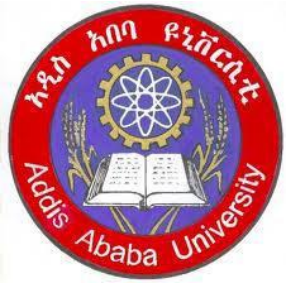

ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

ADDIS ABABA INSTITUTE OF TECHNOLOGY

SCHOOL OF CIVIL AND ENVIRONMENTAL ENGINEERING

INSURANCE COVERAGE DISPUTES IN THE ETHIOPIAN CONSTRUCTION INDUSTRY, A CASE STUDY

Abel Tezera

A Thesis Submitted to School of Graduate Studies of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Masters of Science in Construction Technology and Management

Advisor – Abebe Dinku, (Prof. Dr.-Ing)

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This is to certify that the thesis prepared by Abel Tezera, titled: *Insurance Coverage Disputes in the Ethiopian Construction Industry, A Case Study* and submitted in partial fulfillment of the requirements for the Degree of Master of Science in Construction Technology and Management complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

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Dedication

This study is dedicated to my son, Milkias Abel.

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Abstract

Risks associated with construction and the potential losses demand that insurance is an important aspect of construction work as a way of mitigating the risks. Currently, there is a growing body of interests in construction insurance, supporting interactions between the construction industry and the insurance industry. Internationally, the distinct types of insurance covers have increased the complexity of insurance, the contractual provisions and the nature of the claims made hence making it sensitive to disputes.

Although, dispute resolution is a core concern of insurance law, unlike any other financial service provider, insurers' obligations are depending on events-such as fires, thefts, health problems, and litigations-which are often difficult to specify fully. Yet aggrieved policy holders need compensation quickly while insurers have a natural object and capacity to delay litigation as well as claims resolution generally complicating the dispute. The problem even becomes worse in an insurance industry like Ethiopia which is defied by lack of awareness of the participating parties about construction insurance and less intention of parties to use less costly ADR schemes. Consequently, the study conducted herein aims at addressing the issue of construction insurance coverage disputes in Ethiopia. Before any other step is taken then, it is crucial to first identify the causes and contributing factors of the disputes, the mechanisms used to solve them and finally propose a reliable strategy to help minimize the disputes by avoiding the causes before they happen (as a way of proactive measure) and recommending a consistent framework that entails processes and strategies to reduce court litigations by initiating and implementing Alternate Dispute Resolution approaches for the disputes with an ultimate goal of protecting both the insurance and construction industry.

This study is conducted by analyzing fifteen practical court cases from the Federal Supreme Court (eleven cassation files and four appeal files) related to construction. To overcome the common downside of case study, which it involves smaller sample size and inadequate of persuasion, the result of the case study was checked by interviewing of the eight insurance companies in the cases to ensure the validity of the research. Intensive literature and document review was also conducted to have a basic understanding on insurance principles, types of construction insurances, legal foundations, claim management, dispute resolution

and international and local construction insurance practices as presented in their respective chapters and subchapters.

Therefore, it was found in this research that motor insurances are frequently leading to disputes in Ethiopia followed by performance bonds and marine insurances respectively. The first cause of the dispute for the insurance coverage disputes in construction identified in this research is conflict of laws in trying to settle a claim followed by failure to proof loss (both in amount and supporting documents). Then comes performance bond forfeiture claims followed by disagreement on whether a claim should be barred by limitation (period of limitation). It was implied from this research that the insurance companies' mind is set to 'protecting the businesses' and their enthusiasm to pay all genuine claims (if made) is questionable. Intra industry dispute resolution schemes which are practiced in different developed countries aren't available and they should be designed in our country too. It can be said that the use of Alternative Dispute Resolutions in construction insurance and guarantee disputes is often overlooked although there are some efforts.

Keywords: *Alternative Dispute Resolution, Claim Management, Dispute, Dispute Resolution, Insurance Coverage Disputes.*

Acronyms and Abbreviations

AACCSA	Addis Ababa Chamber of Commerce Arbitration Institute
ADR	Alternate Dispute Resolution
AIA	American Institute of Architects
ALOP	Advance Loss of Profit
CAR	Contractor's All Risk
DRB	Dispute Review Board
DSU	Delay in Start-Up Insurance
EACC	Ethiopian Arbitration and Conciliation Center
EAR	Erection All Risk
EIC	Ethiopian Insurance Corporation
ERA	Ethiopian Roads Authority
ESL	Ethiopian Shipping Lines
ESLSE	Ethiopian Shipping and Logistic Service Enterprise
ETB	Ethiopian Birr
EUR	Euro
FBI	Federal Bureau of Investigation
FIDIC	International Federation of Consulting Engineers
FOS	Financial Ombudsman Service
GCC	General Conditions of Contract
GERD	Grand Ethiopian Renaissance Dam
IAIS	International Association of Insurance Supervisors
ICSI	Institute of Company Secretaries of India
IIC	Imperial Insurance Company
ISD	Insurance Supervision Department
MDB	Multilateral Development Bank
MIDI	Machinery Inherent Defects Insurances
MoWUD	Ministry of Works and Urban Development
NBE	National Bank of Ethiopia
NICB	National Insurance Crime Bureau
OCIP	Owner Controlled Insurance Program

PII	Professional Indemnity Insurance
PPA	Public Procurement Agency
PRC	People Republic China
SCC	Special Conditions of Contract
S.Co	Share Company
SIB	Supervision of Insurance Business

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Chapter One

Introduction

This chapter discusses the Background, Motivation, Statement of the Problem, Objectives, Significance of the Research, Research Questions, Methods, Scope and Limitation and Organization of the Research.

1.1 Background of the Study

The multidisciplinary intricate interaction of design, construction, finance, law and insurance involves a wide range of risks, and one of the ultimate ways of dealing with risk is through insurance. Insurance is a fundamental aspect of construction work. Today different types of insurance cover have increased the complexity of insurance, the contractual provisions and the nature of the claims made and hence making it sensitive to disputes.

According to Black (2009), a 'dispute' is a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. When insurance coverage becomes a cause of dispute, the dispute could be between the insurer and contractors, consultants, owners, and any third party who bought an insurance cover or it could also be between two insurance companies claiming subrogation rights over the other.

Abebe (2000) found that most of the construction firms in Ethiopia were making their business with no or without adequate insurance coverage. One of the reasons for the non-existence of the required insurance policy was lack of proper understanding on the importance of relevant insurance policies by construction firms and their clients, law makers, legal professionals and the society in general. Abebe also found that insurance companies were not efficient in responding to clients' claims. The lack of awareness about the relevant insurance policies (and exclusions) plus inefficient claim handling of the insurer contributed for a dispute to occur.

Similarly, a recent study by Tigist (2016) indicated that there was a huge awareness gap regarding construction insurance policies provisions and exceptions from both construction firms and insurers. Tigist also found claim management in most insurance companies to be bureaucratic, time consuming and tedious. Awareness gap regarding construction insurance

policy provisions and exceptions from both sides; disagreement between contractors and insurers in settling claims and admitting liability added to the knowledge gap of the insurance industry about the construction work were found to be the constraints hampering efficient claim responses by insurance companies to construction clients.

Although not inclusive of all insurance companies and all policy types, Mekdelawit (2014) in a study of motor insurance claim settlement in Tsehay Insurance S.Co, found that clients were not satisfied with claim service which the company offered. The major factor that causes dispute according to Mekdelawit was misunderstanding of the policy wording; the clients' failure to fill the proposal form by reading policy terms conditions, which results in a dispute at a time of claim which has an implication for the delay of claim settlement. Further the majority of the underwriters did not give a brief description of policy terms and conditions which became a cause of dispute later as the policy holders filled the proposal with lack of information.

Abebe (2000) and Tigist (2016) studied the general construction insurance practices including claim as one of them. Mekdelawit (2014) on the other hand focused on claim settlement in motor insurance of one insurer. It can be deduced referring these studies that Ethiopian insurance industry is characterized by poor claim management, poor interaction of design, construction, finance, law and insurance, and lack of awareness of the participating parties making it sensitive to potential dispute which are very difficult and time taking to solve. Insurance coverage disputes and mechanisms used to solve them in Ethiopia should be studied in detail as an extension to the above studies. This study tries to explore the causes of construction insurance coverage disputes, the mechanisms used to solve them, the policy types frequently leading to disputes and finally recommend on what should be done minimizing the occurrence of the disputes comparing to international practices of the same.

1.2 Motivation

What motivated the author of this study under the title "insurance coverage disputes in the Ethiopian construction industry" was a news posted on Fortune Newspaper (Fasika Tadesse, Published on May 25, 2014 , Volume 15, No 734), that Ethiopian Roads Authority was back in court over United Insurance (Advance payment and Performance guarantor of Tibebe Construction for a road project ETB 546.9 million worth) claim and the case was adjourned

twice as the two parties attempted to find an amicable conclusion themselves. But after seven months of negotiation towards an amicable settlement of the dispute between them, the Ethiopian Roads Authority (ERA) and United Insurance Company took the battle back to the court according to the news. Then it came to the author's mind that similar other cases might have been hampering the link between construction and insurance motivating him for this study.

1.3 Statement of the Problem

Disputes are inevitable in any business. Worldwide insurance disputes are influenced by superiority in power of the insurer, the unequal position of the parties, the weaker position of the insured and/or damaged party, the bigger financial source of the insurers to start legal disputes and the material interest of the insurer to delay the payment. Solving disputes using formal dispute resolution mechanism, such as litigation isn't recommended. Especially in Ethiopia, court litigation has many problems that force the business society to spend much resource in the process. Due to the accumulation of cases and lack of expertise, dispute settlement through courts often takes many years. Needless to say, in cases where the dispute involves technical matters, as in the construction industry, insurance and banking transactions, dispute settlement can take decades. Alternative systematic, less costly, less time consuming and more certain approaches to resolving disputes provide greater options for commercial dispute resolution, an alternative mechanism to the courts. Hence to minimize the adverse impact of the disputes on the infant insurance sector, it is important to study insurance coverage disputes in the Ethiopian construction industry in greater detail.

1.4 Objectives of the Research

The general objective of this research work is to study about the methods used in resolving insurance coverage disputes in the Ethiopian construction industry in detail. In trying to achieve the above general objective, the causes of insurance coverage disputes, the types of insurances frequently leading to disputes, the role and use of the insurance company's internal claim management and the use of ADR in resolving the disputes will be answered as specific objectives. Finally, practical recommendations to be used to reduce the insurance coverage disputes in construction are to be developed.

1.5 Significance of the Research

This study helps contractors, consultants, owners and other construction parties by showing them the areas where insurance disputes are likely to occur and to use either a preventive approach to combat them or devise a strategy to win when they occur. It also helps insurers to propose a corporate strategy aimed at satisfying their customers by handling claims efficiently and closing the gaps in their policies which lead to claims (ambiguity, policy wording etc.).

As this study is a compilation of different construction insurance dispute cases, it enables legal entities and government authorities in identifying the gaps and weaknesses of the laws relevant in solving the disputes. This research is also important for practicing construction engineering professionals who want to specialize in construction law as in every case discussed; there are controversial issues motivating for a further research.

This study in general helps to create a peaceful construction environment where all parties know their responsibilities and minimize the occurrence of disputes. It can be said that this study is an attempt of creating an understanding on the current situation of insurance coverage disputes; causes, resolution, legal background and the position they stand from the international practice.

1.6 Research Questions

This research mainly answers the following fundamental questions.

a. What are the types of insurance covers or guarantees frequently leading to disputes?
b. What are the causes of construction insurance and guarantee related disputes?
c. What methods are used to solve the disputes? (Internal (within the insurance company) or external (ADR or litigation))?
d. What should be done to increase the use of ADR in insurance disputes?
e. What needs to be done to minimize construction insurance related disputes?
f. What practical lessons can be learnt from the cases under study?

1.7 Research Methodology

The methodology to be implemented in this research will be literature review followed by case study, cassation decision document review and interview with the legal and claim

department of selected insurance companies. Then the qualitative data will carefully be analyzed to reach on findings, conclusions and recommendations.

1.8 Scope and Limitations of the Study

The followings are the scope and limitation of the study.

i. This study will explore insurance coverage disputes in Ethiopia and how they are resolved. Although the sample for data collection will not be randomly selected, all knowledge resources gathered in this study may not be viable to the full sector. The capability to draw conclusions regarding the full demographics of the Ethiopian construction industry will require intricately drafted requirements. However, every effort will be made to display the correct state of insurance coverage disputes.
ii. Limitation of the data collection process. Since information obtained during the interview largely depended on the interviewee and what he or she was willing to share, the nature of their information was limited to his or her own perspective and experiences.
iii. Having conducted case study research in cases obtained only from Federal Supreme Court could be viewed as delimitation. Although a complete perspective could be gained by collecting data from each first instance courts, high courts and supreme courts at both state and federal levels, it would be time and money consuming.
iv. Disputes related to reinsurance are not subjects of this paper.

1.9 Thesis Organization

The study will be organized into five chapters. The first chapter is as discussed already. The second chapter will be literature review where literatures will be gone through to establish a robust theoretical background. The third chapter will discuss the methodology used in the study; the approach, data collection strategies and how the data needs to be analyzed. The fourth chapter will be data presentation, discussion and analysis, where the new data obtained will be interpreted. The last and final chapter will be conclusion and recommendation.

Chapter Two

Literature Review

This chapter discusses about insurance, insurance origin and types, functions of insurance, insurance contracts, parties in insurance business (market players), gaps and overlaps. It also discusses insurance principles, insurance policies applicable in construction, insurance disputes and dispute resolution. Further, insurance practice of different countries like USA, UK, China and South Africa will be discussed. Finally, insurance practice of Ethiopia (including construction insurance) will be discussed and gaps from the international practice will be identified.

2.1 General

Under this section, a thorough discussion of insurance; classes of insurance, insurance origin and current status, insurance market players, uses, roles and functions of insurance, insurance documentation, insurance contract interpretation, differences between insurance, guarantee and securities, overlaps and gaps, construction insurance provisions in FIDIC condition of contract and insurance regulation.

2.1.1 Insurance and the Different Classes of Insurance

According to Black's Law Dictionary (2009), insurance is a contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage or liability arising from the occurrence of some specified contingency.

There are three main insurance classes in the United States. These are life insurance, fire and causality insurance and marine and inland marine insurance (Jhon F. Dobby, 1996, as cited on Berihun, 2017). Some also classify insurance as life/ health and non-life (general) insurances. There are also ways of classifying as life/ health and property/ casualty insurance (ICSI, 2014). Classifying insurance as general insurance and life insurance has got wide acceptance including Ethiopia. General insurance is basically an insurance policy that protects against losses and damages other than those covered by life insurance. In South Africa, insurance is classified as short term and long term. The insurance companies that transact life insurance business are referred to as long-term insurers and the companies that transact non-life (property) insurance are referred to as short-term insurers. The Commercial

Code of Ethiopia (Article 675 and 678) whereas, classifies insurances generally as; insurance of objects (better to be termed property insurance (Berihun, 2017)), insurance of liability for damage and insurance of persons.

In construction, there are two main categories of insurance. The first relates to damage occurring to property or the works themselves during construction and is referred to as "property" or "works" insurance. This category covers the property, contract work, materials, equipment and machinery connected with it. The second category is liability insurance dealing with claims by third parties for personal injury and property damage (Gould, N., 2003).

2.1.2 Insurance Origin and Current Status in the World

Historians believe insurance first developed in Sumer and Babylonia (in what is now Iraq) beginning in about 3000 B.C. The merchants and traders of these societies transferred and pooled their money to protect themselves from losses of cargo to thieves and pirates. In the 18th century B.C., Babylonian king Hammurabi developed a code of law, known as the Code of Hammurabi, which codified many specific rules governing the practices of early risk-sharing activities dictating that traders had to repay merchants who financed trading voyages unless thieves stole goods in transit, in which case debts would be cancelled (Microsoft Encarta, 2009; Bunni, 2003). Sea trade by ancient Chinese traders has also contributed for the development of insurance (Vaughan E.J., 1997, as cited on Berihun, 2017).

Many modern forms of insurance developed in England between the 16th to 18th centuries. As the series of wars in Europe and the Anglo-American conflict came to an end in 1815, insurance spread on a broader scale beyond Europe and the USA, which had imported the British invention almost from the start. Based on growing trade, and in the wake of emigration, the British system was gradually adopted in most white settler colonies in the Americas, Australia and New Zealand, India and in South Africa. India was an important driving board for the spread of insurance into the Far East. In Latin America, insurance was imported on a large scale by European immigrants. Across the African continent, especially in Sub-Saharan Africa, it was South Africa that took the lead. Dutch and British immigrants founded combined fire and life insurance companies already in the 1830s.

The first known life insurance policy was written in London during the late 1500s by groups called friendly societies. The first marine insurance company was Lloyd's of London in late 1680s which was started by Edward Lloyd in his coffee house. The development of this coffee house is widely known and is probably the most important insurance institution in the world. Currently, however, Lloyds only accounts for around one third of British insurance business. The corporation does not in fact undertake insurance business, as this is done by its members. The underwriters are authorized to agree to insurance, set the premium and issue the insurance policy (Gould, N., 2003). Property insurance as we know it today can be traced to the Great Fire of London, which in 1666 devoured more than 13,000 houses. At the same time, the first insurance schemes for the underwriting of business ventures became available (Microsoft Encarta, 2009).

2.1.3 Insurance Market Players and Their Roles

Apart from insurers, the insured and third parties (who acquire rights under the insurance contract); the insurance market in most countries include the brokers, insurance agents, the underwriters, loss adjusters (loss assessors) and reinsurers.

The brokers arrange insurance on behalf of their clients and act as intermediaries. They receive commission and the commission paid is usually calculated as a percentage of the premium charged to the insured and, in general terms, it works out at around 10% to 25% covering expenses and profit. It is important; however, to note that the broker does not take part in the indemnity contract transacted and does not accept any of the risks which form the subject matter of insurance (Article 56 of the Commercial Code of Ethiopia; Directive No. SIB/31/2010).

The other insurance market players are insurance agents who represent an insurance company (Bunni, 2003; Directive No. SIB/30/2007). The basic difference between an insurance broker and an insurance agent is that while an insurance broker represents the client, an insurance agent represents the insurance company. As a corollary to the above, an insurance broker is licensed to recommend the products of any insurance company, whereas insurance agent at any point in time can sell the insurance products of only one insurance company with which he is attached (ICSI, 2014).

The underwriters are insurance companies and the societies who take on the risks whereas loss adjustors (loss assessors) negotiate and settle claims on behalf of the underwriters or the insured (Bunni, 2003; Directive No. SIB/12/1996). Reinsurers are companies who engage in reinsurance business. Reinsurance is similar in concept to insurance in that they are both tools that guard against large losses. Reinsurance is the protection taken out by a large insurance firm to ensure that they survive large losses (as a protection to avoid bankruptcy) whereas insurance is a protection for the individual (ICSI, 2014).

2.1.4 The Role, Benefits and Functions of Insurance and Insurance Company

Insurance is practically a necessity to business activity and enterprise. It exists to combat the adverse effects of risks in day-to-day activities. The main benefits of insurance according to Skipper (1997) are:-

- It provides financial stability to community
- It gives a peace of mind
- Creates a more loss prevention system

The core functions of an insurance company on the other hand are product development (which basically focuses on policies), customer servicing, marketing and promotion, insurance sales, underwriting, policy administration, claim management, reinsurance, actuarial support, accounting and investment and training and development. Among the listed functions, underwriting and claim management which are of special importance in this study will be broadly discussed below.

i. Underwriting

Underwriting refers to the process of evaluating a proposal that comes for insurance and a decision is to be taken as to the acceptance of proposal or otherwise if it is to be accepted, at what price and on what terms, conditions and coverage. The underwriting process follows a series of stages (as shown on *Figure 2.1*), at the end of which the status of a risk is decided. It is only after the risk has been weighed and all possible alternatives evaluated that the final underwriting is done. When a proposal for insurance is received, the underwriter has four possible courses of action: the first is accept the risk at standard rates or charge extra premium depending on the risk factor or impose special conditions (policy terms) or the last

reject the risk. When the underwriter accepts a proposal, he has to calculate the appropriate premium. Especially in situations like Ethiopia where studies found that rising costs of premium is hindering contractors from purchasing insurance policies, (Tigist, 2016), the premium calculation needs to be carried out carefully.

