion, act of foreign enemy, hostilities of war like operations (whether war be declared or not.), civil war.*
 - ❖ *Mutiny, civil commotion, popular rising, military rising, insurrection, rebellion, revolution, military of usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege or any acts of terrorism.*
 - ❖ *Earthquake, flood or other Acts of God*
15. *All differences arising out of this Bond shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been requested in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and making of an award shall be a conditions precedent to any right or action.*

IN WITNESS WHEREOF the CONTRACTOR and the SURETY have duly executed this Bond, this day of 20th December, 2019

THE CONTRACTOR

(Seal)



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THE SURETY





አብረት ኢንሹራንስ አማ

THE UNITED INSURANCE COMPANY SC

*Al Paolo Building, Debre Zeit Road
Tel. 65 56 56, Fax. 65 32 58, P.O.Box 1156, Addis Ababa, Ethiopia*

PERFORMANCE BOND NO.: PB

Account No.:

In the Sum of E Br

KNOW ALL MEN BY THESE PRESENT that

(hereinafter called the "SUPPLIER") and

THE UNITED INSURANCE COMPANY SC of P.O.Box 1156, Addis Ababa, Ethiopia, (hereinafter called the "SURETY") are held and firmly bound unto

M/S TENDAHO AGRICULTURAL DEVELOPMENT S.C

(hereinafter called the "BUYER") in the full and just sum of E Br _____ for the payment of which sum well and truly to be made, the SUPPLIER binds itself, its successors and assigns and the SURETY binds itself, its successors and assigns jointly and severally firmly by these presents.

WHEREAS THE SUPPLIER has entered into a certain CONTRACT with the BUYER dated _____ relating to _____

which Contract with all its covenants and conditions is hereby made a part of this BOND to all intents and purposes as though the CONTRACT had been incorporated herein, including any duly authorized modifications of the said CONTRACT that may be made hereafter.

NOW THEREFORE, the conditions of the foregoing obligations are such that if the SUPPLIER shall well and truly and faithfully comply with all terms, covenants and conditions of the said CONTRACT, on its part to be kept and performed according to the tender of the said CONTRACT or if in default by the SUPPLIER the SURETY shall satisfy and discharge the damage sustained by the BUYER thereby up to E Br _____ then this obligation shall be null and void otherwise it shall remain in force and virtue for

THIS BOND is executed by the SURETY upon the following express conditions, which shall be conditions precedent to the right of the BUYER to recover hereunder.

PROVIDED ALWAYS THAT:

1. Upon the discovery by the BUYER or by the BUYER'S agent or representative, of any act or omission that shall or might involve a loss hereunder, the BUYER shall give immediate written notice hereof with the fullest information obtainable at the time to the SURETY at its Head Office.
2. If the SUPPLIER shall fail to comply with the provisions of the CONTRACT to such an extent, that the CONTRACT shall be forfeited, the SURETY shall have the right and opportunity to assume the remainder of the CONTRACT and at its option, to perform or subcontract the same.

3. In the event of any breach of the provisions of the CONTRACT, the SURETY shall be subrogated to all the rights and properties of the SUPPLIER arising out of the CONTRACT. All deferred payments and any and all monies and properties, that are then, or that may thereafter, become due to the SUPPLIER under or by virtue of the contract shall be credited upon any claim that the BUYER may make upon the SURETY.
4. Legal proceedings for recovery hereunder may not be brought unless begun within twelve months from the time of the discovery of the act or omission of the SUPPLIER on account of which claim is made; but if the SURETY shall assume the performance of the contract the period within which legal proceedings for recovery hereunder may be brought shall be deemed to be extended twelve months beyond the date of failure of the SURETY to perform the said contract.
5. The SURETY shall not be liable for any damage resulting from Strikes, or labour difficulties, or from Mobs, Riots, Fire, the Elements, or Acts of God or for the repair or reconstruction of any work or material damaged or destroyed by any such causes, nor for damages for injury to persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.
6. No change shall be made in the plans and specifications forming part of the contract that shall increase the amount to be paid to the SUPPLIER by more than 5% unless the SURETY's consent thereto shall be secured in writing.
7. With the exception of the instances where differences may not be submitted to arbitration according to Article 315 (2) of the Code of Civil Procedure, all differences arising out of this Bond Guarantee shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been requested in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and making of an award shall be a condition precedent to any right or action.

IN WITNESS WHEREOF the SUPPLIER and the SURETY have duly executed this Bond, day of

THE SUPPLIER

THE SURETY

(seal)

(seal)



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LION INSURANCE COMPANY (S.C.)