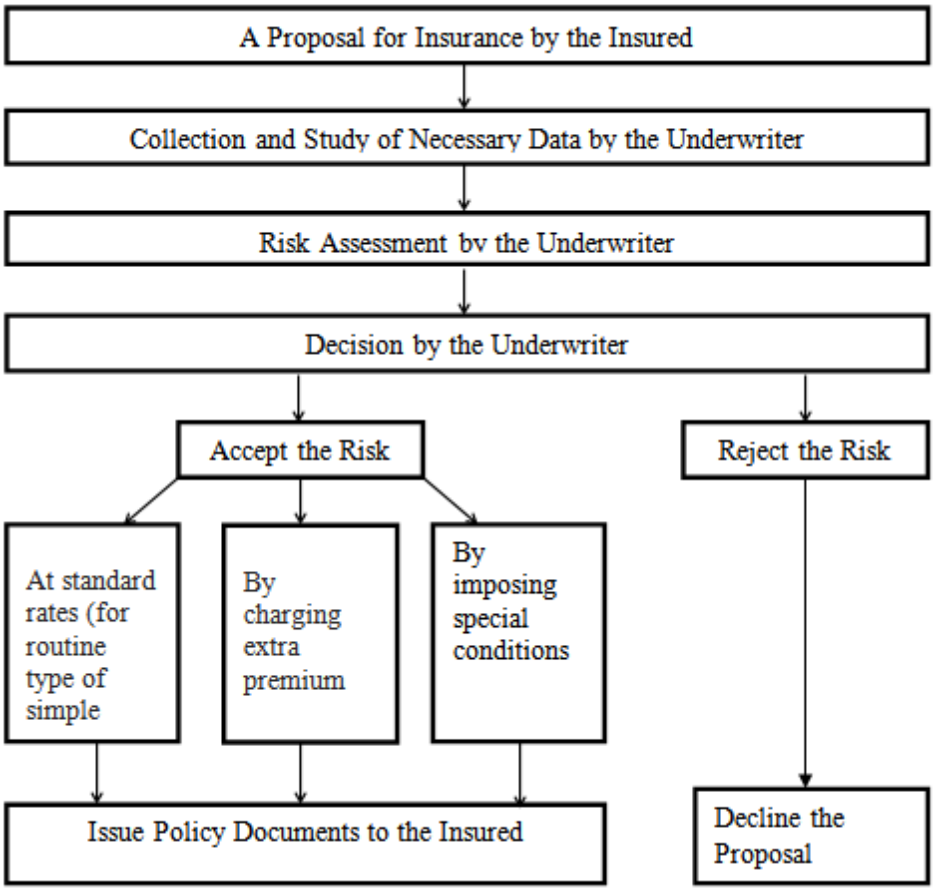

Figure 2.1: *Summary of the underwriting process*

ii. Claim Management

A typical claim settlement procedure in most forms of general insurance involves five steps (shown diagrammatically on *Figure 2.2*). The first step is intimation/submission of the claim by the insured. The second step is evaluation/registration of the claim (here the insurer briefly initiates process check; whether the policy has been issued by the insurer, whether the policy is in existence, whether correct premium has been received by the insurer and whether the peril causing loss/damage is an insured peril). The third step is appointment of surveyor/loss assessor/investigator responsible for assessing the actual loss suffered in

money terms and that which can be indemnified in terms of the contract, advice the insurer regarding compliance of the various terms conditions and warranties under the contract etc. The fourth step is settlement of claims where the insurer ensures the settlement of claims on the receipt of the final report from the surveyor, generally within the TAT (Turnaround Time) stipulated by various regulations and committed by the insurance company. The fifth final yet very important step is recovery. There are different modes of recovery. They are (ICSI, 2014);

- Excess/deductible – that portion of the claim which is to be borne by the insured is called an excess or deductible. It is an amount of each and every claim which is not covered by the policy.
- Subrogation – rights and remedies preferred against the third party.
- Contribution – occurs when the insured property is insured by more than one insurer - in such cases recovery would be made by the lead insurer from the coinsurer.
- Reinsurance – discussed under sub-section 2.1.3.
- Salvage – a form of recovery in any claim. In most property claims, including transit insurance claims, damaged property can be disposed off for either lower or scrap value, this is done to reduce the financial impact of claims.

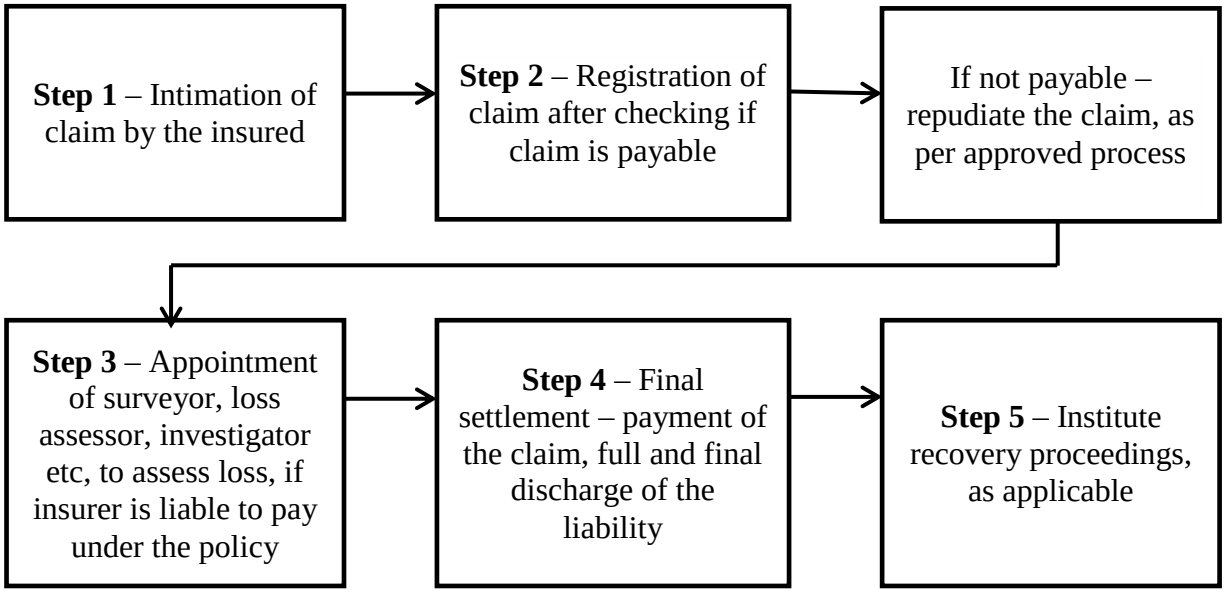

Figure 2.2: *General procedure for claim settlement*

(ICSI, 2014)

2.1.5 Insurance Documentation

The following documents form the basis of the whole insurance transaction.

A. Proposal Form

The 'Proposal Form' which is used in almost every type of insurance is essentially designed to provide the insurers with full details of the risks they are being asked to insure. The proposal form ends with the declaration that, to the best of the proposer's knowledge and belief, the answers given are true and complete. This declaration binds the information given by the proposer to the contract and forms the basis of the premium calculation. A quotation is usually given to the proposer setting out the premium required (Bunni, 2003). The proposal form is therefore the foundation of the insurance contract.

B. Insurance Policies

The second document is the insurance 'policy'. The insurance contract is evidenced by a policy. If and when the insurer accepts the proposal and the quotation of a premium is accepted by the proposer, a contract is made. An insurance policy is like any contract, a legal document and enforceable in a court (Bunni, 2003).

C. Certificates of Insurance

These are usually given in marine transit insurance under open policies and also for motor insurance. In motor insurance they are mandatory as it confirms that there is insurance cover extant for the vehicle plying on public roads. They are less detailed than a policy and not stamped, but essentially give the same information regarding insurance (ICSI, 2014).

D. Cover Note

These are documents that are issued immediately to prove that insurance cover is existing and valid for 60 days from the date of issue. Mostly used in motor insurance and transit insurance, particularly for import covers by sea. The cover note in marine insurance would be valid for duration of transit (ICSI, 2014).

E. Endorsements

Endorsements are used to vary the terms of an existing policy and are usually read in conjunction with a policy and form part of it. Generally endorsements are issued for such

alterations as; change in insurable interest, cancellation of insurance, change in the value at risk, change in the location or situation of risk, reduction or addition to the risk, change of the insured as when a transfer of interest or assignment of interest is made, correction to a typographical error in the policy already issued (ICSI, 2014; Bunni, 2003).

F. Renewal Notice

Insurance cover is applicable only to the duration of cover and is subject to renewal or endorsement. The duration of cover for insurance depends on the type of risk or condition. But generally except life insurance, other types of insurance are issued for a specified duration (Berihun, 2017). Almost all general insurance policies are for 1 year; specific voyage policies can be shorter for the transit duration only. Project polices can be longer than 1 year till the project is commissioned and operative. While it is not obligatory to issue renewal notices reminding insured that the policy is due for renewal, it is recommendatory as an excellent customer service initiative (ICSI, 2014). But if the insurer specified to give renewal notice on the policy agreement, and if an accident occurred thereto, there is no possibility that the insured will be unrestrained from responsibility to indemnify the loss.

G. Warranties

Warranty is a statement, by which the insured undertakes to do/not do a particular thing or fulfill a condition, or whereby he affirms or negates the existence of a particular state of facts which affect the incidence of a claim. It can either relate to facts existing at the time of the contract or relate to the future. It is an undertaking given by the insured either voluntarily or at the instance of the insurer about something that will determine the insurability of the risk (ICSI, 2014). For example, in a fire policy, a warranty may read "warranted that no combustible materials are stored in the warehouse".

H. Claim Form

The claim form asks for details of the insured, the property lost, damaged or destroyed, the party injured, and details of how the loss came about, as appropriate. The questions help to seek the information required to assess whether the circumstances of the loss fall within the policy cover, and if so, what the severity of the loss may be. The answers given on the claim form are checked against the information given at the proposal stage. In this way non-

disclosure or misrepresentation often comes to light, allowing the insurer to avoid liability if they so wish, provided the breach of utmost good faith is material to the loss (Wanner, 2011).

2.1.6 Insurance Contract Interpretation

The provisions of the insurance contract become ambiguous when the insurer and the insurance applicant, the insured or the beneficiary, have different interpretations of the policy. If a provision is found to be ambiguous, it should be interpreted in accordance with the following interpretation methods (Rogan (ed.), 2015).

i. Semantic interpretation which means interpreting the policy with common knowledge in accordance with the common sense of ordinary people. The interpretation can't deviate from the wording of the policies, and other methods of interpretation can be applied only when the outcome of semantic interpretation is still unclear. The semantic interpretation method is also the fundamental method.
ii. Systemic interpretation which refers to interpreting the provisions based on the entire contents of the contract, and taking into consideration the connection of each provision with the other provisions in the contract.
iii. Contract-aim-based interpretation which means interpreting the policy in accordance with the real intention of the parties to the insurance contract.
iv. Good faith interpretation which is based on utmost good faith principle, and will interpret the insurance principle by applying the waiver and estoppel rules. The good faith principle is an essential principle in the civil law system, and is similar to the utmost good faith doctrine in the common law system.
v. Special interpretation

   Under special interpretation, the contents of the schedule outweigh the policy clauses; the handwritten clauses outweigh the printed clauses; and a special exemption is that the contents of the application form outweigh the insurance policy and schedule even if the application form is formed earlier than the latter two parts of the insurance contract.
vi. Unfavorable interpretation

Where the insurer and applicant, insured or beneficiary have a dispute over a clause in an insurance contract concluded by using the standard clauses provided by the insurer, the clause shall be interpreted as commonly understood. If there are two or more possible interpretations of the clause, a court or arbitration institution shall interpret the clause in favour of the insured and beneficiary.

vii. Contra proferentum rule

Of particular importance in the insurance context is the rule that in the event of ambiguity the contract will be construed against the party who drafted it. This rule is referred to as the contra proferentum rule. The rule may, however, be applied only if all the other rules of interpretation have been applied and a real, as opposed to a simulated, ambiguity still exists. The contra proferentem rule is therefore a subordinate rule of interpretation (Niekerk, 2010).

2.1.7 Insurance, Surety Bond/ Guarantee Bond, Securities

Guarantee is a provision to answer for the payment of some debt, or the performance of some duty in the case of failure of some person who, in the first instance, is liable for such payment or performance. There are three parties in a contract of guarantee; the creditor, the principal debtor and the surety. The giver of a guarantee is called the surety or the "guarantor". The person to whom the guarantee is given is the “creditor”; while the person whose payment or performance is secured thereby is termed, "the principal debtor", or simply "the principal" (Merritt and Ricketts, 2001).

In a contract of guarantee, there are two contracts; the principal contract between the principal debtor and the creditor as well as the secondary contract between the creditor and the surety. The contract of the surety isn’t contract collateral to the contract of the principal debtor but is an independent contract. Sureties underwrite construction contract bonds carefully. They are interested in determining whether a contractor has the capital to meet all financial obligations, the equipment to handle the physical aspects of the particular undertaking, and the construction experience to fulfill the terms of the contract.

A bond is not an insurance policy that will pool the premiums from those contractors who receive bonds and will pay the losses out of that pool, as is done with insurance. Rather, the bond essentially is a credit guarantee by the bonding company, and, as for any credit

guarantee given in business, the bonding company expects to be reimbursed if this guarantee is enforced (Merritt and Ricketts, 2001). Therefore, before providing a bond to a contractor, the surety requires the contractor to sign an application for surety bond. This application, among other things, includes an agreement by the contractor to reimburse the surety for any losses that the surety may bear as a result of having written the bond. The contractor, in order to receive the bond, therefore is indemnifying the surety. Cost of the bond is added by the contractor to the construction contract price.

There are two major differences between insurance and surety bonds. One difference is that insurance is a direct agreement between the insurance provider and the policy holder, while for surety bond, the contractor obtains a guarantee from a third party i.e. a bank or an insurance company, which in return for a fee, agrees to undertake the financial responsibility for the performance of contractor's obligations. This third party will pay to the employer in case there is a contractor's default. A second difference is that insurance policy calculations are based on underwriting and possible loss, while a guarantee bond focuses strictly on performance or non-performance. In addition, insurance providers or policy holders can cancel policies with notice, while guarantee bonds often cannot be canceled (ICSI, 2014).

For security, a sum of money is deposited in the employer's account and upon satisfactory fulfillment of contractor's obligations; the sum will be repaid to the contractor.

2.1.8 Overlaps and Gaps

Overlaps or duplications occur generally when the same insurance cover was obtained by more than one of the parties involved in construction (see *Figure 2.3*). The effect of overlaps is essentially two-fold; the first effect is cost, and is reflected in higher premiums paid initially by the contractor, reimbursed in part or in total by the owner/employer and finally by the consumer or the community at large meaning premium paid more than once. The second effect is a complicated insurance arrangement, which is reflected in multiplicity of insurance policies, possibly of different wordings, and from different insurers, each with a promise that might never be kept and leading to a dispute between various insurers (Bunni, 2003).

Gaps on the other hand are more numerous than overlaps when the insurance cover is executed in accordance with the conventional method (see *Figure 2.3* again). They also have

a more adverse effect, sometimes a ruinous one (Bunni, 2003). The problem with a gap in the insurance cover is that there is no insurance in respect of the risks represented by that gap. However, the situation becomes grave where the gap is not known by the insured parties when the insurance cover is taken out or when it is in operation.

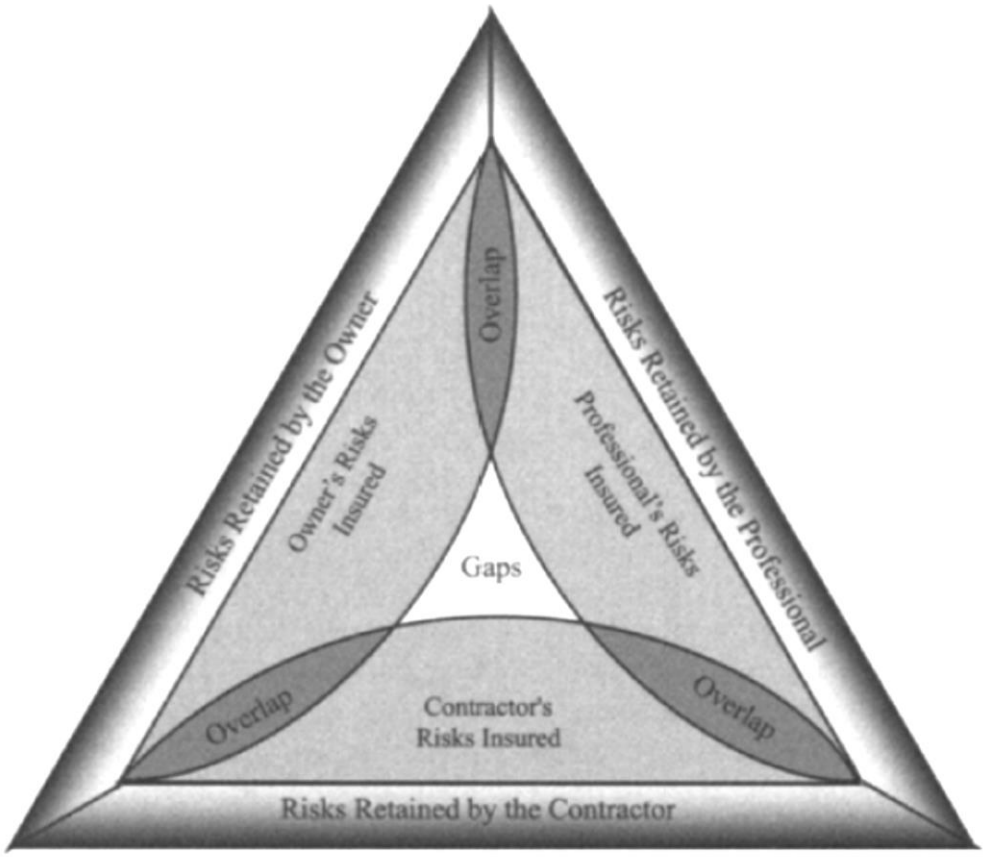

Figure 2.3: *Retained and insured risks*

(Bunni, 2003)

2.1.9 Construction Insurance Contract Provisions in FIDIC Form of Contract

The construction insurance provisions under Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonized Edition, March 2006 will be discussed in this study. This harmonized edition is derived from the New Red Book, 1999, and is used for large projects financed by banks.

Under clause 17 (Risks and Responsibilities), and sub clause 17.1 (Indemnities) of this harmonized edition, the contractor is expected to indemnify and hold harmless the employer,

the employer's personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of bodily injury, sickness, disease or death, of any person and damage to or loss of any property, real or personal (other than the works) whatsoever arising out of or in the course of or by reason of the contractor's design (if any), the execution and completion of the works and the remedying of any defects, unless attributable to any negligence, willful act or breach of the contract by the employer, the employer's personnel, or any of their respective agents, and by any of them.

When the loss is attributable to any negligence, willful act or breach of the contract by the employer, the employer's personnel, or any of their respective agents, the matters for which liability may be excluded from insurance cover, the employer shall indemnify and hold harmless the contractor, the contractor's personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses). The contractor is obliged to take full responsibility for the care of the works and a goods from the commencement date until the taking-over certificate is issued for the works, when responsibility for the care of the works shall pass to the employer (clause 17.2). Clause 17.3 identifies employer's risks to avoid controversies on who has to bear such responsibilities.

The types of insurance covers to be provided according to sub-clause 18.2, 18.3, and 18.4 are insurance for works and contractor's equipment (works, plant, materials and contractor's documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit), insurance against injury to persons and damage to property and insurance for contractor's personnel. When each premium is paid, the insuring party shall submit evidence of payment to the other party. Whenever evidence or policies are submitted, the insuring party shall also give notice to the Engineer. Each party is to comply with the conditions stipulated in each of the insurance policies. The insuring party shall keep the insurers informed of any relevant changes to the execution of the works and ensure that insurance is maintained accordingly.

2.1.10 Insurance Regulation and its Need

The focal point of financial regulation is the need to protect consumers and investors by ensuring that there is financial stability. The other relevant goal of regulation are; removal of barriers to entry, providing for recovery in the event of a market or institution failure,

promotion of competition, avoiding of negative externalities from the markets. Founded in 1994, the International Association of Insurance Supervisors (IAIS) is the only truly global body focusing its attention entirely and exclusively on the regulatory and supervisory issues of the insurance sector. It is a voluntary membership organisation of insurance supervisors and regulators from more than 200 jurisdictions in nearly 140 countries. In addition to its members, more than 130 observers representing international institutions, professional associations and insurance and reinsurance companies, as well as consultants and other professionals participate in IAIS activities. The main purpose of this association (IAIS) is to promote a globally consistent approach towards insurance regulation aimed at supporting the overall stability and growth of the financial sector of a country. Membership to IAIS has not been open to the Bank of Ethiopia because the insurance supervisor is not independent from the Central Bank (requirement by the IAIS).

2.2 Principles of Insurance

Apart from the essentials of a valid contract, insurance contracts are subject to additional principles. These principles are based on the basic principles of law and are applicable to all types of insurance contracts and they provide guidelines based upon which insurance agreements are undertaken.

A. Principle of Uberrimae Fidei (Utmost Good Faith)

According to this principle, the insurance contract must be signed by both parties (i.e., insurer and insured) in an absolute good faith or belief or trust. It requires each party to willingly disclose and surrender to the insurer all material facts which might influence the other party in deciding whether to enter into the contract. This is because the insured usually has the advantage of knowing most of the particulars relating to the subject-matter. The insurer's liability gets void (i.e. legally revoked or cancelled) if any facts, about the subject matter of insurance are either omitted, hidden, falsified or presented in a wrong manner by the insured. It appears that the only remedy for non-disclosure is avoidance of the entire contract. The principle of Uberrimae Fidei applies to all types of insurance contracts (Gould, N., 2003; ICSI, 2014). Although this principle puts more responsibility on the insured to disclose all material facts in an utmost good faith, insurers are also responsible in providing information about the basics of the policy in an absolute good faith.

B. Principle of Insurable Interest

The principle of insurable interest states that the person getting insured must have insurable interest in the object of insurance. A person has an insurable interest when the physical existence of the insured object gives him some gain but its non-existence will give him a loss. Ownership plays a very crucial role in evaluating insurable interest (Gould N., 2003; ICSI, 2014).

C. Principle of Indemnity

Indemnity means security, protection and compensation given against damage, loss or injury (ICSI, 2014). A fundamental principle of insurance is that the insured can only recover what it has lost. There are three exceptions. First, life policies (the value of human life cannot be measured in terms of money), second, value policies where the parties agree the value of the subject matter, and finally, where a surplus arises following a subrogated claim (Gould, N., 2003; ICSI, 2014).

Where the insurers accepted liability there are methods which insurers can provide indemnity. The option as to which method is to be employed is given to the insurers by the wording of the policy. The methods of indemnity are cash payments, repair, replacement and reinstatement. Giving the insured cash (cheque) for the amount payable under the policy is cash payment. Insurers make extensive use of repair as a method of providing indemnity in motor insurance where garages are authorized to carry out repair work on damaged vehicles. Replacement is usually used in total or constructive total loss cases. For example total loss of machinery insured under fire policy due to fire accident and constructive total loss occurs where the entire subject matter of insurance (e.g. entire consignment of goods in transit, are lost). In fire insurance the principle of indemnity can be modified in the case of building, machinery and other fixed assets where, subject to the sum insured representing the value of similar new property, it can be insured under 'reinstatement value' clause. In case of reinstatement value policy, the basis of loss settlement is the value of new property without taking any depreciation into account. This type of insurance enables the owner to replace his property without any financial strain on his own resources and is quite commonly taken by industrialists and building owners (ICSI, 2014; Gould N., 2003).

D. Principle of Subrogation

Subrogation means substituting one creditor for another. Principle of subrogation is an extension and another corollary of the principle of indemnity. It also applies to all contracts of indemnity. According to this principle, when the insured is compensated for the losses due to damage to his insured property, then the ownership right of such property shifts to the insurer. This principle is applicable only when the damaged property has any value after the event causing the damage. The insurer can benefit out of subrogation rights only to the extent of the amount he has paid to the insured as compensation (ICSI, 2014). It can be said that as 'assignment of right' is a right of the insured, while 'right of subrogation' is a right for the insurer (John F. Dobby, 1996 as cited on Berihun, 2017).

E. Principle of Contribution

An insured may have more than one insurance policy covering the same loss. An insured can recover the full amount of his loss from whichever insurer or insurers he chooses unless a term of the policy or policies in question provide for the contrary. In any event, an insured cannot recover more than his total loss regardless of the number of insurance policies because of the principle of indemnity (Gould, N., 2003).

F. Principle of Causa Proxima (Nearest Cause)

The loss of insured property can be caused by more than one cause in succession to another. The property may be insured against some causes and not against all causes. In such an instance, the proximate cause or nearest cause of loss is to be found out. If the proximate cause is the one which is insured against, the insurance company is bound to pay the compensation and vice versa (ICSI, 2014; Gould, N., 2003).

G. Principle of Loss Minimization

According to the principle of loss minimization, the insured must always try at his best level to minimize the loss of his insured property, in case of uncertain events like a fire outbreak or blast, etc. (ICSI, 2014). The insured must take all possible measures and necessary steps to control and reduce the losses in such a scenario.

H. Risk or Condition/Warranty

A condition is a provision of a contract which limits the rights provided by the contract. There are two basic types of conditions: conditions precedent and conditions subsequent (ICSI, 2014).

i. A **condition precedent** is any event or act that must take place or be performed before the contractual right will be granted. For instance, before an insured individual can collect medical benefits, he or she must become sick or injured. Further, before a beneficiary will be paid a death benefit, the insured must actually become deceased.
ii. A **condition subsequent** is an event or act that serves to cancel a contractual right. A suicide clause is an example of such a condition. Typical suicide clauses cancel the right of payment of the death benefit if the insured individual takes his or her own life within two years of a life insurance policy's effective date. Other example is if a person insured his residence and found using it for commerce, the insurer will not be responsible.

Here it is important to note that in the law of insurance the term "warranty" is more readily associated in general contract law with the term "condition".

2.3 Insurance Policies Applicable to Construction

Construction insurance means all contracts of indemnity within the activities of the construction industry where insurance is chosen as the intermediate through which liabilities are shifted. Construction insurances are used as a collective term to describe various types of policies to protect the construction stakeholders. It is required in the projects whole life cycle and must be obtained by all stakeholders when the need arise. With the development of construction management and civil engineering, construction insurance products and services have become increasingly specialized (Bunni, 2003). As a rule of thumb, losses arising out of war or a warlike action or rebellion and nuclear risks are generally excluded by all insurance because these losses are unpredictable and are often catastrophic in nature (ICSI, 2014).

The two figures below, *Figure 2.4* and *Figure 2.5* illustrate insurances which may be required on a construction project (from contractors, professional teams and owners) and for the period they are required (starting from design to maintenance).

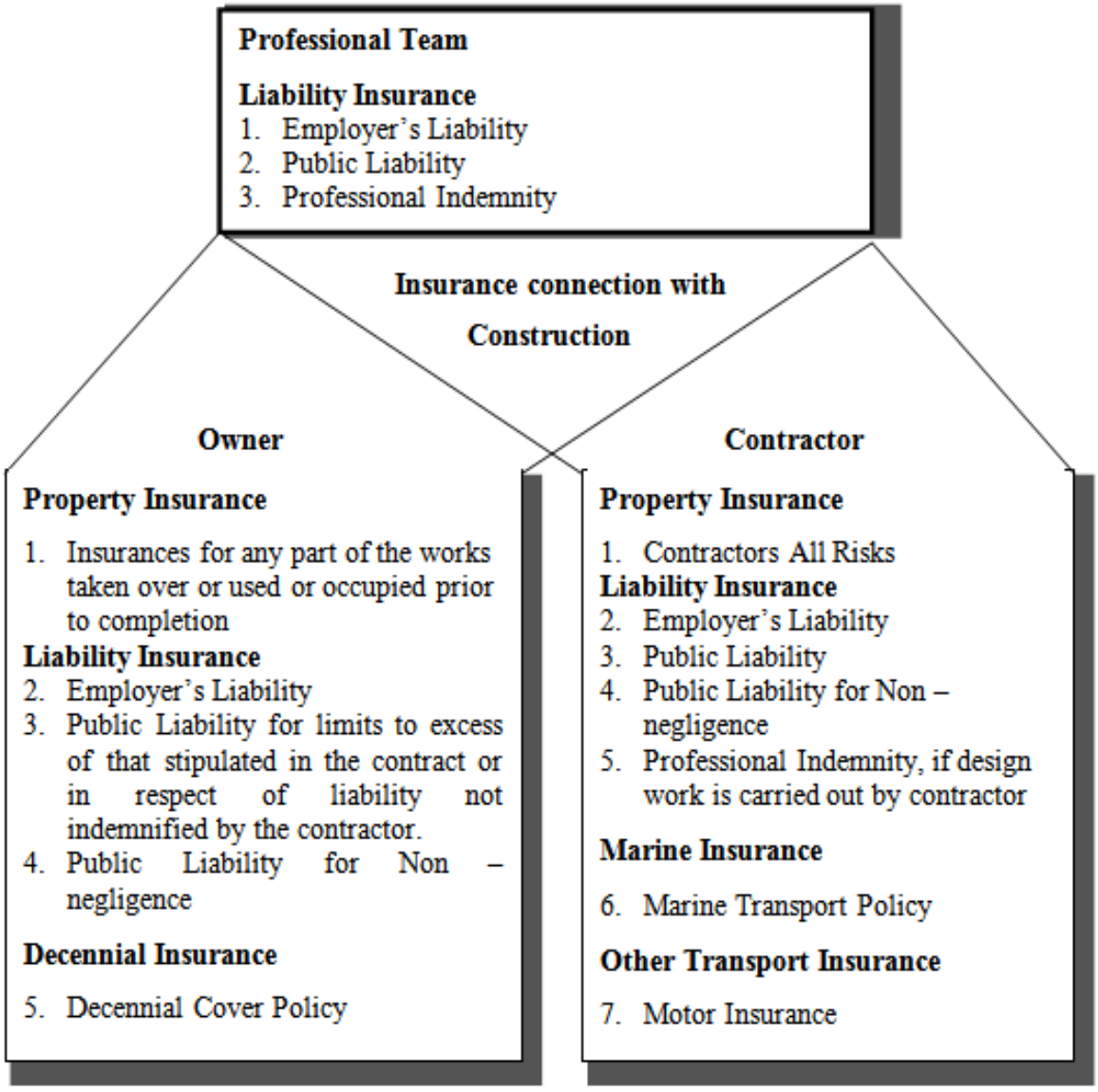

Figure 2.4: *Insurances which may be required on a construction project*

(Bunni, 2003)

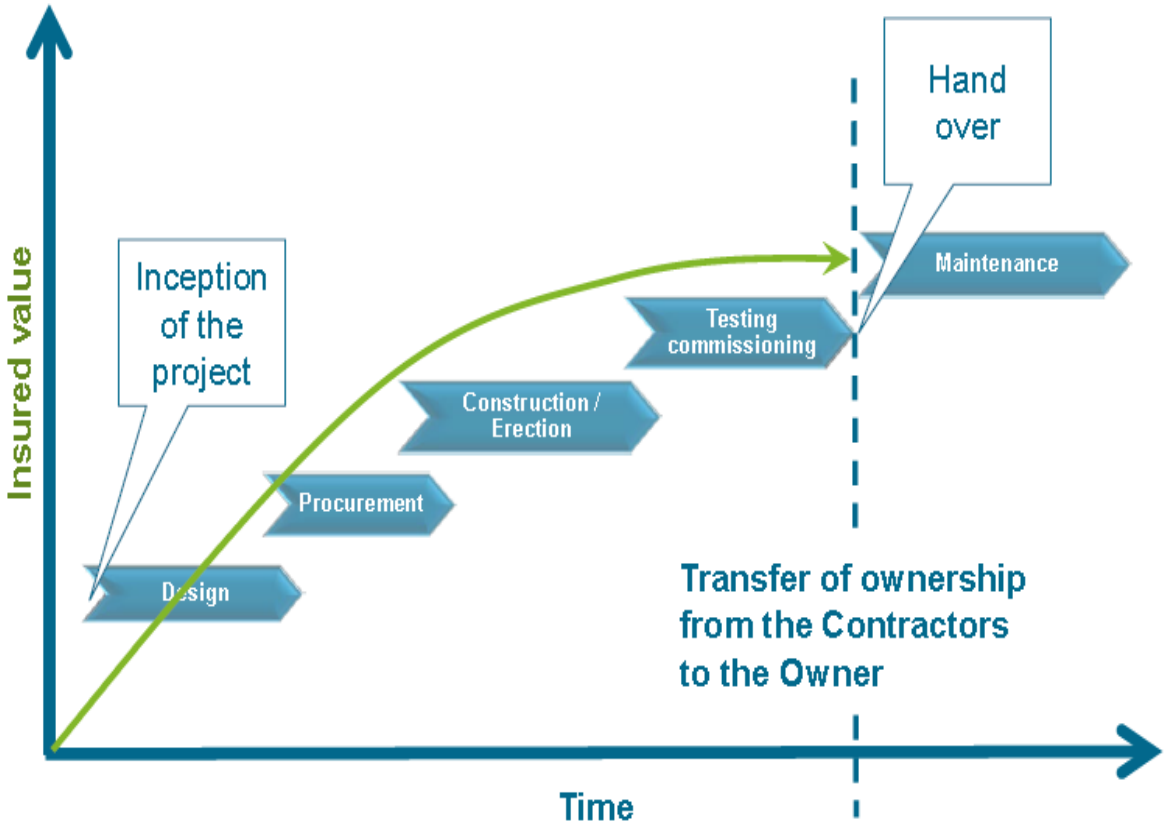

Figure 2.5: *Duration of insurance period in a typical project in time vs. insured value* (www.scor.com accessed on February 7, 2017)

The different main types of construction insurances from several literature sources are enumerated below.

A. Construction Insurance (Contractors' All Risks (CAR) or Contract Works Insurance)

All risks insurance cover provides protection during the works, until the project is complete and handed over to the customer. Thereafter, insurance becomes the customer's responsibility. All risks policies typically protect work in progress against fire, storm damage, theft and malicious damage, but any new policy proposal should be studied with care as it is likely to list exceptions (Lock, 2004). The CAR policy is normally taken out by the contractor but should insure in the joint names of the contractor and the client (employer). The subcontractors may or may not be jointly insured under the CAR policy (Richard, *et al.* 2002).

B. Erection All Risks (EAR)

EAR policies insure against loss or damage to electrical and mechanical plant whilst in the erection and installation stage either by a contractor or employer. EAR insurance provides cover for machinery installation and refurbishment. There are policies which combine EAR and CAR into one policy and are called Comprehensive Project Insurance.

C. Professional Indemnity Insurance (Errors and Omissions)

Its purpose is to cover the liabilities arising out of 'duty of care'. Typically the consultants (including the project manager) will require this policy to cover their design or similar liabilities and liabilities for negligence in undertaking supervision duties. In the case of a design and build contract, the contractor has to take out a separate PI (Professional Indemnity) policy, as designing is not covered by the normal CAR policy. Typically the cover includes claims that may arise from the services involved where they include a breach of professional duty. These are negligence, bodily injury and property damage arising from service negligence, fraud/dishonesty other than a company director's dishonesty, infringement of intellectual property, breach of duty/confidentiality, defamation and loss of documents (Richard, *et al.* 2002).

D. Decennial (Latent Defects) (Inherent Defects) Insurance

Decennial insurance, which can cover a period of up to ten years, is designed to insure against damage to premises caused specifically by an inherent defect in the design, materials or construction of a project. The ten-year cover matches the limitation period in respect of the stability and major defects in the structure or of an important part thereof in certain jurisdictions (Bunni, 2003). In Ethiopia too, article 3039 of the Civil Code (warranty due by the contractor) under contracts of work and labour related to immovable for private construction contract, it is expected that the contractor shall guarantee during ten years from its delivery the proper execution and the solidity of the work done by him and any provision shortening the period laid down (i.e., ten years) or excluding the warranty due by the contractor is of no effect. On the other hand, for public construction Article 3282 of the Civil Code is more relevant and is fundamentally the same to article 3039 of the Civil Code.

E. Pecuniary Insurance

Pecuniary insurances are designed to protect a company against financial losses from a variety of causes. Risks that can be covered include embezzlement, loss through interruption of business and legal expenses (Lock, 2004).

F. Delay in Start-Up Insurance (DSU) or Advance Loss of Profit (ALOP)

In some limited circumstances, advance profits insurance may be possible to provide cover for delay in receiving planned return on project investment caused by the late completion of the project (Lock, 2004). This is called Delay in Start-Up insurance (DSU) or Advance Loss of Profit (ALOP) which provides compensation for losses including loss of revenue and other consequential losses arising out of late completion as well as other forms of delay such as force majeure. Contractually the contractor will pay liquidated damage for the project delay but the amount is limited to 10% of the contract price. This means for a substantial delay by the contractor, the client will not be compensated an amount greater than 10% of the contract price and this poses a risk to the client. This is why clients sometimes take DSU insurance (Gould N., 2003).

G. Equipment Floater Insurance

Construction equipment and machinery used on the project is subject to damage and can be protected by what is known as an equipment floater policy. This policy covers equipment that moves from job to job (the equipment "floats"). Such protection is necessary because of the size of the investment in such equipment and of the multiplicity of perils to which the equipment is exposed (Merritt and Ricketts, 2001).

H. Motor-Vehicle Insurance

Loss and damage caused by or to motor vehicles should be separately insured under specific policies designed to cover hazards resulting from the existence and operation of such vehicles. Bodily injury or property damage sustained by the public as a result of the operation of contractor's motor vehicles or other self-propelled equipment is insured under a standard policy of insurance. To secure complete protection, a Comprehensive Automobile policy should be obtained to provide protection, in addition to the preceding, for hired cars, employers' non ownership, and any newly acquired motor vehicles or self-propelled

equipment during the term of the policy. Damage to owned vehicles can be added to the same policy on an automatic basis to provide Comprehensive Coverage and Collision Insurance. Damage to owned motor vehicles may be insured under a fire, theft, and collision policy as comprehensive motor-vehicle protection (Merritt and Ricketts, 2001).

I. Boiler and Machinery Insurance

Boilers and other pressure vessels and machinery require the protection provided by boiler and machinery insurance. These policies cover loss resulting from accidents to boilers or machinery, and in addition, cover contractor's liability for damage to the property of others. Policies may also include liability arising from bodily injuries sustained by persons other than employees. This is needed because of the exposure that many contractors have as a result of the interest of the public in construction work (Merritt and Ricketts, 2001).

J. Worker's Compensation Insurance

Worker's Compensation insurance provides medical care and other benefits for employees in the event that they are damaged on the job regardless of contributory neglect of the employee except in cases where the worker was under the influence of drugs or alcohol.

K. Wrap-up Insurance (Owner Controlled Insurance Program) (OCIP)

The owner may provide coverage for the owner, architect, engineer, prime contractor, and all subcontractors to lower the insurance cost of a construction project, this policy is referred to as Wrap-up Insurance. For such a project, all contractors must exclude insurance coverage from their bids and accept the coverage provided by the owner. The usual procedure is for a single insurance company to provide all coverage, including general liability, worker's compensation, and builder's risk. Because the owner pays for an insurance policy that covers the project's contractors, each contractor is expected to submit a lower bid (Gould, N., 2003).

L. Liability Insurance

Generally speaking, legal liabilities are incurred as a result of negligence and lack of care (Bunni, 2003). However, in certain circumstances, insurance is required even when negligence has not been committed. Such insurance is also transacted within the liability

type of insurance. Liability insurance is discussed under Article 654(2) to Article 685 of the Commercial Code of Ethiopia. Some of the Liability insurances commonly issued are;

- Compulsory (Liability) Motor Insurance; (in case of car accident or collision on road);
- Employer‘s Liability Insurance; (to compensate the employer in case of the worker‘s negligence who injures third party); also Article 2130 of the Civil Code;
- Professional Liability Insurance/Professional Indemnity Insurance; (in case of Engineer‘s or Architect‘s liability towards its client); and
- Workmen‘s Compensation Policy; (to cover the liability of the employer to the worker as per the Labour Law)

In addition to the contractual liability, liability under the Ethiopian law is further extended to extra-contractual liability that emanates from the law. The goal of the extra-contractual liability is to safeguard third party or the general public. The Law of Extra-contractual liability is provided under the Civil Code of Ethiopia from Article 2027 to Article 2161. According to Article 2027 of the Civil Code, there are three sources of extra-contractual liability; liability based on fault (Article 2027(1)), liability without fault (strict liability) (Article 2027 (2)) and liability for others (vicarious liability) (Article 2027 (3).

M. Surety Bonds/ Securities

Bonds can be classified as conditional or unconditional. Unconditional bonds guarantee payment at a specific time, known as maturity. Somewhat like an insurance policy, conditional bonds promise payment only if a specified event occurs or fails to occur (E.g., if work is not completed on schedule, the bond is forfeited). Most conditional bonds are issued by a surety company, which promises to pay a predetermined sum if the bond is forfeited (Microsoft Encarta, 2009). According to Directive No. SIB/24/2004, insurance companies in Ethiopia are prohibited from issuing a Financial Guarantee Bond and any unconditional bond by whatever name it may be referred to or in any form whatsoever because the basis on which such bonds are issued (physical collateral or financial standing of the borrower) are not well suited to insurers to serve them as adequate safe guards against losses and there is no reliable and readily available reinsurance arrangement for such bonds.

It is important to note here that prime contractors require a surety bond from their subcontractors. The prime contractor's position is similar to that of an owner. Prime contractors should be careful to obtain bonds from their subcontractors that are of the same form and not less than the guarantee that the prime is giving the owner under the owner's own bond. Where awards can be made to prequalified contractors, such as on private work, surety bonds might be eliminated if the financial stability and record of performance of the contractor are known to be satisfactory.

The following are the types of bonds available in construction.

i. Bid Bonds

Bid bonds assure the owner that if the contract is awarded to the successful bidder, that bidder will enter into contract with the owner. Bid bonds, certified checks, and sometimes negotiable securities may be accepted as bid security. The amount of bid security a public body may require in Ethiopia shall be in the range of 0.5% to 2% of the total estimated contract price, which the public body has to fix and indicate in the invitation to bid and the bidding document. However, the bid security to be fixed by the public body shall not exceed ETB 500,000 (Federal Public Procurement Directive, Ministry of Finance and Economic Development, June/2010).

ii. Performance and Payment Bonds/ Contractual Security

After award of the contract, the contractor is required to provide performance and payment (labor and materials) bonds on all public works contracts as a guarantee against potential lien claims and failure to complete the work. Under a performance bond, the surety has an obligation to the owner for any additional costs to complete the contract due to the contractor's failure to comply with its contract requirements. In Ethiopia, except for procurements executed by means of request for quotation or procurement of rental services, a public body has to require a supplier under contract with it to furnish performance security in any procurement. The successful bidder has to provide performance security within fifteen days from signing a contract in the amount of at least 10% of the total contract price. The security can be in the form of cash, cheque certified by a reputable bank, bank guarantee or letter of credit (Federal Public Procurement Directive, Ministry of Finance and Economic Development, June/2010).

iii. Advance Payment Bond

In case of anticipated cash the owner requests, an advanced payment bond is required to guarantee that the contractor performs the corresponding work value after receiving the advance payment (down payment). This bond is requested by the client if he agrees to give the contractor an advance payment which is assumed to facilitate mobilization. Mostly, advance is paid to the contractor in an amount not exceeding 30% of the total contract price. In any public procurement in Ethiopia also, advance may be paid in an amount not exceeding 30% of the total contract price and the advance bond to be provided by the contractors should be equal to the advance payment they receive (Federal Public Procurement Directive, Ministry of Finance and Economic Development, June/2010).

iv. Retention Money Bonds

For all construction works in Ethiopia, 5% shall be retained from payment indicated in each payment certificate. 50% of the amount retained shall be released up on completion of the works and issuance of provisional acceptance certificate. The remaining 50% shall continue to be retained for one year period of warranty. However, such sum may be released on condition that the suppliers submits unconditional guarantee valid for 12 months (Federal Public Procurement Directive, Ministry of Finance and Economic Development, June/2010).

v. Maintenance (or Mechanical) Bond or Defect Liability Bond

This bond may be included in the contract if the contractor is requested to provide a period of maintenance after completion but fails to provide that service. According to article 3039 and article 3277 through 3282 of the Civil Code stipulate about maintenance guarantee as discussed under Decennial (Latent Defects) (Inherent Defects) Insurance in the same section.