At
Den

☎ 251-11-618 70 00/618 88 00

Fax: 251-11-663 29 40

✉ 26281/1000

E-mail: lioninsurance@ethionet.et

Website: <http://www.anbessainsurance.com>

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS that the CONTRACTOR named in the Schedule hereto and THE LION INSURANCE COMPANY (S.C.) of P.O.Box 26281/1000, Addis Ababa, Ethiopia (hereinafter called the "SURETY") are held and firmly bound unto the EMPLOYER named in the Schedule hereto in the full and just sum of the Bond Amount stated in the Schedule hereto for the payment of which sum well and truly to be made, the CONTRACTOR binds itself, its successors and assigns and the SURETY binds itself, its successors and assigns jointly and severally firmly by these presents.

WHEREAS THE CONTRACTOR has entered into a certain CONTRACT described in the Schedule hereto in writing with the EMPLOYER, which CONTRACT with all its covenants and conditions, except those covenants and conditions which render this Bond in any way unconditional, is hereby made a part of this BOND to all intents and purposes as though the CONTRACT had been incorporated herein, including any duly authorized modifications of the said CONTRACT that may be made hereafter.

NOW THEREFORE, the conditions of the foregoing obligations are such that if the CONTRACTOR shall well and truly and faithfully comply with all terms, covenants and conditions of the said CONTRACT, on its part to be kept and performed according to the tender of the said CONTRACT or if in default by the CONTRACTOR, the SURETY shall satisfy and discharge the damage sustained by the EMPLOYER thereby up to the sum of money equal to the Bond Amount then this obligation shall be null and void otherwise it shall remain in force and virtue.

THIS BOND, which shall remain valid for the period specified in the Schedule hereto, is executed by the SURETY upon the following express conditions, which shall be conditions precedent to the right of the EMPLOYER to recover hereunder.

PROVIDED ALWAYS THAT:

1. Upon the discovery by the EMPLOYER or by the EMPLOYER'S agent or representative, of any act or omission that shall or might involve a loss hereunder, the EMPLOYER shall give immediate written notice hereof with the fullest information obtainable at the time to the SURETY at its Head Office or Branch Office concerned.
2. If the CONTRACTOR shall fail to comply with the provisions of the CONTRACT to such an extent that the CONTRACT shall be forfeited, the SURETY shall have the right and opportunity to assume the remainder of the CONTRACT and at its option, to perform or subcontract the same.
3. In the event of any breach of the provisions of the CONTRACT, the SURETY shall be subrogated to all the rights and properties of the CONTRACTOR arising out of the CONTRACT. All deferred payments and any and all monies and properties, that are then, or that may thereafter, become due to the CONTRACTOR under or by virtue of the CONTRACT shall be credited upon any claim that the EMPLOYER may make upon the SURETY.
4. Legal proceedings for recovery hereunder may not be brought unless begun within twelve months from the time of the discovery of the act or omission of the CONTRACTOR on account of which claim is made; but if the SURETY shall assume the performance of the CONTRACT the period within which legal Proceedings for recovery hereunder may be brought shall be deemed to be extended twelve months beyond the date of failure of the SURETY to perform the said contract.
5. The SURETY shall not be liable for any damage resulting from Strikes, or labour difficulties or from Mobs, Riots, Fire, the Elements or Acts of God or for the repair or reconstruction of any work or material damaged or destroyed by any such causes, nor for damages for injury to persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.
6. No change shall be made in the plans and specifications forming part of the CONTRACT that shall increase the amount to be paid to the CONTRACTOR by more than 5% unless the SURETY'S consent thereto shall be secured in writing.
7. With the exception of the instances where differences may not be submitted to arbitration according to article 315 (2) of the Code of Civil Procedure, all differences in amount arising out of this Bond Guarantee shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or, if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been requested in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an award shall be a condition precedent to any right of action.

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FOR FULLER DETAILS OF THE CONDITIONS OF THE BOND...



THE SCHEDULE

BOND NUMBER	07/BOPB/02571/14
BOND AMOUNT	Birr 2,969,564.25 (Birr Two Million Nine Hundred Sixty Nine Thousand Five Hundred Sixty Four & 25/100 Cents Only)
CONTRACTOR	M/S Sesk Construction Plc Address: - <u>Addis Ababa</u> , Tel: <u>0911-236549</u>
EMPLOYER	M/S Saving Houses Development Enterprise of Addis Ababa City Government
CONTRACT (Description)	For the construction work of two Blocks of saving housing
Date of CONTRACT Between EMPLOYER and CONTRACTOR	20 th May, 2014
Validity of the Bond (period)	For 720 <u>calendar days</u> effective from the date of Performance Bond.
Defect Liability Period	365 Calendar Days
Other Remarks (if any)	Performance Bond.