N. Marine Cargo Insurance

Marine insurance covers the risks associated with marine adventures (for e.g., transportation of cargo through ships). The consignment is exposed to the perils associated with transportation through sea and hence requires an insurance cover against sea perils such as storm which could result in damage to the ship as well as the goods consigned. However, a marine insurance can cover the land as well as the sea risks associated with the goods

transported. However, such land risks must be incidental to the sea voyage. A marine insurance policy can be considered for coverage of mixed land and sea risks (ICSI, 2014).

2.4 Insurance Coverage Claims/Disputes

Claim in general is defined as a demand or request for something, which one has a right to have. On the other hand 'insurance claim' according to the Cambridge Business Dictionary (2017) is a request to an insurance company for payment relating to an accident, illness, damage to property, etc. Claims are a common occurrence in the construction industry. Most claims are legitimate and do not give rise to disputes or confrontation between the responsible parties. Two situations can arise. The parties can come to an agreement on the claim or the parties disagree and a dispute arises which must be resolved (Aiiuja *et al*. 1994).

Generally, a dispute does not become a dispute until a claim has been presented and denied. Either party claims for compensation of a loss, or then the insurance company either agrees or denies coverage using their own claim procedure. If they agree, then the claim is already accepted and settled. If they don't, it becomes a dispute and there will be a long way to go from the 'simple' negotiation to the 'extreme' litigation.

According to Hollingdale *et.al*, (2009), insurance and indemnity related disputes were one of the five identified sources of dispute in Australia apart from breach of contract, failure to settle and appeal, contractual interpretation and security of payments. The Cambridge Business Dictionary (2017) defines insurance dispute as "an argument or disagreement about a request to an insurance company to pay for costs related to damage, an accident, etc."

2.4.1 Causes of Insurance Coverage Claims/Disputes

The causes of insurance coverage disputes identified from different literatures are compiled by the author of this study as follows:

i. Ambiguous wording or language of the insurance policy/ indeterminate phraseology and errors and omissions in the insurance policy and problems in the interpretation of the policy.

ii. Policy renewal issues (duration of cover), where the insured never renewed his policy but yet claiming for a loss.
iii. Payment of premium (at the agreed time), the insured claiming for a loss even though he never paid an outstanding premium for the policy to be effective.
iv. The insured settling a claim without the knowledge or notice of his insurer and making the insurer lose his subrogation right over other parties.
v. The insured deviating from endorsement requirements and other conditions and responsibilities.
vi. Disagreement between the insured and the insurer on whether consequential loss is covered in the prevailing policy and disagreement on the amount.
vii. Late notification by the insured to the insurer of the occurrence of increasing risks.
viii. The insured failure to maintain his property to reduce the risk of damage to the property.
ix. Non-disclosure of material facts on part of the insured.
x. Policy cancellation – insurers cancel insurance policies in the middle of the period of insurance cover. This may be done in response to additional information provided by the insured that increases the insurers risk to unacceptable level.
xi. Disagreement on the cause of the loss in a covered peril which could be linked with failure of the insured to proof loss due to an event against which is insured (the cause of the risk or condition) and the value or amount of that loss. The onus is on the insured to prove that he suffered a loss due to an event against which is insured and the value or amount of that loss. (If the insurers wish to rely on some exclusion in the policy, the onus is on them to prove that the exclusion applies)
xii. Failure to notify the insurer of any event which could give rise to a claim under the policy within the stipulated time (late notice of claim).
xiii. Disputes because of partial acceptance of the claims by the insurer which includes underinsurance matters, the amount of cover (indemnity) assessed by the insurer not adequate for the damage occurred and the event causing some additional damage not covered by the policy.
xiv. Disputes concerning expiry of period of limitation.

According to Black's Law Dictionary (2009), statute of limitation is a statute establishing time limit for suing in a civil case, based on the date when the claim occurred (as when the injury occurred or was discovered). The purpose of such statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claim will be resolved while evidence is reasonably available and fresh.

xv. Disputes concerning forfeiture of bonds; bid bond, performance bond, etc.

It is the author of this study's belief that all the above causes can be embraced into the following five root categories. These are;

i. Failure of the insured and the insurer to carry out their responsibility as per the insurance policy (conditions and responsibilities) and the prevailing legal laws either intentionally or due to lack of awareness of the parties about insurance or due to complexity of insurance business and construction.
ii. Absence of good faith of both the insured and the insurer in the different requirements of the insurance contract starting from pre-contract information to claim reporting.
iii. Causes relating to lack of awareness of the participating parties due to the infancy of the insurance industry of Ethiopia mainly and due to complexity of insurance laws and principles in general (characteristic nature of insurance).
iv. Causes relating to the distinctive nature of construction which include insurance gaps and overlaps/ duplications due to the multi-parties involved in construction and rising insurance costs because of the different stages in construction.
v. Causes relating to defective underwriting such as ambiguous wording, defective premium calculation which can be a potential source of dispute.

2.4.2 Dispute Resolution

It is more effective to approach dispute resolution in a manner similar to medical treatment; diagnose the problem first, and then select the least invasive procedure that will correct it, as the cost-effectiveness and timeliness of dispute resolution are very critical factors to be addressed. The best practices for designing dispute resolution systems include flexibility, early intervention, exhaustion of collaborative options before resorting to adjudicatory

methods, and controlled escalation of the dispute by using different ADR methods in a logical progression (Aiiuja *et al* 1994).

2.4.2.1 Alternative Dispute Resolution (ADR)

Oxford Dictionary of Law (2002) defines ADR as any of a variety of techniques for resolving civil disputes without the need for conventional litigation. ADR is a generic term used to describe a range of procedures designed to provide ways to resolving a dispute as an alternative to court procedures (Tefera and Mulugeta, 2009). Obviously, ADR may not be feasible for all situations, for example, where points of law need to be decided, one party has no interest in settlement, or where one party is withholding money from another, but for some disputes it can be a viable solution. ADR is unlikely to be a sensible option in the insurance industry when the legal position of the parties is very clear, when the legal point being raised is fundamental to the contract and therefore requires a legal ruling (e.g. fraud, intentional nondisclosure or misrepresentation), where the case may set an important legal precedent, where the parties don't wish to settle the dispute themselves, where publicity is important and where the power is too concentrated in the hands of one of the parties (Glynn, 2004).

ADR is a sensible option in the insurance industry when there is no clear legal answer (dispute is a "mess"), when parties wish to try to continue a good working relationship, when confidentiality, costs and time are important and when final deal is supportable by all parties (Glynn, 2004). On the other hand, ADR may give an opportunity for 'time wasters' and those seeking to obtain information on the other side's tactics. ADR sometimes is being used as a public relations exercise by lawyers to promote their firms; however, this should not preclude its use, even if this may be the case.

The following ADR methods are widely known mechanisms in the spectrum (Aiiuja *et. al*, 1994).

A. Negotiation

Negotiation involves two parties who agree to communicate with each other and make decisions. This is a non-judgmental (amicable) method which brings the disputants to a round table and mutually resolves their dispute (Aiiuja *et. al*, 1994).

B. Dispute Review Boards (DRB)

Dispute Review Board (DRB) is formed at the inception of the project and remains throughout construction. Disputes are heard as they arise and resolutions are handled in a timely manner. These boards consist of industry experts who make nonbinding recommendations for the settlement of each dispute. The DRB fosters cooperation between the parties and provide a means for prompt and equitable resolution of claims and disputes. The DRB is an intermediate step aimed at avoiding more expensive and less satisfactory procedures. A DRB emphasizes dispute prevention (Aiiuja *et. al*, 1994).

C. Conciliation (called Mediation in USA)

The provision for mediation is usually provided for by the contract. A neutral third party acts as a communicator and facilitator as the parties make decisions themselves. An agreement is reached which is nonbinding, but one to which the parties are morally committed (Aiiuja *et. al*, 1994). There are some authors who underline a slight difference between mediation and conciliation. In this study, though, they are used interchangeably.

D. Minitrials

Minitrials are also a nonbinding resolution procedure which follows a structured process similar to litigation and is usually conducted by a judge (Aiiuja *et. al*, 1994).

E. Arbitration

Arbitration is typically an out-of-court method for resolving a dispute in which a party submits a disputed matter to impartial person (the arbitrator) for decision. The arbitrator controls the process; listen to both sides and make a decision. Like a court trial only one side will prevail, but unlike court litigation appeal on the merit of the case is limited (Tefera and Mulugeta, 2009). Arbitration is stipulated by contract or legislation or is simply agreed upon by the parties (Aiiuja *et. al*, 1994).

F. Adjudication

Adjudication (expert appraisal) is a process whereby the disputants present their cases to an independent expert who then evaluates the evidence according to the relevant law, rules, contract and practice that is applied appropriately in the dispute and gives a confidential opinion on the likely outcome of the case if it were to go to court or arbitration.

2.4.2.2 Litigation

Litigation (used when all other venues failed) is a dispute resolution method that is cross-examining and adversarial, where by the disputants initiate legal action against the other party by going to court. It has a win/lose outcome and seldom satisfies both parties. It is costly and results into much delay for the disputants and may not do justice to the parties. However, the benefit of litigation is that the court has authority to find out the "truth" from the parties and the implementation of the order or judgment is supported by law enforcement bodies. It is also used when parties have low resources or when they cannot agree to other forms of dispute resolution. The following *Figure 2.6* shows dispute resolution methods in context, to control from outcome related to escalating dispute cost and hostilities.

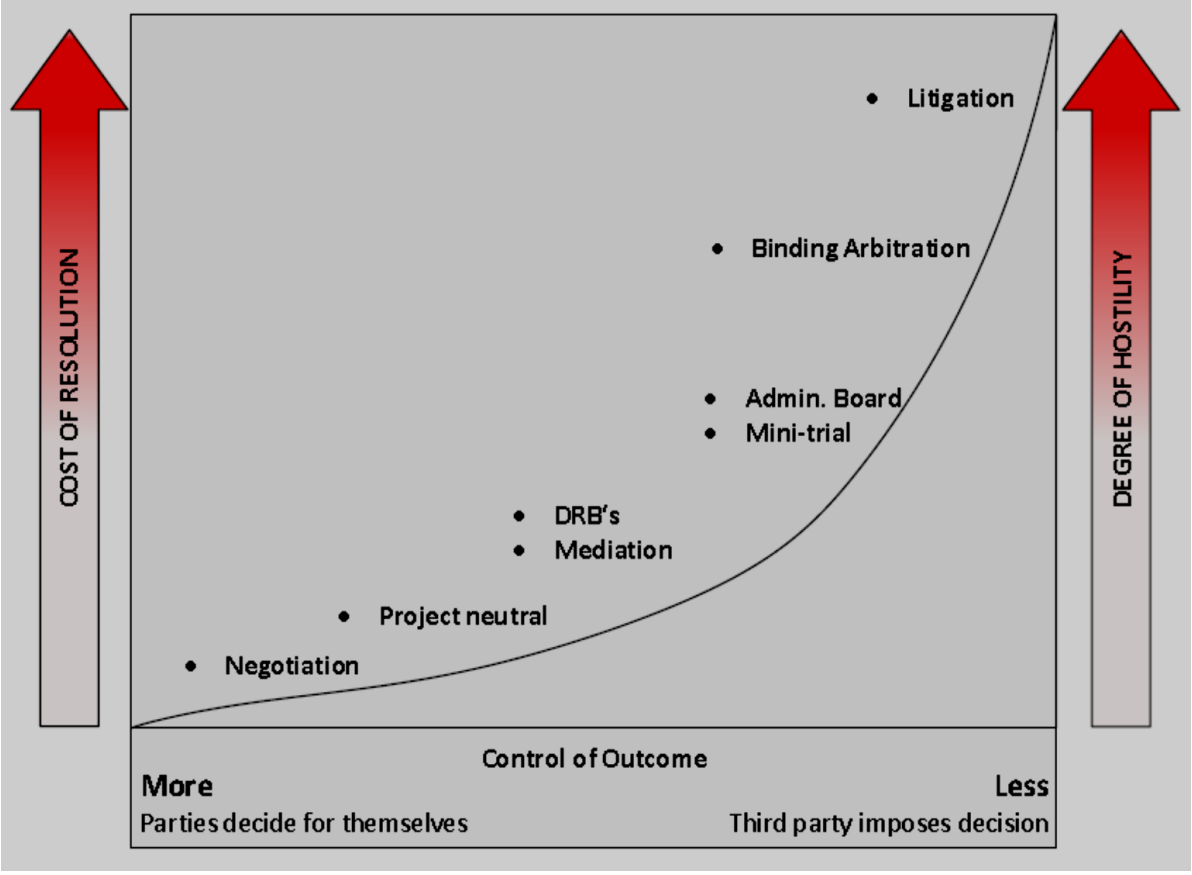

Figure 2.6: *Control of outcome vs. cost/hostility of dispute* (Richter, 2000)

2.4.2.3 Challenges in Effecting ADR to Insurance Disputes

In the major business areas underwriters have been slow to respond to ADRs. Various mediators, arbitrators etc. have approached insurance companies to explain the situation;

however, to date the take up still seems to be relatively low (especially with regard to large commercial business disputes). The reasons for this would seem to be (Glynn, 2004):

- Lack of knowledge/understanding as to how ADR works.
- Parties like to rely upon trusted methods such as litigation.
- Insurance personnel are put in the position where, once a dispute has arisen, they are required to more directly negotiate with the party rather than simply via a third party (e.g. broker, loss adjustor, or lawyer)
- Underwriters may not wish to settle a dispute promptly.
- Todate there has been no forced acceptance of ADRs (although it seems that present movements in the legal system are putting more pressures on parties to look to try ADR first before going to court).
- Lawyers have been slow to suggest ADRs to their client as a way of resolving disputes, although this is now certainly changing.
- Lawyers suggest that their position in a case could be perceived by the other party to the dispute to be weak if they suggest ADRs.
- Lawyers feel that ADRs will negatively affect their fee income.

2.5 Insurance Practices of Different Countries; focus on construction, insurance law, regulation, claim and dispute resolution

In this section, we will see the individual insurance experience of four countries (USA, UK, China and South Africa) in detail with focus on construction, insurance law, regulation, claim and dispute resolution. They are selected because all have leading insurance premium volume in their respective continents. It is the author's belief that studying the insurance practice of the four countries is important to establish the gaps in the Ethiopian insurance industry in general and construction insurance in particular. Construction insurance is broad in the sense that it also includes insurance types to be purchased by other businesses too.

2.5.1 USA

USA, the world top economy has the largest financial markets in the world including insurance. In 2016, from the total global premium income (EUR 3.61 trillion), about one-third of it (30%), EUR 1.1 trillion was attributable to the US alone, which remains the

biggest insurance market in the world followed by Japan (EUR 368 billion) and China (EUR 366 billion). The US premium volume (insurance spending) was equivalent to just over 7% of GDP in 2016 (premiums as a percent of GDP by business type) (Association of British Insurers, 2017). And according to US Bureau of Economic Analysis (as cited on Brandmeir *et.al*, 2017), construction spending relative to GDP in US in 2017 was around 6.4%.

Coming to construction insurance provisions in US, there are longstanding requirements that parties to construction contracts purchase various insurance coverage that are included in the "General Conditions of Contract for Construction," American Institute of Architects (AIA) Document A201, 2007. For e.g., Article 11, "Insurance and Bonds," requires contractors to purchase coverage for claims by employees, such as workers' compensation, disability benefits, and bodily injury claims, as well as coverage for non-employees for damages because of bodily injury, personal injury liability, property damage, completed operations and contractual liability, and for automobile liability claims. Owner's insurance provisions address liability, "all-risk" property insurance, boiler and machinery insurance and loss of use insurance. Similarly, under owner-architect agreements, such as the standard form, AIA Document B101 (2007 edition), architect insurance provisions are also now specifically addressed in the contract to allow for identification of maintenance by the architect of listed coverage, including general liability, automobile liability, workers' compensation and professional liability coverage. (AIA Document B101, Article 2, Architect's Responsibilities). Recently in 2017, the 2007 edition of AIA Document A201 was revised.

Because of variations among state laws, there are no overarching rules of insurance contract interpretation in USA. In general, the rules of interpretation applicable to commercial contracts apply to insurance policies. State or federal courts that interpret contract provisions typically try to determine the objective intent of the parties. Unambiguous insurance policy provisions are generally enforceable (Rogan (ed.), 2015).

The laws regarding insurance and reinsurance claims issues vary from state to state. The key issues include; notice, good faith and dispute resolution. With respect to notice, both insurance and reinsurance claims generally require that a policy holder or insured provide reasonably timely notice of claims or other information. For insurance claims, timely notice

is considered a condition precedent to coverage in many states and, in the absence of reasonably timely notice; a claim may not be covered.

Every state insurance department provides a mechanism by which aggrieved policy holders can lodge complaints about their insurers. Insurers are required to maintain their own internal "complaint handling procedures" under each state. When a consumer contacts the department, a regulator first determines whether the contact is a complaint or merely an "inquiry,"" and whether the department has jurisdiction. If both of these initial hurdles are cleared, the regulator will then investigate complaints that seem potentially legitimate. In some states, the regulator who initially interacts with the consumer investigates the complaint, whereas in others the complaint is assigned to a designated complaint handler (Schwarcz, 2009).

Apart from state sponsored conciliation of insurance coverage disputes, a range of dispute resolution techniques are used in the US. Beyond arbitration and mediation, ADR procedures include early neutral evaluations, peer review and mini-trials. A number of industries including the construction, maritime etc. have adopted such procedures to handle intra-industry claims. The most widely used ADR process in the US is arbitration. Many casualty insurance policies contain arbitration clauses. There are numerous types of insurance arbitrations. The difference between each type generally relate to the number of arbitrators, arbitrator selection procedures, arbitrator neutrality, and the arbitration hearing procedure.

In a number of states, parties in commercial disputes are required to participate in atleast one mediation or settlement conference prior to moving forward with trial. In addition, parties to an insurance dispute will often agree to retain a private mediator to help resolve one or more issues. In some states, however, arbitration clauses aren’t permitted and disputes are required to be resolved through litigation in state or federal courts (Rogan (ed.), 2015).

2.5.2 UK

The UK is a leading European country with estimated gross written premiums of more than EUR 230 billion, followed by France (EUR 198 billion) and Germany (EUR 152 billion). According to the Association of British Insurers (2017), the UK insurance market is very large compared to the overall size of the economy, with premium volume equivalent to just

over 10% of GDP. Since the UK‘s estimated gross written premiums were the leading in Europe, it is very important to carefully analyze UK’s insurance industry with a special focus on dispute resolution.

Of the many potential models, the British scheme for resolving consumer financial disputes, which is known as the Financial Ombudsman Service (FOS), is the most natural source of guidance. The FOS is formally independent from the British insurance regulator, the Financial Services Authority (FSA) and combines various ADR strategies including internal complaint handling by firms, state provided complaint conciliation, and arbitration into a single coordinated scheme whose sole function is to resolve British consumers' disputes with their financial service providers. The FOS achieves extraordinary rates of voluntary settlement, covers a broad array of disputes, and enjoys remarkable support among British consumers, consumer groups, industry, and academics. Perhaps for these reasons, the FOS has served as a model for reform in many countries, including Australia, Canada, New Zealand, Ireland, India, and Japan (Mendelowitz, 2014; Schwarcz, 2009).

Within the FOS, separate teams deal with (for example) retail banking, pensions, insurance, stokes and shares and other investments. In recent years, seventeen to twenty-two percent of its total caseload has involved complaints about insurance. The FOS is believed to be the largest ombudsman service in the world today. From April 2012 to 31 March 2013 for e.g., the FOS received 2,161,439 initial complaints and enquiries, over 7000 each working day. About one in four initial approaches turned into a formal dispute, a record 508,881 new cases. 223,229 cases were resolved (198,897 by adjudicators and 24,332 by ombudsmen) resulting in compensation for consumers in 49% of complaints. The FOS operated on a budget of £150 million, with about 2600 employees (Mendelowitz, 2014).

2.5.3 China

The Asian insurance market is dominated by the two heavyweights: Japan (EUR 368 billion premium income in 2016) and China (EUR 366 billion premium income in 2016). The premium volume of China’s insurance sector was equivalent to just over 4% of GDP in 2016 (Association of British Insurers, 2017).

To enhance the use of ADR, the China Insurance Regulatory Commission (CIRC) and the Supreme People’s Court jointly issued on 18 December 2012, the notice of the Supreme

People's Court and the CIRC on carrying out pilot work of establishing the mechanism for linking insurance dispute litigation with mediation in some regions of China to establish a mediation system for insurance litigation for some cities. The local courts and insurance associations conduct this system.

With regard to the other common form of ADR in PRC, arbitration, there is no difference between the arbitration procedure of an insurance dispute and that of other kinds of commercial disputes in PRC. More and more insurance companies are choosing arbitration as their dispute resolution method, and the most popular arbitration institution in China is the China International Economic and Trade Arbitration Commission. However, in the insurance contracts of some foreign-invested insurance companies, a dispute resolution clause gives the parties the right to select the method of dispute resolution, either by arbitration or litigation. The costs for an arbitration procedure are decided by the arbitration rules of each arbitration institution (Rogan (ed.), 2015).

2.5.4 South Africa

The insurance industry in Africa is still in its infancy with around 1.5% global market shares. The highest premium income in 2016 in Africa was that of the South African insurance industry (EUR 37.3 billion). Nigerian insurance industry premium income in 2016 was EUR 1.1 billion and Egypt's was EUR 1.4 billion which is very far from the leading South Africa's insurance sector. And according to the World Bank, insurance penetration rate (premiums as % of GDP) of South Africa in 2016 was around 14% (Brandmeir *et.al*, 2017).

The general principles of the law of contract in South Africa also apply for contracts of insurance. It is sometimes maintained that a contract of insurance comes into existence as soon as the parties have agreed upon every material term of the contract they wish to make, such as: the person or property to be insured, the event insured against, the period of insurance and the amount of premium. This suggests that the parties need not agree on terms other than material terms. For their contract to qualify as one of insurance, the parties must agree on the essentials of insurance. If they don't reach specific agreement, there can be no insurance of contract (de Beer *et. al*, 2015). Similarly, the principles which apply to the

interpretation of contracts in general likewise apply to the interpretation of insurance contracts in South Africa.

If disputes can't be agreed between the insured and insurer, the following methods are used to deal with complaints or disputes (Kuschke, 2014).

- **Internal dispute resolution procedures** – these are internal complaint resolution procedures as agreed upon between the insurer and the insured.
- **Voluntary ombudsman schemes** – where a dispute continues to exist between an insurer and an insured, the parties then refer the dispute for resolution to the voluntary schemes created by insurers, namely the Ombudsman for Long Term Insurance and the Ombudsman for Short Term Insurance which are funded and regulated by the industry to serve as form of structured dispute resolution alternative to litigation.
- **Statutory ombudsman schemes -** in disputes where advisors, brokers and intermediaries are involved, the dispute resolution process resorts under the jurisdiction of the Office of the Ombud for Financial Service Providers.
- Arbitration
- Litigation

2.6 Ethiopian Insurance Industry; focus on insurance law, construction, claim/dispute resolution

2.6.1 Overview

The developing construction industry of Ethiopia should always go parallel with other industries and particularly the insurance sector should benefit from the prospering construction industry in that the parties in construction insure against hazards to protect their business and the construction contracts mandatory insurance provisions encourage the insurance industry.

Currently there are 17 insurance companies (some take this figure to 18 adding the newly formed reinsurance company, Ethiopian Re). Sixteen of the insurance companies are private and one is government performing in Ethiopia with a total of 492 branches by the end of 2016/17 of which more than 50% was in Addis Ababa. Among the 17 insurance companies,

8 provide life insurance while the remaining nine are engaged in other insurance services. Besides there were 1438 insurance agents, 54 insurance brokers, 97 damage actuaries and two insurance investigators. The industry underwrote gross written premium of ETB 7.5 billion of which 95% is general insurance and the remaining ETB 400 billion is life business. During this time, the insurance industry has registered a total of ETB 1.1 billion profits after tax and EIC and Nyala Insurance Company have the lion's share in making ETB 700 million and ETB 122 million profits respectively.

Proclamation No. 86, 1994 (The Licensing and Supervision of Insurance Business) together with Proclamation No. 83, 1994 (The Monetary and Banking Proclamation) designate the Bank of Ethiopia as the policymaker, regulator and supervisor of the insurance industry in Ethiopia. The Bank has an Insurance Supervision Department (ISD) that is responsible for all insurance policies, regulation and a supervision activity is not independent from the central bank. Recently, the Association of Ethiopian Insurers has requested the NBE to stop supervising the insurance industry and a new body to be formed because of their claim that the sector wasn't given adequate attention due to NBE's focus on banks.

Effective from 15th April 2013, the minimum fully paid up capital in cash and deposited in blocked bank account in the name of the insurer to be established to obtain a general insurance license is ETB 60 million, ETB 15 million for a long term insurance license and ETB 75 million to obtain both general insurance and long term insurance license (Directive No. SIB/34/2013; Proclamation No. 746/2012).

Needless to say, insurance penetration is low in Ethiopia. The industry's aggregate contribution to national GDP (penetration) is around 0.5% and this shows the low level of insurance development in Ethiopia, even by East African standards (Bilal, 2017). In Kenya insurance penetration is 2.9% and 14% in South Africa. It is also noted that the one billion aggregate profits reported from the insurance industry was four times lower compared to that of Kenya. Ethiopian insurance is dominated by motor class of insurance and the market expansion remained focused in major urban areas than to new frontiers. Lack of dynamism and skilled manpower shortage are also challenges. Lack of enabling environment for the business to flourish further is impeding the insurance sector to play due role (Bilal, 2017).

As per article 293 of the Maritime Code, an underwriter may reinsure the risks which he has agreed to cover. Recently the Ethiopian Reinsurance S.Co., (Ethiopian Re), the first reinsurance company in the country, begun operating after an announcement the company made on August 23, 2016. This is in accordance with the directive issued by the NBE that all local insurance companies in the country have to allocate 25% of their insurance payment. The directive also made insurance companies pay 5% of every premium for the new company. The Ethiopian Re was established with a paid up capital of ETB 500 billion and ETB one billion subscribed capital and it provides fire and engineering, accident and motor, marine and aviation, life and health, non-demand bonds, liability and agriculture and political violence and terrorism insurances. The company has diverse shareholders, which currently comprise of seven banks, seventeen insurance companies, eighty individuals coming from different sectors and one trade union. Ethiopian government doesn't permit foreign direct investment in the insurance industry.

2.6.2 History of Insurance in Ethiopia

Modern insurance service in Ethiopia was introduced by foreigners as far back as 1905 during the era of Menelik II when the bank of Abyssinia began to transact fire and marine insurance as an agent of a foreign insurance company (Hailu Zeleke, 2007). The first Ethiopian origin insurance company is the Imperial Insurance Company which was established in 1951. In 1960, the IIC and 33 foreign insurance companies were operating in Ethiopia (Hailu Zeleke, 2007; Berihun, 2017). The first significant event in the Ethiopian insurance market observation was the issuance of proclamation No. 281/1970 which was issued to provide for the control and regulation of insurance business in Ethiopia. After four years that is after the enactment of the proclamation, the military government that came to power in 1974 put an end to all private enterprises. From January 1, 1975 onwards the government took over the ownership and control of these companies and merged them into a single unit called Ethiopian Insurance Corporation. After the change in the political environment in 1991, the proclamation for the licensing and supervision of insurance business heralded the beginning of a new era. Immediately after the enactment of proclamation no. 86/1994 in the 1994, private insurance companies began to increase (Hailu Zeleke, 2007). The enactment of proclamation no. 799/2013, third party insurance, has also motivated the insurance market.

2.6.3 Insurance Law

The provisions of the Civil Code about contract in general and provisions of warranty are important to both insurance and construction contracts. Discussion of the provisions of the Civil Code is also made in detail under the different case studies as a reasoning the courts applied to solve the case.

Insurance business is regarded as a trade and hence falls under the provisions of the Commercial Code (article 5). Apart from other laws, insurance contracts in Ethiopia are governed by the Commercial Code under book 3, carriage and insurance, and title 3 insurance. From article 654 to 712, insurance of objects (property insurance), insurance of liability for damage and insurance of persons are stipulated. Although the generally applied code for insurance is the Commercial Code, the Maritime Code on title 7, article 288 to article 326 has insurance provisions to be applied basically for maritime activities.

Insurance policy as per article 654(1) of the Commercial Code of Ethiopia is defined as a contract whereby a person, called the insurer, undertakes against payment of one or more premiums to pay to a person, called the beneficiary, a sum of money where a specified risk materializes. The risk is not a result of intentional default of the beneficiary but rather risks arising out of unforeseen events or the negligence of the beneficiary which shall be covered by the insurance unless otherwise agreed (Article 663 of the Commercial Code). It is understood from this stipulations that premium is paid by the insured to the insurer and it can be paid periodically or once as a sum. Although it doesn't apply to life insurances, Article 666 of the Commercial Code forces the beneficiary to pay the agreed premium at the time specified in the policy, but the policy shall not terminate as of right when the premium is not paid in due time. The insurer shall demand payment. If the insured failed to pay the premium within a month, the policy shall be suspended. Where the period of one month has expired, the insurer may claim payment of the premium or require the termination of the policy by court according to Article 1784 of the Civil Code. Where the premium is paid, the policy shall reenter into force on the day of payment.

Unless otherwise expressly specified, the insurance policy shall come into force on the day when the policy is signed, but provisions may be made to the effect that the policy shall only come into force after the first premium has been paid. It is not clear, however, whether this

declaration applies for renewal premium or installment (Berihun, 2017). The Ethiopian Commercial Code Article 658 stipulates an insurance policy to have a term for which the contract is made after the completion of which the contract will be renewed and article 657(2) obliges the policy to be varied only in writing by documents called endorsements.

Article 709 of the Commercial Code applies to life insurances. The insurer may not bring an action for the payment of premiums due in respect of a life insurance. If a premium has not been paid at the due date on a policy on which less than three annual premiums have been paid, the insurer may demand payment. If payment is not made within one month from the date of the demand, the insurer may terminate the policy. This period may not be shortened in the policy. If a premium hasn't been paid at the due date on a policy on which at least three annual premiums have been paid and payment is not made within one month from the date of a demand for payment, the policy shall not lapse. The insurer may issue a paid up policy or otherwise reduce the capital or life interest of the policy according to regulations made under Article 656.

It seems that the Commercial Code used the words 'insurance policy' and 'insurance contract' interchangeably to represent the same meaning (Zekarias, 2002, Fekadu, 2008 as cited on Beihun, 2017). A contract of insurance is formed when it is ascertained that the insured sent the proposal form to the insurer by filling and signing it and the insurer after investigating the proposal form sends a signed insurance policy to the insured without any reservations and preconditions (Berihun, 2017). As insurance is one type of contract, it is subject to the provisions of the Civil Code of Ethiopia on contracts. The requirements for a legal contract to be established accordingly are:

i. The parties should be capable of contracting and give their consent sustainable at law (Article 1678(b) of the Civil Code).
ii. The object of the contract is sufficiently defined and is possible and lawful (Article 1678(b) of the Civil Code). In insurance, this means the risk to be insured, the premium required and amount of compensation to be paid when the risk materializes should be clearly defined.
iii. Contract made in a form prescribed by law (Article 1678(c) of the Civil Code)

In Ethiopia, insurance contract should be made in writing and signed by the parties constituting the contract and two witnesses (Civil Code, article 1725, 1727(1, 2), 1728(1), 1729), (Commercial Code article 657, 658). Most lawyers and the business community however agree that the requirement in the Civil Code that the contract to be signed by witnesses should be canceled because insurance business is performed by insurance companies adhering to strong legal regulations and hence they can't deny the forms they use. The signing of witnesses is also claimed to limit the insured's possibility of getting insurance business through modern technologies from where they are (Zekarias, 2002, Fekadu, 2008, Position of the Business Community on the Revision of the Commercial Code, 2009, as cited on Berihun, 2017).

As in any other insurance laws, the basic insurance principles are respected in Ethiopian laws with serious consequences if not implemented. Disclosing all material facts on the proposal form in an absolute good faith is pre-contractual duty and the policy shall be of no effect where the beneficiary intentionally concealed facts or made false statements that caused the insurer to wrongly appreciate the risks to be insured (Article 667 of the Commercial Code). A risk that already occurred should be notified to the insurance company within less than five days from the date of the occurrence or from the party knew the occurrence unless prevented by force majeure (Article 667 of the Commercial Code). Another important thing here is "statute of limitation" or "period of limitation". According to Article 674 of the Commercial Code of Ethiopia (Limitation), any claim arising out of a contract of insurance shall be barred after two years from the occurrence giving rise to the claim or from the day when the parties knew of the occurrence. In case of concealment or false statements, the period of limitation shall run from the day when the insurer knew of the concealment or false statement. In general, the provisions give the impression that utmost good faith is effected by the insured but in principle, utmost good faith is expected from both the insurers and the insured (Berihun, 2017).

Apart from the principle of utmost good faith discussed above (on article 667 of the Commercial Code), the principle of indemnity is also valued in Ethiopian insurance laws. If the insured complies with all his duties, he is entitled to a full settlement within the terms of the policy. This settlement must be speedily made and cannot be held up pending recovery of subrogation rights or contribution rights under a market agreement (Article 665 of the

Commercial Code). If the amount of the damage to be compensated is of a value greater than the amount for which it is insured (sum insured) on the day of the occurrence of the damage, underinsurance, the insured person shall be deemed to be his own insurer for the difference and shall share proportionately in the damage, unless otherwise provided in the policy (Article 679 of the Commercial Code). Where the compensation provided in the policy exceeds the value of the object insured, overinsurance, and there has been fraud on the part of either party, the other party may require the policy to terminate and may in addition claim damages (article 680 of the Commercial Code). Where there has been no fraud, the policy shall remain in force but to the extent only of the actual value of the object insured.

Related to indemnity is consequential loss which is still a controversial issue in the Ethiopian Commercial Code in that the code says nothing on whether it should be indemnified or not. As a result, there have been contradicting decisions by courts on consequential losses to be indemnified or not. Especially when the insurer delayed the payment of indemnification for the loss, the courts might decide consequential losses to be paid (Berihun, 2017).

Another important insurance principle apart from utmost good faith and indemnity is the principle of subrogation covered in article 683 of the Commercial Code. The right of subrogation is denied under life insurances because life loss is not susceptible to economic measurement, and therefore, there is no concern for the prevention of double recovery by the beneficiary (Jhon F. Dobby, 1997 as cited on Berihun, 2017).

Interpreting insurance contracts follows similar rules of interpretation of general contracts (Civil Code article 1732 through 1738) which are similar to contract law interpretations discussed under sub-section 2.1.6.

2.6.4 Construction Insurance Provisions

The Civil Code, Commercial Code and some provisions of the Maritime Code may be referred for insurance practices in general. There are also other contract conditions (construction for example), different government proclamations and directives which force some insurance type compulsory and strengthen the bond between insurance and construction.

One such document is Standard Conditions of Contract for Construction of Civil Work Projects (MoWUD, 1994). In this standard condition, the insured items by contractors are the works (insure in the joint names of the employer and the contractor), damage to persons and property and third party insurance. Third party insurance shall be effected with an insurer domiciled and licensed to carry out business in Ethiopia and in terms approved by the employer, which approval shall not been reasonably withheld for at least 10% of the contract value but not exceeding ETB 200,000 per occurrence, with the number of occurrences unlimited. The contractor shall, whenever required, produce to the engineer or the engineer's representative the policy or policies of insurance and the receipts for payment of the current premiums. Apparently, MoWUD's Standard Condition of Contract designed contractors to fulfill insurance requirements.

Parallel with the MoWUD condition of contract, PPA General Condition of Contract, The Public Procurement Agency's Standard Bidding Document for works (January 2006) in its section 7 discusses the General Conditions of Contract (GCC) to be used in Ethiopia. GCC Article 40 of PPA 2011 also states insurances to be taken out by the contractor as mainly similar to those of the 2006 edition. In clause 13 (insurance) of this contract condition, the contractor is expected to provide, in the joint names of the employer and the contractor, insurance cover from the start date to the end of the defects liability period, for events which are due to the contractor's risks (similar to the requirements of MoWUD Standard Condition of Contract): loss of or damage to the works, plant, and materials**,** loss of or damage to equipment, loss of or damage to property in connection with the contract and personal injury or death.

Apart from MoWUD and PPA condition of contracts assisting the construction insurance sector, the Ethiopian building proclamations, regulations and directives has set compulsory insurance and guarantee requirements. The Building Regulation No. 243/2011 was issued by the Council of Ministers to be effective as of May 2011 to help to implement the Ethiopian Building Proclamation 624/2009. Pursuant to the cited Proclamation and Regulation, the then Federal Ministry of Construction and Urban development has also issued the Building Directive No.5/2003 to be effective as of May, 2011.

According to Article 26 of the proclamation and detailed in regulation 243/2003 (article 19), any registered professional who has contracted to carry out the design work of category "B" and "C" buildings shall produce guarantee for any damage resulting from any defective work due to the design. "Category 'B' building" means a building with a span of more than 7 meters between two reinforced concrete, steel or other structural frames or of two or more stories not covered in category 'C' or a real estate development of category 'A'; and "category 'C' building" means any public or institutional building, factory or workshop building or any building with a height of more than 12 meters. In accordance with Article 26 of the proclamation, the form and amount of the guarantee to be produced by a registered professional who has reached agreement to carry on the design of Category "B" and "C" buildings shall be as shown in *Table 2.1*:

Table 2.1: *Guarantee for design of Category B and C buildings*

No.	*Building Category*	*Project Cost/ETB*	*Guarantee (% of project cost*	*Maximum Guarantee/ ETB*	*Duration*	*Mode of the Guarantee*
1	Category B buildings excluding real estates	5 million	10%	500,000	One year from completion of project	From recognized insurance company before commencing project
2	Building category C and real estates	2.5 million	20%	500,000	One year from completion of project	From recognized insurance company before commencing
		10 million	15%	1.5 million		
		20 million	10%	2 million		

Similarly, according to article 27 of the proclamation and detailed in regulation 243/2003 (article 20), any contractor who has reached agreement to construct Category "B" and "C" buildings shall produce guarantee and the amount and procedure of production a guarantee on basis of categories of building shall be as shown in *Table 2.2*:

Table 2.2: *Guarantee for construction of Category B and C buildings*

No.	*Building Category*	*Project Cost/ETB*	*Guarantee (% of project cost*	*Maximum Guarantee/ ETB*	*Duration*	*Mode of the Guarantee*
1	Category B buildings excluding real estates	10 million	20%	2 million	One year from completion of project	From recognized insurance company before commencing project
2	Building category C and real estates	10 million	30%	300,000	One year from completion of project	From recognized insurance company before commencing
		15 million	25%	3.75 million		
		25 million	20%	5 million		

The guaranty period provided shall not affect contract of work relating to immovable property provisions of the Civil Code.

The project cost, for insurance purpose, shall be calculated by taking in to account the total project area and the price of the construction per square meter which is to be prepared by the building officer and approved by the urban administration or the designated organ.

2.6.5 Dispute Resolution

All forms of dispute resolution from the simple negotiation to court litigation are found in Ethiopian business disputes including construction and insurance.

According to the Civil Code article 3318 through 3324, it is provided that the disagreeing parties may entrust a third party with the mission of bringing them together and, if possible, negotiating a settlement between them. This is conciliation. The conciliator may be appointed, at the request of the parties, by an institution or by a third party and he is free to accept or to refuse his appointment. Before expressing his findings, the conciliator shall give the parties an opportunity of fully stating their views and he shall draw up the terms of a

compromise or, if none can be reached, a memorandum of non-conciliation (within six months) and communicate these documents to the parties.

Arbitration is also used under Ethiopian law and it is regulated in more detail than any other kinds of ADR under the Civil Code provisions of Arts 3307 – 3346. According to the Civil Code of Ethiopia, arbitral submission or arbitral agreement is the contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law (article 3325(1)). The arbitrator may be appointed either in the arbitral submission or subsequently and the submission may provide that there shall be one arbitrator (sole arbitrator) or several arbitrators, where the submission fails to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator (article 3331). Where there is an even number of arbitrators they shall, before assuming their functions, appoint another arbitrator who shall as of right preside the arbitration tribunal. Where their number is odd, the arbitrators shall appoint the president of the arbitration tribunal from among themselves. Failing agreement between the arbitrators, the appointment of the president shall be made by the court at the request of one of the parties (article 3332).

There are only two arbitration institutions in Ethiopia. Even worse, till 2002, before the establishment of Ethiopian Arbitration and Conciliation Centre (EACC), there was only one arbitration center, Addis Ababa Chamber of Commerce Arbitration Institute (AACCSA) to deal with a majority of commercial disputes since 1947.

For those disputes ADR failed to solve and based on the interest of the disputing parties, litigation is the final option in Ethiopia too similar to other countries experience. There are different courts with judicial authority established as per article 78, 79 and 80 of the Constitution of Ethiopia (1994).

2.7 Gap Identification and Summary

Apart from framing basic knowledge, the literature review helped in identifying the gaps outlined below.

i. Construction firms in Ethiopia make their business without adequate insurance coverage.
ii. Insurance companies claim management with focus on construction should be investigated as the number of claims going to dispute have kept increasing.
iii. Fraud is also affecting the insurance sector in general. Fraud results in higher premiums and increased disputes. Insurers in the US have created a national fraud academy, a joint initiative of the Property Casualty Insurers Association of America, the FBI, National Insurance Crime Bureau (NICB) and the International Association of Special Investigating Units, which is designed to fight insurance claims fraud by educating and training fraud investigators. It offers online classes under the leadership of the NICB. There is no such organization in Ethiopia.
iv. In the developed world there is intra-industry dispute resolution model particularly suited for each sector like finance, construction, maritime etc. One such remarkable model is the UK's FOS.
v. With regard to ADR, for example, in a number of states in USA, parties in commercial disputes are required to participate in atleast one mediation or settlement conference prior to moving forward with trial. Similar to USA's experience, China also established the mechanism for linking insurance dispute litigation with mediation in some regions of China. There are no such systems developed in Ethiopia yet.
vi. There are only two arbitration institutions in Ethiopia to refer to solve disputes through arbitration.
vii. In the insurance markets of the countries covered on the literature review, there are different legal advisors specializing in insurance and reinsurance laws. There are limited legal advisors in Ethiopia specializing in insurance and construction laws making the dispute resolution process challenging.