IN WITNESS WHEREOF the CONTRACTOR and the SURETY have duly executed this Bond, this 02th day of June 2014.

THE CONTRACTOR

(SIGNATURE AND SEAL)
SEAL)

THE SURETY

(SIGNATURE AND SEAL)

SIGNATURE






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ADVANCE PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS that the CONTRACTOR named in the Schedule hereto and THE LION INSURANCE COMPANY (S.C.) of P.O.Box 26281/1000, Addis Ababa, Ethiopia (hereinafter called the "SURETY") are held and firmly bound unto the EMPLOYER named in the Schedule hereto in the full and just sum of the Bond Amount stated in the Schedule hereto for the payment of which sum well and truly to be made, the CONTRACTOR binds itself, its successors and assigns and the SURETY binds itself, its successors and assigns jointly and severally firmly by these presents.

WHEREAS THE CONTRACTOR has entered into a certain CONTRACT described in the Schedule hereto in writing with the EMPLOYER for which and only purpose the EMPLOYER has agreed to pay to the CONTRACTOR a sum of money equal to the Bond Amount upon presentation of an ADVANCE PAYMENT BOND for the same amount which agreement with all its covenants and conditions, except those covenants and conditions which render this Bond in any way unconditional, is hereby made a part of this BOND to all intents and purposes as though the ADVANCE PAYMENT AGREEMENT had been incorporated herein.

NOW THEREFORE, the conditions of the foregoing obligations are such that if the CONTRACTOR shall well and truly and faithfully comply with all terms, covenants and conditions of the said ADVANCE PAYMENT, on its part to be kept and performed according to the ADVANCE PAYMENT AGREEMENT or if in default by the CONTRACTOR, the SURETY shall satisfy and discharge the demand by the EMPLOYER thereby up to the sum of money equal to the Bond Amount then this obligation shall be null and void otherwise it shall remain in force and virtue.

THIS BOND, which shall remain valid for the period specified in the Schedule hereto, is executed by the SURETY upon the following express conditions, which shall be conditions precedent to the right of the EMPLOYER to recover hereunder.

PROVIDED ALWAYS THAT:

1. This original Bond shall be returned to the SURETY after the expiry date. Where no claim hereunder is received by the SURETY from the EMPLOYER on or before the expiry date, this Bond will automatically become null and void irrespective of its being returned to the SURETY or not.
2. Upon the discovery by the EMPLOYER or by the EMPLOYER'S agent or representative, of any act or omission that shall or might involve a loss hereunder, the EMPLOYER shall give immediate written notice hereof with the fullest information obtainable at the time to the SURETY at its Head Office.
3. In the event of any breach of the provisions of the CONTRACT, the SURETY shall be subrogated to all the rights and properties of the CONTRACTOR arising out of the CONTRACT. All deferred payments and any and all monies and properties, that are then, or that may thereafter, become due to the CONTRACTOR under or by virtue of the CONTRACT shall be credited upon any claim that the EMPLOYER may make upon the SURETY.



THE SURETY shall not be liable under this Bond for any occurrence whether directly or indirectly caused by or arising out of:

- War, invasion, act of foreign enemy, hostilities or war like operations (whether war be declared or not), civil war
- Mutiny, civil commotion, popular rising, military rising, insurrection, rebellion, revolution, military or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege or any acts of terrorism.
- Earthquake, flood or other Acts of God.

5. All differences in amount arising out of this Bond shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been requested in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and making of an award shall be a condition precedent to any right or action.

Ato Kelle

THE SCHEDULE

BOND NUMBER	12/BOAP/0265/2012
BOND AMOUNT	846,179.72
CONTRACTOR *	Desalegn Zeleke
EMPLOYER	Dangela Town Administration Office.
CONTRACT (Description)	For the Construction of Bridge at Dangela town Amen wonze
Date of CONTRACT Between EMPLOYER and CONTRACTOR	03/07/2012
Validity of the Bond (period)	For 365 Calendar days effective from 03/07/2012
Other Remarks (if any)	



IN WITNESS WHEREOF the CONTRACTOR and the SURETY has duly executed this Bond, this 03rd day of July, 2012.

THE CONTRACTOR

THE SURETY



Handwritten signature of the surety over a horizontal line.



(SIGNATURE AND SEAL)

(SIGNATURE AND SEAL)

WITNESSED BY

SIGNATURE

1. Amarech Gebreab
2. Kahames Derie

Two horizontal lines with handwritten signatures above them, corresponding to the witnesses.

11950 20 119509A