Chapter Three

Research Methodology

Research methodology is the whole process of the research study. Therefore, the research methodology revolves around the problem to be examined in the research study and depends entirely upon that problem. Choosing the best methodology to suit the research is important not only to meet the specified objective but also to enhance the study's credibility.

Qualitative approach is choosen for this study mainly for three compelling reasons.

The first is because qualitative research involves an interpretive, naturalistic approach to the world – studying things in their natural settings while attempting to make sense of and interpret phenomena in terms of the meanings people bring to them (Denzin and Lincoln, 2000). It is believed that a lot of insurance cases took a lot of years to resolve while everything seems to be simple on the paper. Hence it is important to study by engaging in actual cases following naturalistic, interpretive approach.

The second is because a qualitative approach is warranted when the nature of research questions requires exploration (Stake, 1995). Qualitative research questions often begin with how or what, so that the researcher can gain an in depth understanding of what is going on relative to the topic. For the current study, construction insurance disputes are explored from the cases and participants by asking the following what questions: (a) what are the types of insurance covers frequently leading to disputes and what are the causes for the disputes? (b) What methods are used to solve the disputes? (c) What should be done to increase the use of ADR in insurance disputes? (d) What needs to be done to minimize construction insurance related disputes? and (e) what practical lessons can be learnt from the cases under study?

Third, qualitative methods emphasize the researcher's role as active participant in the study. For the present study, the author was the key instrument in data collection, and the interpreter of data findings. An ongoing interpretive role of the researcher is prominent in any qualitative case study (Stake, 1995).

Hence, this chapter will discuss about the research design to be used, data analysis, research steps, ethical considerations and ensuring validity.

3.1 Research Design

Research design is a plan for selecting subjects, research sites, and data collection procedures to answer the research question(s). The goal of a sound research design is to provide results that are judged to be credible.

3.1.1 Pilot Study

Before deciding the research methodology to be followed, a brainstorming session was conducted with two judges to recommend methodology among interviews, questionnaires and case studies. Both agreed that case studies would be ideal to know the most important cause and how it is resolved.

A pilot study is the process whereby the research design for a prospective research is tested. The pilot sample consisted of seven respondents (three contractors, two consultants, and two clients) who were purposively sampled due to their active role in the construction sector. The reason of the pilot study was to determine the feasibility of the study; to test the reliability and validity of the instrument and trustworthiness of respondents for data collection in the main study; to establish how appropriate, understandable and practical the instrument is; to address any problems prior to the main study. The pilot study demonstrated that the questionnaire is difficult to be taken as an appropriate research tool for this topic because responses on most of them were contradictory of each other and returned unanswered. This perhaps is due to the lack of awareness on insurance practices and poor data keeping of the companies which the author of this study concluded that questionnaire should not be used for this research as a way of validating the case study.

3.1.2 Case Study

There's no formula to determine whether case study is an appropriate research methodology for this study. But the choice depends in part on the research question(s). The research questions are more of descriptive ("what has been happening?") and explanatory ("how or why has it been happening?"), which make the case study method relevant.

Case studies have both strengths and limitations (Hodkinsons, 2001).

The strengths of case studies are:-

- They can help us understand complex inter-relationships.
- Case studies are grounded in "lived reality".
- Case studies facilitate the exploration of the unexpected and unusual.
- Multiple case studies can enable research to focus on the significance of the idiosyncratic.
- Case studies can show the processes involved in causal relationships.
- Case studies can facilitate rich conceptual/ theoretical development.

The limitations of case studies are:-

- There is too much data for easy analysis.
- Very expensive if attempted in large scale. Time consuming to collect and to analyze.
- Most of them don't lend themselves to numerical representation.
- Because the sample is small and idiosyncratic, and because data is predominantly non-numerical, there is no way to establish the probability that data is representative of some larger population.
- They are strongest when researcher expertise and intuition are maximized, but this raises doubts about their "objectivity".

In many ways, doing case study research will not be different from using other research methods. All methods require reviewing the literature, defining research questions and analytic strategies, using formal data collection protocols or instruments, and writing good research reports. Case studies however call for at least one additional skill on the researcher's part. Unlike most other methods, when doing case studies it may be needed to do data collection and data analysis together. The need to do data analysis while still collecting data produces huge differences compared to using other methods. For example, with surveys and experiments, data collection is likely to occur as a formal stage separate from data analysis. One stage usually gets done before the other starts (Yin, 2009).

Case study methodology is described as a strategy of inquiry in which the researcher explores in-depth a program, event, activity, process or one or more individuals according to

Stake (1995). Cases are bounded by time and activity, and researchers collect detailed information using a variety of data collection procedures over a sustained period of time. For this study, the phenomenon under investigation is the causes of construction insurance disputes and how they are resolved. The cases for the current study are 15 cases heard at the Federal Supreme Court, of which eleven are Cassation files and the remaining four are appeal files

The term "case study" can refer to either single or multiple case studies. This research uses multiple case studies. Selecting the case(s) serves as possibly the most critical step in doing case study research. One of the most common misconceptions for a researcher using a case study is to overcome the belief that case studies are to represent a formal "sample" from some larger universe, and that generalizing from the cases depends on statistical inference (statistical generalization); instead, generalizing from case studies reflects substantive topics or issues of interest, and the making of logical inferences (analytic generalization) (Stake, 1995).

Case study researchers collect detailed information using a variety of data collection procedures over a sustained period of time. For this study, data are collected through reviewing documents (court decisions) supported by interviews.

3.1.3 Participants and Sampling

During the initial planning stages of the research, the author intended to involve all the construction insurance court cases in Ethiopia. Due to the time available to complete the research and financial implications though, 15 purposively sampled court cases extracted from the Federal Supreme Court are to be used. Purposive sampling is when researchers use their judgment to select the membership of the sample based on research goals.

The simple selection criterion of the cases was that they had to be relevant to the construction industry in any region of Ethiopia. Cases involving contractors, consultants, public bodies, suppliers, freight forwarders, are to be taken as cases in the construction sector. Retailers and importers of construction materials are also involved in this study. The extraction of the cases from Federal Supreme Court includes 15 cases from June 2008 to April 2017, involving companies or organisations participating in the construction industry. The cases were heard in a number of different courts (the first instance court, the High Court

and the Court of Appeal, Supreme Court). The court cases used in this investigation have been made public; there is no breach of privacy or confidentiality towards any company or organisation. Selecting the eight insurance companies for the semi-structured interview was also purposeful in that they participated in the selected fifteen cases. The insurance companies are; EIC, Awash Insurance S.Co, Nyala Insurance S.Co, Hibret Insurance S.Co, Anbessa Insurance S.Co, Nib Insurance S.Co, Nile Insurance S.Co, and Global Insurance S.Co.

3.1.4 Data Collection Methods

Yin (2009) stated that a carefully conducted case study benefits from having multiple sources of evidence, which ensure that the study is as robust as possible. The concept of methods refers in general to the appropriate use of techniques of data collection and analysis. In a case study, it is important to converge sources of data, also known as triangulation, as a means to ensure comprehensive results that reflect the participants' understandings as accurately as possible. Yin (2009) and Stake (1995) concur that triangulation is crucial to performing a case study reliably.

The data collection methods used for qualitative studies are written surveys, open-ended questions, individual interviews, focus group interviews, observations (recorded in field notes) and document textual analysis (Yin, 2009). This study uses individual interviews, observation and document analysis as major data collection methods.

3.1.4.1 Semi-Structured Interviews

Semi-structured interviews are described as less rigid than structured interviews, and allowing for a free exchange between the interviewer and interviewee (Esterberg, 2002). They allow for triangulation of information obtained from other sources and, thus, increase the credibility of study findings.

The semi-structured interviews were conducted for claim and legal departments of the eight insurance companies described under sub-section 3.1.3. The questions are mostly open ended, making it possible for the interviewer to add new questions and to encourage participants to respond freely and openly to queries during the interviewing process. Probing and/or follow-up questions were used, when necessary, to encourage participants to

elaborate on or clarify a response (Denzin and Lincoln, 2000). All interviews were held at the participants' offices and all were conducted face to face and lasted from 45-60 minutes.

3.1.4.2 Document Review

Documents of fifteen cassation decision volumes from June 2008 to April 2017 were reviewed to look for construction insurance cases which reached litigation. Further intensive review of literatures was conducted in this study to get a robust theoretical foundation. The use of literature review is dual. First, it seeks systematic reading of previously published and unpublished information relevant to the subject matter. The gathered information will develop issues and themes and drives to the research design. Second, the literature review will help to improve the research study by looking into previous research design or questionnaires which will give the researcher some insights into how to design the study more effectively.

3.1.4.3 Observation

An important component in any scientific investigation is observation. In this sense, observation refers to two distinct concepts; being aware of the world around us and making careful measurements. Observations of the world around us often give rise to the questions that are addressed through scientific research (Yin, 2009).

3.2 Data Analysis

Qualitative analysis is a form of intellectual craftsmanship. There is no single way to accomplish qualitative research, since data analysis is a process of making meaning. It is a creative process, not a mechanical one (Denzin and Lincoln, 2000). Similarly, a qualitative study capitalizes on ordinary ways of making sense (Stake, 1995). Stake reminds qualitative researchers that, "there is no particular moment when data analysis begins". Qualitative data analysis, then, gives meaning to first impressions and final compilations. It is an analysis that tells what the causes of insurance disputes are, the most important causes and how they are resolved.

This research is a case study research in nature and analyzing case study data starts with questions rather than with the data. It is better to start with a small question first, and then identify the evidence that addresses the question. A tentative conclusion is drawn based on

the weight of the evidence, and also asking how the evidence should be displayed is important so that readers can check the assessment. Questioning will then continue to a larger question until the main research questions are addressed (Yin, 2009).

This research followed the data analysis and coding procedures suggested by Esterberg (2002). Specifically, Esterberg (2002) suggested that open coding is a process where "the researcher works intensively with his data, line by line, identifying themes and categories that seem of interest". Frequently disputing insurance types, causes of insurance disputes and most important factors were identified by analyzing the cases line by line.

3.3 Ethical Considerations

Research requires not only expertise and diligence but also honesty and integrity. Ethics in research refers to the norms for conduct that distinguish between acceptable and unacceptable behavior. This helps to protect the rights of respondents. To render this, the rights to anonymity, confidentiality and informed consent were observed. Permission was obtained from different offices as well as individual respondents. Respondents were well communicated about the purpose of the study and the required data (Stake, 1995; Yin, 2009).

3.4 Ensuring Validity and Reliability

Because qualitative research entails the researcher taking an active role in the collection and interpretation of others' meaning making, to be credible, qualitative researchers must be good and trustworthy. Stake (1995) cautioned qualitative researchers against narrow thinking, and instead suggested that researchers learn to understand their research as their participants do, rather than impose their own assumptions. In qualitative research, these protocols come under the name of, "triangulation" which is the use of two or more methods of data collection to study a particular phenomenon. "Triangulation" is a strategy recommended by distinguished qualitative researchers and hence is supposed to increase the trustworthiness of the study's findings and decrease threats to credibility.

Chapter Four

Data Presentation and Analysis

This chapter presents the fifteen cases used in the research and interpretation of the case suitable in achieving the objectives.

4.1 Selected Cases

Case One: Fetan Construction vs. Ethiopian Insurance Corporation (Federal Supreme Court Cassation Bench File No. 37491**,** Judgment delivered on June 11, 2008)

Fact

- Fetan Construction (hereinafter named as 'Fetan') was insured under EIC's motor insurance cover from July 11, 2002 to July 10, 2003 and was benefiting for this duration without paying an outstanding premium (premiums that are currently due but haven't yet been paid) of ETB 40,154.74.
- Because 'Fetan' ignored EIC's warning to pay the money, EIC sued 'Fetan' to the Federal First Instance Court to pay the remaining amount.
- 'Fetan' argued the policy to be of no effect because the policy wasn't signed by the parties bound by the contract and wasn't attested by two witnesses (as per the requirement of Article 1727 of the Civil Code).

Holding of the Federal First Instance Court, the Federal High Court and the Federal Supreme Court Cassation Bench

The Federal First Instance Court ordered 'Fetan' to pay the remaining premium amount ETB 40,154.74 plus its interest to EIC. The Federal High Court upheld the decision of the First Instance Court when viewing the case on appeal. When the case was applied to be reviewed by cassation, a panel of three screening judges at the Federal Supreme Court Cassation Bench upheld the decision of the lower courts.

Reasoning of the Courts

The Federal First Instance Court after evaluating both sides of the arguments verified that 'Fetan' wrote a letter to EIC on May 31, 2002 requesting the price estimation for his six cars plus the amount of the premium he was to be charged if he was to insure the cars. As a response to Fetan's request, EIC on June 10, 2002 expressed the amount of premium to be paid. On July 10, 2002, 'Fetan' notified to EIC that he has accepted the premium and the price estimation made by the surveyors of the insurance company and hence agreed the insurance policy to be effective. The court inferred here that 'Fetan' accepted the offer made to him by EIC. Accordingly, EIC issued two insurance policies to 'Fetan' for duration of cover of a year (from July 11, 2002 to July 10, 2003) according to article 657(1) of the Commercial Code.

The court established that Fetan's argument (the policy should be of no effect because the policy wasn't signed by the parties bound by the contract and wasn't attested by two witnesses), isn't legitimate and decided there was an insurance contract for the stated duration on the policy indeed and ordered 'Fetan' to pay the premium as per article 666(1) of the Commercial Code *(The beneficiary shall pay the agreed premium at the time specified in the policy).*

Cause of the dispute – a claim by an insurance company for payment of an outstanding premium

Type of insurance – Motor Insurance

Amount of claim–ETB 40, 154.74

Legal document used to solve the case (in the order of relevance to the case) - Commercial Code and letters.

Lessons learnt –

As per article 657(1) of the Commercial Code, the contract of insurance should be supported by a document called an insurance policy as a proof of contract of insurance.

<u>Case Two</u>: Ethiopian Roads Authority vs. EIC (Federal Supreme Court Cassation Bench File No. 42309**,** Judgment delivered on: July 7, 2009)

Fact

- ERA's car was insured under EIC's motor insurance cover and the car crushed on May 20, 2002 and EIC repaired the damaged car.
- On April 11, 2007, EIC filed a lawsuit to the Federal First Instance Court claiming ERA to replace the cost of repairing the car (because of fraud) because the car crushed not while driven by a driver but while being checked by a mechanic after fixing the car's defective brake at downtime (an exclusion in the insurance policy).
- ERA preliminarily objected the claim that it is barred by limitation as per article 674(1) or (2) of the Commercial Code.
- The Federal First Instance Court, after evaluating both sides of the argument and evidences decided ERA to replace the cost of repairing (because he didn't adhere to the policy requirements).
- The Federal High Court viewing the case on appeal confirmed the decision of the First Instance Court.
- ERA brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the lower courts in their decision that he had to replace the cost of repairing even though the damage occurred before two years.

Holding of the Cassation Bench

The Cassation Bench reversed the decision of the lower courts and decided EIC's claim to be barred by limitation because it was brought to action after two years from the occurrence of the damage.

Reasoning of the Cassation Bench

The damage occurred on May 20, 2002 and EIC was aware of the damage at the same time. The claim of EIC to First Instance Court was on April 11, 2007. The difference between the two dates is four years and ten months which means the claim of EIC is void according to article 674(1) of the Commercial Code *(any claim arising out of a contract of insurance shall be barred after two years from the occurrence giving rise to the claim or from the day*

when the parties knew of the occurrence). Let the true cause for the damage was concealed as EIC claims; the difference between the days when EIC knew the concealment, June 3, 2004 (as found from court proceedings) to April 11, 2007 is two years and ten months which again nullifies the claim according to article 674(2) of the Commercial Code *(in case of concealment or false statements, the period of limitation shall run from the day when the insurer knew of the concealment or false statement)*.

Cause of the dispute

The insurance company's claim that his client's car was repaired because the insured concealed true cause of the damage which should have been excluded from coverage (fraud)

Type of insurance cover – Motor Insurance

Amount of claim – ETB 67,034.47

Legal document used to solve the case (in the order of relevance to the case) **–** Commercial Code

Lessons learnt –

Since a claim arising out of insurance is barred after two years from the occurrence of the damage, or from the day the parties new the occurrence, or from the day the insurer knew of the concealment, insurers should process the claim within the two years stipulated by law.

<u>Case Three</u>: Nyala Insurance S.Co., vs. Ethiopian Shipping Lines S.Co., (Currently Known as "Ethiopian Shipping and Logistic Service Enterprise"), (Federal Supreme Court Cassation Bench File No. 52667**,** Judgment delivered on: December 21, 2010)

Facts

- A client was provided with a marine insurance cover from Nyala Insurance S.Co., (hereinafter named 'Nyala') to cover for the risks that might happen while his 50 boxes of glasses were being transported from China to Djibouti.
- The transporter was Ethiopian Shipping Lines (hereinafter abbreviated as 'ESL') as per a contract of carriage of goods between ESL and the client of 'Nyala' to transport and deliver the 50 boxes of glasses.
- When the glasses reached Djibouti, ten boxes were damaged because of poor stowage.
- 'Nyala' compensated his client with ETB 101,465.00 and sued ESL (using his subrogation right) to the Federal First Instance Court so that the amount he already paid to his client is reimbursed.
- ESL defended to the claim that he never checked the condition of the glasses before loading and hence he isn't liable for the damage. ESL also argued that if he is to be liable, his liability should be limited to ETB 500 (Article 198(1) of the Maritime Code) since the value of the goods wasn't known.
- The Federal First Instance Court and the Federal High Court (on appeal) asserted from a survey report that the damage on the goods were caused because of a poor handling of the container that contained the glasses and decided ESL to be liable. Regarding the amount of compensation, the courts referred article 198(1) of the Maritime Code, global statutory limitation of liability, which says in respect of loss of or damage to goods, the liability on the carrier shall not exceed ETB 500 and decided ESL to pay ETB 500 for each damaged box, or a total of ETB 5,000 for ten boxes.
- 'Nyala' brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the lower courts to which the courts based article 198(1) of the Maritime Code though the value of the goods was already known.

Holding of the Federal Supreme Court Cassation Bench

The Cassation Bench reversed the decision of the Federal First Instance Court and the Federal High Court and returned the case back to the Federal First Instance Court to decide it by evaluating the LC and related documents and base its decision on Article 198(3) of the Maritime Code not by Article 198(1) of the Maritime Code because the value of the goods is already known.

Reasoning of the Cassation Bench

The Cassation Bench evaluated both sides of the arguments once again. Accordingly Nyala's client has given LC document showing the payment of money he made for the goods (in foreign exchange through Nib Bank amounting USD 21,499.94) which means the nature and the value of goods had already been declared. The bench further found that the LC number was inserted in the 'bill of lading' given by ESL and ESL never denied about the LC in the trials which should be assumed as if ESL admitted he was aware of the LC and hence the value of the goods which a client of 'Nyala' paid through Nib Bank (Article 234(1e) of the Civil Procedure Code). Given ESL was aware of the value of the goods through a letter of credit from Nib Bank, and the LC number expressly stated on the 'bill of lading', referring article 198(1) of the Maritime Code (statutory limitation of liability on the carrier when the value of the good isn't known) is a 'basic error of law' the bench concluded.

Cause of the dispute

- Disagreement on the cause of the damage and liability (proof of loss)
- Applicable law/provision

Type of insurance – Marine Insurance

Amount of claim – ETB 101,465.00 (one hundred one thousand four hundred sixty five)

Legal document used to solve the case (in the order of relevance to the case) – Maritime Code, Civil Procedure Code, Bill of Lading, Letter of Credit

Lessons learnt –

A statutory limitation of Article 198(1) may not be set up against the shipper where the nature and value of the goods have been declared by the shipper before shipment, and such declaration has been inserted in the bill of lading.

Case Four: EIC vs. China Wanbo Engineering Corporation et.al. (Federal Supreme Court Cassation Bench File No. 49295**,** Judgment delivered on: March 31, 2011)

Facts

- EIC provided a marine insurance cover for an electric transformer of China Wanbo Engineering Corporation's (hereinafter abbreviated as 'CWEC') to cover for risks while the transformer is transited.
- A trailer carrying the transformer crushed and caused a heavy damage to the transformer while the transformer was on the way from Djibouti to Debrebrhan.
- CWEC claimed ETB 2,223,293.80 to the Federal High Court to be paid to him jointly and severally by EIC (the insurance company), Tabtra PLC (the freight forwarder, hereinafter called 'Tabtra) and Yonas Tesfaye (the transporter, hereinafter called 'Yonas').
- EIC defended that the policy prevailing between him and CWEC is marine insurance and hence the governing code should be the Maritime Code not the Commercial Code. EIC also defended he isn't responsible as per the insurance policy that the accident to the transformer occurred because the trailer was loaded beyond its carrying capacity by the freight forwarder ('Tabtra') and because of the equal relationship between the principal (CWEC) and the agent ('Tabtra'), the act of the agent binds the principal. EIC further argued CWEC didn't draw up a protest within 7 days which made the insurance company lose its subrogation right and the amount claimed was exaggerated and lacked appropriate supporting evidences.
- 'Tabtra' on its part raised a preliminary objection that he fulfilled his obligation as an agent according to the laws and argued he shouldn't be liable for the loss.
- 'Yonas' on the other hand defended he transported and delivered the transformer to CWEC as agreed and that it wasn't reasonable to say after eight months that the loss occurred because of him where he never received a protest at the time.
- The Federal High Court after evaluating all sides of the argument decided the Maritime Code to prevail over the Commercial Code and released 'Yonas' and EIC from liability and made 'Tabtra' to be responsible to pay the claim amount.

- ‘Tabtra’ appealed to the Federal Supreme Court and the Supreme Court’s Appellate Bench reversing the decision of the High Court ruled the Commercial Code to be relevant for the case instead of the Maritime Code. Hence the court decided EIC to compensate the claim amount to CWEC and reimburse the sum by using his subrogation right against ‘Tabtra’ and ‘Yonas’.
- EIC brought the matter to the Cassation Bench of the Federal Supreme Court invoking ‘basic error of law’ committed by the decision of the Federal Supreme Court Appellate Bench that there is no legal or contractual right EIC replaces the money by charging ‘Tabtra’ and ‘Yonas’ if he had to pay the claim amount.

Holding of the Cassation Bench

The Cassation Bench reversed the Federal Supreme Court Appellate Bench’s decision (EIC to compensate CWEC and reimburse by suing ‘Tabtra’ and ‘Yonas’) and referred the case for trial back to the Federal High Court (based on article 343(1) of the Civil Procedure Code) to resolve the case as per Regulation No. 37/1998, and after identifying the agreement and the law that determines the relationship and responsibility between ‘Tabtra’ and ‘Yonas’.

Reasoning of the Cassation Bench

i. Concerning the law to be implemented in the insurance contract between EIC and CWEC

The Cassation Bench deduced that the insurance policy available is marine insurance and covers the CWEC’s transformer for any losses that might happen to it while on its way from China to Debrebrehan except for the exclusions stipulated under article 1 of the policy. In essence, a trailer was transporting the transformer from Djibouti port to Debrebrehan while it fell and damaged the transformer protected under the insurance policy.

EIC without clearly confuting on the contents of the policy argued based on the policy title, typical characteristics of marine insurance and international practices. Unquestionably, typical characteristic of marine insurance is that it is entered for accidents that happen on the sea. According to article 292(1) of the Maritime Code, anything which can he valued in money's worth and which is exposed to maritime risk for lawful purpose may be insured. On 292(2) of the same code, it is stipulated that no person may claim under the policy unless he

has suffered damage as a result of the causality. The Maritime Code puts the decrees about the contract of insurance on article 288. In this article, any policy of insurance having as its principal object to guarantee, a maritime risk, including collateral risks, is subject to the provisions of the title, insurance. It is possible to understand then that the Maritime Code is applicable only when damage occurs on sea (by pirates etc. occurring within the territorial waters). So the Maritime Code can't be referred for this case and the Commercial Code article 655 is used to decide the subject matter. This article puts the scope of application of the general provisions of insurance (those in the Commercial Code) to apply to insurance of risks arising on land, on rivers or in the air and that it shall not apply to marine insurance which shall be subject to the relevant provisions of the Maritime Code.

EIC insured CWEC with the policy called "Marine Insurance" in title but when looking into the contents of the policy (article 1 and 19 of the policy), except for those clearly excluded, it covers all damages including those on land. So evaluating article 288 and 292 of the Maritime Code and article 655 of the Commercial Code, it is the Commercial Code that has to be employed for this case.

ii. Concerning liability

CWEC argued that the contract of Freight Forwarding between CWEC and 'Tabtra' was to deliver the transformer to Debrebrehan and it was specified on the contract that 'Tabtra' would be responsible for any damage there with. 'Tabtra' without denying that he had a contract of freight forwarding with CWEC, replied he gave the transporting work for 'Yonas' (a transporter) and the accident happened while 'Yonas' was transporting the transformer to Debrebrehan by his own vehicle.

Accordingly, CWEC sued EIC based on the insurance policy and again sued 'Tabtra' based on a contract of freight forwarding which is governed by Regulation No. 37/1998, Freight Forwarding and Ship Agency License Issuance. As per article 2(1) of this regulation, it is clearly provided that freight forwarding is the representation of a consignor or consignee locally or internationally in fulfilling customs, port and other formalities for import and export cargo at port and includes the transportation and delivery of same. As per article 3(6) of the regulation, if the freight forwarder provides transport services himself, he transports the goods as a carrier; and as per article 3(7) of same regulation, where the freight forwarder

or cargo owner do not have transport services, he can transport the cargo using other transporters (carriers). Hence a freight forwarder does all his works through representation.

It was found in the lower courts that 'Tabtra' fulfilled his transporting responsibility through 'Yonas' (by representation) and not directly by himself. So Tabtra's responsibility will be according to article 12(2) of the regulation (Liability of the Freight Forwarder) that the freight forwarder is liable for defaults in the performance of his duties, in particular liable for loss of or shortage of or damage to the goods or delay in delivery of the goods.

It is expressed in the decision of the Federal Supreme Court Appellate Bench that EIC should pay the claim amount to CWEC and use his subrogation right against 'Tabtra' and 'Yonas' as per article 683 (3) of the Commercial Code *('Notwithstanding any provision to the contrary, the insurer may not claim against the ascendants, descendants, agents or employees of the insured person nor against persons living with him, unless such persons have acted maliciously.')*. This provision articulates that an insurer can't bring about action against those who had close relation with the insured and work not for their own gain but for the benefit of the insured.

'Agent of the insured' in article 683(3) of the Commercial Code isn't equivalent to the meaning of a 'Freight Forwarder' on regulation 37/98 because even though freight forwarding (including the transportation) is implemented by representation, it differs from the purpose and content of article 683(3) in that the freight forwarder works for his own gain not for the gain of the insured.

Even though freight forwarder is different from the insured's agent and article 683(3) of the Commercial Code can't be applied for a freight forwarder, it is important to differentiate between 'malicious act' and 'default'. The insurer can claim against those persons stipulated on article 683(3) if they acted 'maliciously'. According to Black's Law Dictionary (2009), 'malicious act' is an intentional wrongful act performed against another without legal justification. In terms of measure, 'malicious act' is stronger than 'default in performance of duties' in article 12 of Regulation No. 37/98. 'Default' as per the above dictionary is the omission or failure to perform a legal or contractual duty. Hence the Cassation Bench found that the Appellate Bench's decision of EIC to demand 'Tabtra' based on Commercial Code 683(3) isn't relevant for the case although the freight forwarder could be made liable as

indicated on article 12(2) of regulation 37/1998 for defaults in the performance of his duties..

The Cassation Bench finally concluded that there is no law that withdraws EIC from using his subrogation right against 'Tabtra' (on the claim that the transformers were overloaded on a trailer with a less carrying capacity) as this right of the insurance company emanates from the insurance contract between EIC and CWEC. The Cassation Bench further ruled that the issues whether 'Tabtra' is responsible for the loss as per article 12(2) of Regulation 37/1998, whether there is legal background that the transporter ('Yonas') could be made responsible and other issues related with the damage should be identified and clarified before EIC compensates CWEC for the loss (contrary position to the Appellate Court).

Cause of the dispute –

- Disagreement on the cause of the damage and liability (proof of loss)
- Applicable law and its interpretation

Type of insurance cover – Marine Insurance

Amount of claim – ETB 2,223,293.80

Legal document used to solve the case (in the order of relevance to the case) **–** Regulation No. 37/1998, Freight Forwarding and Ship Agency License Issuance, Commercial Code

Lessons learnt –

According to article 683 of the Commercial Code, an insurer can't bring about action against those who had close relation with the insured (ascendants, descendants, agents or employees of the insured person nor against persons living with him) and work not for their own gain but for the benefit of the insured. The word 'agent' in this article of the Commercial Code though doesn't include those who carry out the activity transiting for gain (Freight Forwarders for example).

In any insurance policy interpretation, the title versus the content of the policy should be checked. As in this case, although the title of the insurance policy says a 'marine insurance', looking into the contents of the policy, it covers all damages including those arising on land relevant to the Commercial Code rather than the Maritime Code.

<u>Case Five</u>: ERA vs. Country Trading PLC (Federal Supreme Court Cassation Bench File No. 60951**,** Judgment delivered on: May 27, 2011)

Facts

- Country Trading PLC (hereinafter named 'Country') has entered a contract with Ethiopian Roads Authority for the supply of different asphalt products and has provided a contractual security from Wegagen Bank amounting ETB 9,559,527.37 (10% of the contract price).
- As per the contract, 'Country' was supposed to supply 8276 metric ton of the asphalt type AC 60/70 out of which 3829.50 metric ton wasn't delivered.
- ERA then deducted proportionately ETB 3,557,729.34 (10 % of the amount undelivered) from the performance security bond and returned the remaining money to 'Country'.
- Disagreeing with ERA's measure, 'Country' sued ERA to the Federal High Court. The Federal High Court and the Federal Supreme Court (on appeal) decided ERA to return the money he deducted because he has no authority to deduct the money (accounting for the material undelivered) and further implied that the amount should be decided by the courts. The Federal Supreme Court ruled the same when viewing the case on appeal. The courts based article 1790(1) *(Apart from or in addition to the enforcement or cancellation of the contract, a party may require that the damage caused to him by the other party failing to perform his obligations be made good)* and 1799 *(Damages shall be equal to the damage which non-performance would normally have caused to the creditor in the eyes of a reasonable person. And the nature of the contract, the profession of and the relations between the parties and any circumstances known to the debtor which surrounded the making of the contract shall be taken into consideration in assessing the amount of damages).*
- ERA brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the lower courts to which the courts based their decision on Article 1790(1) and 1799 of the Civil Code.

Holding of the Cassation Bench

The Cassation Bench reversed the decision of the lower courts and decided that it is legitimate that ERA deducted from the contract security ETB 3,557,929.34 for the amount undelivered.

Reasoning of the Cassation Bench

ERA based Article 43 of Proclamation 430/2005, Determining Procedures of Public Procurement that he has the authority to deduct from the contractual security as a compensation for damage as a result of non-performance. 'Country' on the other hand defended ERA doesn't have the authority to deduct (by his own) from the contractual security and mentioned article 3200 of the Civil Code to support his argument. This provision of the Civil Code is for administrative contracts (connected with an activity of the public service) and tells there is no preferential right in principle. Based on this provision, the administrative authorities may not themselves decide that the other party is liable to a penalty by reason of the non-performance of the contract nor may they fix the amount of compensation due by the other party by reason of the non-performance or delay in the performance of his obligations. Nonetheless, it is proclamation 430/2005, determining procedures of public procurement proclamation, the public procurement directive and the contract between the parties that is relevant to this case not the Civil Code (because in terms law interpretation, the Civil Code is a general law while the proclamation is a special law of determining procedures of public procurement and is applicable for this case).

Article 43 of Proclamation 430/2005 dictates a supplier to provide a procuring entity with a contract security to make good on any default by the supplier under the contract. The contracting parties in this case based this proclamation and included a contract security in their contract agreement. Accordingly, it comes to be clear that ERA was damaged because asphalt type AC 60/70 was not fully delivered. Then ERA deducted the money from the contractual security because of the non-performance by 'Country' based on article 18(2) of their agreement. This action is further supported by article 16.27.4 (liability of the supplier for delay in performing his/its obligation under the contract) of the 'Federal Public Procurement Directive, June, 2010' issued by the Ministry of Finance and Economic Development that the supplier shall pay a penalty of 0.1% or 1/1000 of the value of

undelivered item for each day of delay as far as the cumulative penalty to be paid by the supplier doesn't exceed 10% of the contract price. Accordingly, if the delay in performing the contract affects the activities of the public body, the public body may terminate the contract by giving advance notice to the supplier, without any obligation to wait until the penalty reaches 10% of the value of the contract.

Cause of the dispute –

- A Public Body deducting from the performance security for the undelivered items by a supplier (performance bond forfeiture claim)
- Applicable law to be used for the case

Type of insurance – Performance Security/Contractual Security

Amount of claim – ETB 3,557,929.34

Legal document used to solve the case (in the order of relevance to the case) – Proclamation 430/2005 (Determining Procedures of Public Procurement Proclamation), the Federal Public Procurement Directive (June, 2010), contract agreement between the parties

Lessons learnt –

A Public Body is entitled to deduct from the contractual security to account for the damage caused to him by non-performance or partial performance of the contract.

<u>Case Six</u>: EIC vs. Bale Rural Development Enterprise (Federal Supreme Court Cassation Bench File No. 47004**,** Judgment delivered on: March 20, 2012)

Facts

- Axum Construction (hereafter called 'Axum') provided to Bale Rural Development Enterprise (hereafter called 'Bale') a performance bond of ETB 1,101,890 from EIC for a road project as per the prevailing contract requirement.
- 'Bale' then claimed EIC for the payment of the performance bond as a result of breach of performance by 'Axum'.
- EIC rejected the claim arguing the case to be barred by limitation as per article 674 of the Commercial Code.
- The case was then presented to an Arbitration Tribunal and the tribunal after evaluating both sides of the argument decided the claim to be an insurance claim and to be barred by limitation according to article 674 of the Commercial Code (because it was brought to resort after two years from the date of the breach of duty).
- 'Bale' then took the case to the Federal Supreme Court Appellate Bench and the court overruled the decision of the Arbitration Tribunal and decided the case to be resolved by the Civil Code's period of limitation (ten years) instead of the Commercial Code's (two years).
- EIC brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by Federal Supreme Court Appellate Bench in their decision that the case is resolved by the Civil Code's Period of Limitation.

Holding of the Federal Supreme Court, Cassation Bench

The Cassation Bench confirmed that the Federal Supreme Court Appellate Bench's decision that the claim is valid as it was brought within ten years from the date of the breach of non-performance (according to the Civil Code Period of Limitation) has no 'error of law'.

Reasoning of the Federal Supreme Court, Cassation Bench

Under this court case, EIC provided a performance bond for the benefit of 'Bale'. While payment was claimed, the insurance company rejected it. The basis for the rejection was a period of limitation as stated under article 674 of the Commercial Code. Whereas 'Bale'

argued all over the levels of litigation, the performance guarantee is subject to the Civil Code. The court in its judgment assessed the nature of insurance contract. Accordingly, it put emphasis on the absence of insurable interest. Based on its conclusion it emphasized the accessory nature of guarantee and decided that performance guarantee is subject to the provisions of the Civil Code (Surety ship from Article 1920 to 1951). Thus the Period of Limitation applicable is found to be 10 years unlike the argument of EIC.

Cause of the dispute –

- Claim by a creditor for the payment of the performance bond – breach of performance by debtor (performance bond forfeiture claim)
- Governing law for the period of limitation of performance bond

Type of guarantee – Performance Bond

Amount of claim – ETB 1,101,890.00

Legal document used to solve the case (in the order of relevance to the case**)** –

Civil Code 1960, Proclamations No. 110/1990, Proclamation No. 57/1996 and 648/2009 – Financial Administration Proclamation, Directives of NBE, NBE/SID/23/2002 and NBE/SID/24/2004, MoWUD Standard Conditions of Contract for Construction of Civil Work Projects, December 1994, FIDIC Red Book, 1987

ADR options used – Arbitration

Lessons learnt –

Performance bonds formulated by insurance companies are governed by Civil Code provisions, not by the Commercial Code provisions and their period of limitation is ten years.

<u>Case Seven</u>: Nyala Insurance S.Co. vs. China Road and Bridge Corporation, Addis Engineering PLC (Federal Supreme Court Cassation File No. 86601**,** Judgment delivered on: October 4, 2013)

Fact

- Nyala Insurance S.Co., (hereinafter called 'Nyala') provided China Road and Bridge Corporation, Addis Engineering PLC (hereinafter called 'CRBC') with a Contractor All Risk insurance policy cover for a sum insured ETB 446,040,951.27 for the Serdo-Afdera-Afrarhaik Road Upgrading Project he was constructing in Afar region and an additional warranty concerning camps and stores (on a separate endorsement).
- CRBC as per the policy notified 'Nyala' for compensation of ETB 3,683,170.00 for the damage to his consultants' camp and other properties used for the road project he was constructing because of a heavy storm on August 29, 2008 midnight.
- Despite CRBC's notification, 'Nyala' kept still and all requests of CRBC remained unanswered.
- CRBC then on June 9, 2010 proposed the case be resolved by an arbitration tribunal and appointed an arbitrator of his part. (In accordance with Art. 3333 of the Civil Code, *(1) where necessary, the party availing himself of the arbitral submission shall specify the dispute he wishes to raise and appoint an arbitrator. (2) Notice thereof shall be given to the other party and, where appropriate to the person entrusted with the appointment of an arbitrator under the arbitral submission*).
- On June 28, 2010, 'Nyala' notified to CRBC (in accordance with Article 3333(2) of the Civil Code) that he appointed his arbitrator. (Note here that according to Art. 3334 of the Civil Code, *Time-limit (1) Where the other party or the person required to appoint an arbitrator fails to do so within thirty days, the court is given the power to appoint such arbitrator).*
- A panel of three arbitrators entrusted by both parties appointed the president of the arbitration tribunal on their meeting on January 17, 2011. The appointed president accepted the presidency and the tribunal started hearing the arguments.
- 'Nyala' defended on the process of the hearing that the arbitration tribunal doesn't have the legal authority to judge the case and argued that he appointed an arbitrator doesn't

necessarily mean he has agreed to be judged by the tribunal (because he never admitted liability for the said loss) and it is a policy requirement that the tribunal should judge cases only when 'Nyala' admits liability (according to Article 7 of the policy).

- The arbitration tribunal pointed that since 'Nyala' already nominated an arbitrator and has agreed to pay ETB 150,000 to CRBC (confirmed in writing through a letter); it meant 'Nyala' has admitted liability. Hence the tribunal decided a payment of ETB 2,408,877.50 to be made to CRBC as compensation for the damage.
- Disappointed with the decision of the arbitration tribunal 'Nyala' appealed to the Federal Supreme Court. The appellate bench, after reviewing the documents and arguments of both sides, reversed the decision of the tribunal and unahthorized the tribunal to judge the case (indicating 'Nyala' never accepted liability).
- CRBC brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the Federal Supreme Court Appellate Bench in the decision that the Arbitration Tribunal is unauthorized to see the case.

Holding of the Cassation Bench

The Cassation Bench reversed the decision of the Federal Supreme Court Appellate Bench and authorized the Arbitration Tribunal to view the case.

Reasoning of the Cassation Bench

The Cassation Bench found that 'Nyala' accepting the liability, has replied to CRBC through a letter (in response to the claim notification by CRBC) on March 3, 2009 saying Endorsement 107 (warranty concerning camps and stores) doesn't extend a cover for windstorm, but stated the claim to be entertained under the standard cover of the CAR policy and hence notified CRBC to collect the payment ETB 50,000 after deducting an excess of ETB 100,000 (Acts of God Deductible). This means Nyala has admitted to pay a compensation of ETB 150,000 for the damage out of which the ETB 100,000 is deducted and the net pay is ETB 50,000. This justifies Nyala admitted liability and it is shown on article 7 of the insurance policy that once liability is admitted by the insurance company, and if the parties disagree on the compensation amount to be paid, it can be referred to the decision of arbitrator appointed (Article 7 of the insurance policy - *"if any difference shall*

arise as to the amount paid under this policy (liability being otherwise admitted) such difference shall be referred to the decision of arbitrator appointed by writing).

The bench also established that when CRBC requested the case to be resolved by arbitration, Nyala agreeing with the arbitral submission of CRBC (consistent with article 3328 of Civil Code), nominated an arbitrator (consistent with article 3332 of the Civil Code) which means he has given his consent to be judged by the tribunal. Hence the decision of the appellate bench that the case shouldn't be judged by the tribunal is contradictory to the provisions of the Civil Code Article 1731, Civil Code Article 3328(2 and 3) and article 7 of the insurance policy.

Cause of the dispute – whether the policy at hand covers the damage occurred

Type of insurance – Contractors All Risk (CAR) Insurance

Amount of claim – ETB 3,683,170.00

Legal document used to solve the case (in the order of relevance to the case) – Letter (Response of the insurance company to the claim notification), Article 7 of the insurance policy and Civil Code 1960 Article 1731, 3328(2 and 3).

ADR options used – Arbitration.

Lessons learnt –

Once an insurance company admits liability and notifies the insured, and if they disagree with the amount of compensation, they can refer to an arbitration tribunal to decide on the amount (given an arbitration clause of such is available in the insurance policy).

Case Eight: Hibret Insurance S.Co., vs. Satcon Construction (Federal Supreme Court Cassation Bench File No. 100378, Judgment delivered on: October 24, 2014)

Facts

- Satcon Construction (hereinafter called 'Satcon') was the contractor for the Woreta-Weldiya Road Upgrading Project in the Amhara National Regional State.
- While a roller of 'Satcon' was compacting part of the road and a grader cutting and filling, an adjoined house of an individual was damaged on March 2, 2011.
- The 'individual' filed a lawsuit to South Gondar High Court for a compensation of ETB 130,750.00.
- 'Satcon' denying the claim of the damage called Hibret Insurance S.Co., (hereinafter called 'Hibret') to intervene (as per article 43 of the Civil Procedure Code, joinder of third party).
- 'Hibret' was an insurer of 'Satcon' with a Contractor All Risk policy cover amounting ETB 200,038,395.63 for a period of cover of 36 months (with effect from May 2, 2007 plus 12 months maintenance period).
- 'Hibret' responded that it wasn't legitimate to call him as an intervener because Satcon didn't notify him about the occurrence of the damage. 'Hibret' referred article 670 of the Commercial Code (occurrence of risk to be notified) that 'Satcon' should have informed him any occurrence likely to render the insurer liable as soon as he knows of such occurrence or within not more than five days. Since 'Satcon' didn't adhere to this provision, 'Hibret' defended he isn't responsible.

Holding of the South Gondar Zone High Court, the Amhara Regional State Supreme Court and the Federal Supreme Court Cassation Bench

The South Gondar Zone High Court ruled 'Hibret' to be contractually responsible to compensate the damage to the victim with ETB 43,777.50. The Amhara Regional State Supreme Court upheld the decision of the High Court when viewing the case on appeal. When the case was applied to be reviewed by cassation, a panel of three screening judges at the Federal Supreme Court Cassation Bench upheld the decision of the lower courts.

Reasoning of the Courts

The South Gondar Zone High Court after evaluating all sides of the arguments established 'Satcon' as extra contractually liable to compensate the victim with ETB 43,777.50 for the damage he caused out of which ETB 34,077.39 is a reinstatement cost to bring the part of the home fully damaged to a prior state and ETB 9700.11 as a compensation of the damage for the cracked (partially damaged) part of the house (based on the estimation of the South Gondar Zone Urban Development and Industry Directory).

Because of the CAR insurance contract (policy) between 'Hibret' and 'Satcon' (that includes third party liability up to ETB one million), the court ruled 'Hibret' to be contractually responsible to cover the amount. The court rejected Hibret's argument asserting the use of 'notification of the occurrence of risk' stipulated on the Commercial Code article 670 is to minimize the adverse effects of the risk and not to release the insurer from liability for a risk already happened (the insurer would have done nothing to minimize the effect of the risk having the insured notified him of the occurrence within the stipulated time).

Cause of the dispute – notification of occurrence of damage (risk) to the insurer within the time frame stipulated by the law

Type of insurance – Contractors All Risk (CAR) Policy

Amount of claim – ETB 43, 777.50

Legal document used to solve the case (in the order of relevance to the case) – Insurance Policy, Commercial Code

Lessons learnt –

According to the Commercial Code article 670, the insured should notify the insurer any occurrence likely to render the insurer liable as soon as he knows of such occurrence or within not more than five days. The purpose of the notification is to minimize the adverse effects of the risk not to release the insurer from liability for a risk already happened that the insurer would have done nothing had he been informed the occurrence of the risk within the stipulated time.

<u>Case Nine</u>: Anbessa Insurance S.Co vs. Ethiopian Shipping and Logistic Service Enterprise (Federal Supreme Court Cassation Bench File No. 98358**,** Judgment delivered on: January 13, 2015).

Facts

- Anbessa Insurance S.Co., (hereinafter called 'Anbessa') provided his client a marine insurance cover for 246 bundles of reinforcing steel bars to cover for any damage that might happen while the goods were on transit from Turkey to Djibouti (transported by Ethiopian Shipping and Logistic Service Enterprise (hereinafter abbreviated as 'ESLSE')).
- Out of the 246 bundles, 226 were delivered to Anbessa's client on December 21, 2011 and other 9 bundles delivered lately on February 13, 2012.
- Eleven bundles out of the total 246 were lost and this short landing was confirmed on July 1, 2012 by Gulf Agency Service (responsible for the survey work in Djibouti) through the short landing certificate the agency declared.
- Hence 'Anbessa' compensated his client ETB 289,527.23 based on the insurance contract and later sued ESLSE (using his subrogation right) to reimburse him the amount he already paid to his client.
- ESLSE responded to the claim referring article 203(1) of the Maritime Code that the claim should be barred by limitation because a contract of carriage is barred after one year from the delivery of the goods.
- ESLSE argued September 8, 2011 as the delivery date and the Federal First Instance Court and the Federal High Court (on appeal) calculated the period of limitation from September 8, 2011 to February 12, 2013 (the day the case was presented for lawsuit) and decided the case to be barred by limitation as per article 203(1) of the Maritime Code.
- 'Anbessa' brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the lower courts to which the courts calculated the period of limitation from the date the goods were unloaded in Djibouti not from the date delivered to the client.

Holding of the Cassation Bench

The Cassation Bench reversed the decision of the lower courts and decided the claim for compensation shouldn't be bared by limitation.

Reasoning of the Cassation Bench

The Cassation Bench evaluating both sides of the arguments once again found that September 8, 2011 was the date when the goods were unloaded in Djibouti and since the client wasn't delivered with the goods, it can't be taken as the delivery date. Accordingly, the goods were unloaded in Djibouti on September 8, 2011, out of which Anbessa's client was delivered with 226 bundles in Addis Ababa on December 21, 2011 (indicated in Goods Receiving Voucher). The client was again delivered with another 9 bundles lately on February 13, 2012 (also indicated in his Goods Receiving Voucher). The bench concluded from the argument that eleven bundles were lost and confirmed by Gulf Agency Service responsible for the survey work on July 1, 2012 and 'Anbessa' sued ESLSE on February 12, 2013.

The bench assumed that Anbessa's client was certain about the goods he lost on February 13, 2012 (after the last consignment) because all the goods were not delivered by one document. A year from February 13, 2012 is February 13, 2013 and 'Anbessa' sued ESLSE to the Federal First Instance Court on February 12, 2013. Hence, the bench decided the claim shouldn't be bared by limitation.

Cause of the dispute – whether a claim by an insured for compensation of damage is barred by limitation (period of limitation – impact of separate delivery of one consignment on calculation of period of limitation)

Type of insurance – Marine Insurance

Amount of claim – ETB 289,527.23

Legal document used to solve the case (in the order of relevance) – Maritime Code

Lessons learnt –

According to article 203(1) of the Maritime Code, the rights arising out of a contract of carriage shall be barred after one year from the delivery of the goods. If the goods are delivered on a separate incidence, however, the last delivery date should be taken into account.

<u>Case Ten</u>: Awash Insurance S.Co. vs. Ethiopian Water Works Construction Enterprise (Federal Supreme Court Appeal File No. 109264**,** Judgment delivered on: October 23, 2015)

Facts

- A trailer of Ethiopian Water Works Construction Enterprise (hereinafter abbreviated as 'EWWCE') carrying a dozer was to stop at a gas station while the brake failed and the dozer on the trail fell and hit an indicatory sign of the gas station (as confirmed by the driver of the trailer).
- Awash Insurance S.Co., (hereinafter called 'Awash') was the insurer of the gas station through fire and lightening cover (where collision is also covered as an extension to the policy) and compensated his customer (the gas station) ETB 3450.00 for the damage.
- Since the damage was admitted by the driver of the trailer, 'Awash' sued EWWCE to the Federal First Instance Court so that the money he compensated his client is paid back.
- EWWCE protested the claim to be barred by limitation since the claim was raised over two years from the occurrence of the accident.
- The Federal First Instance Court decided the case was presented to the court after three years from the occurrence of the incidence and hence decided the claim to be barred by limitation as per article 2143(1) of the Civil Code.
- 'Awash' appealed to the Federal High Court and claimed the incidence was a crime and for a crime, the period of limitation should have been five years.
- The Federal High Court decided the period of limitation should be as per article 2143(2) of the Civil Code and hence referred the case back to the First Instance Court for trial since the case isn't barred by limitation.
- EWWCE appealed to the Federal Supreme Court claiming the decision of the high court taking the incidence as a crime was an error because it wasn't confirmed as a crime by a police or a prosecuting attorney or a court.

Holding of the Supreme Court, Appellate Court

The Federal Supreme Court, Appellate Court reversed the decision of the Federal High Court and held the claim to be barred by a two years period of limitation.

Reasoning of the Supreme Court

Crimes receive different classifications according to their severity. The mildest crimes are known as infractions (petty offences), more serious crimes are known as misdemeanors, and the most serious crimes are known as felonies. The classification of a crime influences both the substance and procedure of a criminal charge. According to article 857 of the Criminal Code it is viewed as negligently damaging, depreciating the value of others property. And the punishment for such petty offence is a fine or an arrest. The severity of the crime in this case is simple and it is taken as a petty offence (infraction). The period of limitation according to article 773 of the Criminal Code *(Limitation - In the case of petty offences of any nature whatsoever the right to prosecution shall be statute-barred after one year, and the sentence passed after two years)* can't exceed two years and coinciding with article 2143(1) of the Civil Code.

Cause of the dispute – whether a subrogation claim by an insurance company for a compensation for damage is to be barred by limitation (period of limitation – applicable law when the object is a crime and effect of severity of the crime on period of limitation)
Type of insurance – fire and lightening cover (where collision is also covered as an extension to the policy)
Amount of claim – ETB 3450.00 (Birr three thousand four hundred fifty)
Legal document used to solve the case (in the order of relevance to the case) – Civil Code and Criminal Code
Lessons learnt –
According to article 2143 of the Civil Code, period of limitation, an action shall be brought by the victim within two years from the time at which he suffered the damage for which he is claiming compensation.

Where the damage arises from the commission of a criminal offence in respect of which the Penal Code prescribes a longer period of limitation, the latter period shall apply to the action for damages.

According to article 773 of the Criminal Code, in the case of petty offences of any nature, the period of limitation can't exceed two years.

Case Eleven: Nib Insurance S.Co. vs. Teklebrehan Ambaye Construction (Federal Supreme Court Civil Cases Appeal File No. 114333**,** Judgment delivered on: December 28, 2015)

Facts

- Nib Insurance (hereinafter called 'Nib') provided a fire insurance cover for different garage equipment of Teklebrehan Ambaye Construction (hereinafter abbreviated as 'TAC') for duration from August 27, 2008 to August 26, 2009 and another insurance cover for a base machine (held collateral at Wegagen Bank) for duration from April 28, 2011 to April 27, 2012 through the request of Abat Insurance Brokers and Consultants (hereinafter called 'Abat').
- 'Nib' claimed to the Federal First Instance Court, a payment of an outstanding premium of ETB 106,021.56 for the insurance agreement made by 'Abat' on behalf of TAC.
- 'TAC' defended he has not accepted the agreement.
- 'Abat' on his part defended that there is an insurance policy directly between 'Nib' and 'TAC' and since he is only an agent who made an agreement on behalf of 'TAC', he is not responsible.
- The Federal First Instance Court decided 'TAC' to pay the premium amount.
- The Federal High Court viewing the case on appeal reversed the decision of the first instance court and decided; because there is no supporting evidence that the insurance contract is made as per article 661(1 &2) of the Commercial Code, 'TAC' isn't obliged to pay the premium amount. The broker "Abat' was excluded in the high court's hearing though.
- 'Nib' appealed the matter to the Federal Supreme Court protesting the decision of the Federal High Court.

Holding of the Supreme Court

The Supreme Court reversed the decision of the High Court and referred the hearing back to the High Court after framing the argument to involve the broker, 'Abat', whose response on the case was omitted at the prior trial at the High Court (Article 343(1) of the Civil Procedure Code).

Reasoning of the Supreme Court

According to article 661 of the Commercial Code, policy made on-behalf of a third party, an insurance policy for a third party may be made by an agent or without an agent. The most important thing here is that the beneficiary should accept it and the acceptance may be given after the risk insured has materialized. Until the policy is accepted by the beneficiary, however, the subscriber incurs all liabilities under the contract.

For the case under investigation if 'Abat' made the insurance policy on behalf of 'TAC' given that 'TAC' accepted and approved it and there are supporting evidences, then 'TAC' has to pay the premium. If 'TAC' hasn't accepted it on the other hand, 'Abat' has to pay the premium (Article 661 (2), *the subscriber shall incur all liabilities under the contract until the policy is accepted by the beneficiary).* It is therefore inevitable that either 'TAC' or 'Abat' should pay the stated premium depending on their evidences which is going to be decided by the Federal High Court (the trial involving the defending broker ('Abat') as held by the Supreme Court).

Cause of the dispute – a claim by an insurance company for payment of an outstanding premium although the policy was due (payment of an outstanding premium)

Type of Insurance Cover – Fire Insurance

Amount of claim – ETB 106,021.56

Legal document used to solve the case (in the order of relevance to the case) **–** Commercial Code Article 661

Lessons Learnt –

If an insurance policy is made on behalf of a third party, the beneficiary must accept it and there should be supporting evidences that he accepted it.

Many facets of insurance business, including the conclusion of contracts, are transacted through insurance agents representing the respective parties. If, during the conclusion of the contract, a party is represented by an agent with authority to enter into the contract on behalf of his principal, the intention and acts of the agent must be taken into consideration in deciding whether a contract has come into existence.

<u>Case Twelve</u>: Nile Insurance S.Co and Bereka Construction et.al. (Federal Supreme Court Appeal File No. 118071**,** Judgment delivered on: May 6, 2016)

Facts

- Bereka Construction PLC's (hereinafter called 'Bereka') Euro Trakker insured by Nile Insurance S.Co (hereinafter called 'Nile') collided with an Isuzu (insured by EIC) and the Isuzu fell into a depression.
- EIC sued 'Bereka', the driver and 'Nile' to the Amhara National Regional State Supreme Court to reimburse him ETB 563,902.80, the money he already paid for his customer due to the loss claiming the Isuzu fell by Bereka's driver fault.
- The Amhara Regional State Supreme Court rejected the claim of EIC establishing the fault was the Isuzu's driver.
- Declining the Amhara Regional State Supreme Court's decision, EIC appealed to the Federal Supreme Court claiming the fault was Bereka's driver.

Holding of the Federal Supreme Court, Appellate Court

The Federal Supreme Court, Appellate Court reversed the decision of the Amhara Regional State Supreme Court and held 'Bereka' and 'the driver' to be jointly and severally liable for ETB 218,702.80 (deducting ETB 345,200, Salvage Value, from the claim amount ETB 563,902.80). From these, the court ordered 'Nile' to cover ETB 100,000 based on the insurance contract between 'Bereka' and 'Nile'.

N.B: When two or more persons are liable in respect of the same liability, in most common law legal systems they may either be jointly liable, or; severally liable; or jointly and severally liable. Jointly and severally is a legal phrase that means two or more persons are fully responsible equally for the liability. Example – jointly means that both parties have joint liability giving responsibility for the full amount of the obligation to each party in this case for example if one party dies or declares bankruptcy, the full amount of the obligation falls to the other party. As such one or both of the parties can be sued for the full obligation. Severally means that the parties are only responsible for their share of the obligation. For example, if a group of contractors agree to build a project, and one of them fails to complete

the work, only that contractor is liable. The others in the consortium have no liability. Jointly and severally liable, any party is liable similar to joint liability.

Reasoning of the Federal Supreme Court, Appellate Court

'Bereka' to justify he wasn't the cause for the accident, presented three witnesses (the 'driver' and the 'assistant driver' of the Euro Trakker, another driver who was driving at the back when the accident happened). EIC on the other hand presented a 'traffic police' witness who investigated the case after the occurrence of the accident and an investigation report of the accident. According to the traffic police, the Isuzu was going at the front before it was hit by the Euro Trakker at the back. The witnesses of 'Bereka' are three in number and all of them were at the place of the accident, but considering their reliability they can't be as strong evidence as the evidence of EIC's the court justified. The court deduced Bereka's driver to be the cause for the accident.

Cause of the dispute – Disagreement on the cause of the damage and hence on responsibility for the damage (failure to proof loss/damage)
Type of insurance – motor insurance
Amount of claim – ETB 563,902.80
Legal document used to solve the case (in the order of relevance to the case) – Civil Code and Criminal Code
Lessons learnt –
An insurer isn't required to pay more than what is provided in the insurance contract/policy. If the damaged property has salvage value, the salvage needs to be considered.

Case Thirteen: Assefa Mengistu Construction Materials Rental Company et.al. vs. Global Insurance S.Co. (Federal Supreme Court Cassation Bench File No. 109563, Judgment delivered on: December 5, 2016)

Facts

- A car owned by Assefa Mengistu Construction Materials Rental Company (hereinafter called 'Assefa') and insured by Nyala Insurance S.Co., (hereinafter called 'Nyala') collided another car insured by Global Insurance S.Co., (hereinafter called 'Global') and 'Global', after paying ETB 159,626.68 to his client, exercised his subrogation right and sued 'Assefa' to the Federal First Instance Court to pay the amount.
- The First Instance Court after evaluating both sides of the argument, decided 'Nyala' (insurer of the car owned by 'Assefa') or the intervener to pay the amount jointly and severally.
- 'Assefa' and 'Nyala' appealed to the Federal High Court while the court upheld the decision of the first instance court.
- 'Assefa' and 'Nyala' then brought the matter to the Cassation Bench of the Federal Supreme Court by invoking 'basic error of law' committed by the lower courts in their decision that they are liable jointly and severally even though the sum insured under the policy is ETB 100,000. According to 'Assefa', if he was responsible for the loss, 'Nyala' should cover ETB 100,000 (the sum insured under the policy).

Holding of the Federal Supreme Court, Cassation Bench

The Cassation Bench established that since 'Nyala' provided the motor insurance cover for a sum insured of ETB 100,000, he should be responsible for that amount. The remaining amount ETB 59,626.68 should be covered by 'Assefa'.

Reasoning of the Federal Supreme Court, Cassation Bench

The cassation court after looking at the legal documents decided that Assefa's car collided and damaged the other car (owned by Global's client). 'Assefa' is responsible to compensate for the loss as he is the owner of the car causing the collision (Civil Code article 2081(1) - *the owner of a machine or motor vehicle shall be liable for any damage caused by the machine or vehicle, notwithstanding that the damage was caused by a person who was not*

authorized to operate, handle or drive the machine or vehicle) and since 'Nyala' insured Assefa's car, 'Nyala' is also contractually responsible for the compensation to the amount of the sum insured.

Cause of the dispute – Disagreement on the cause of the damage and hence liability for the damage (failure to proof loss/damage)

Type of insurance – Motor Insurance

Amount of claim – ETB 159,626.68

Legal document used to solve the case (in the order of relevance to the case) **–** Civil Code, Insurance policy

Lessons learnt –

An insurer isn't required to pay more than what is provided in the insurance contract. For any loss, the insured is responsible for an amount beyond the sum insured.

<u>Case Fourteen</u>: China Communications Construction Company (Injibara – Chagni – Pawe Junction Road Project) vs. Abay Insurance S.Co (Federal Supreme Court Civil Cases Appeal File No. 134528, Judgment delivered on: January 13, 2017)

Facts

- China Communications Construction Company (hereinafter abbreviated as 'CCCC') entered a contract with ERA on November 22, 2012 to carry out road design works of Injibara – Chagni – Pawe Junction Road Project (Design – Build type of contract) and purchased PII from Abay Insurance S.Co., (hereinafter called 'Abay') to cover professional liability arising from negligence in the performance of professional activities and for the costs incurred in rectifying defects in the insured's contract works or in the design plans or specifications of such works.
- As specified on the insurance policy, the duration of cover was from January 12, 2013 to July 11, 2016 and the sum insured was ETB 52,516,120.
- CCCC completed the design work and the design was approved by ERA.
- When progressing with the construction, difference in design elevation for the approach slab and the existing bridge occurred because the elevation of the existing bridge which was taken for the roadway design and the approach slab was different from the actual elevation. This in turn resulted in higher elevation of the approach slab and the roadway in the same direction.
- Then CCCC notified the insurance company on January 29, 2015 claiming it was a design error.
- The insurance company replied to the notification on February 5, 2015 and ordered CCCC to leave the 'error' as it happened until an Insurance Engineer shows up. The engineer arrived to the construction site after a month, the end of February 2015.
- 'Abay' rejected the claim stating his Insurance Engineer found all defects repaired when he went to the site for survey as opposed to the policy requirement that no further action was required to be executed before assessment was engaged by the Engineer.
- CCCC filed a lawsuit to the Amhara National Regional State Supreme Court as a reaction to his rejected claim.

- CCCC maintained his position that since heavy vehicles flew on the road very frequently and unless the road was rectified immediately, the existing old bridge might even collapse and further noted that since their works were scheduled, it was difficult for them to wait a month until the engineer of the insurance company arrived. With these ideas in mind, CCCC made design modifications to rectify the incident as soon as possible.
- On the process of rectification, a total of 320m asphalt road was demolished (based on the work order given by CCCC) by Melcon construction, for a payment of ETB 688,933.95. The approach slabs in both directions from the bridges were reconstructed by concrete by Shang Hai Jing Ling, based on the work order from CCCC for a payment of ETB 323,541.80. Additionally, CCCC used his own force; asphalt and base course material, machinery and equipment, manpower, fuel and vehicles with an engineering estimate value of ETB 522,489.69. Adding all the costs, the economic loss incurred in rectifying defects in the contract work which was caused by the design problem was ETB 1,534,965.44.
- 'Abay' again defended that his Insurance Engineer found all defects repaired when he went to the site for survey and even the sub-contractors (Melcon and Shang Hai Jing Ling) were not selected by an open tender and the amount claimed by CCCC was based on his interest and not based on a competitive tender which makes it an unfair trade. Further, according to 'Abay', the money which added to the total claim amount other than the subcontractors work was CCCC's own work and presented by his own engineer as an estimate. So it means that it can't be taken as a supportive document as there would be a conflict of interest (raised Article 2017 of the Commercial Code – *domestic record and papers are no evidence in favonr of the person who wrote them* and Article 2016(1) – *entries in trade books are no evidence in favour of those who made the entries*). Additionally 'Abay' defended that CCCC hasn't adhered to the policy terms. In the policy section 3(3.5), claim, it is stipulated that "in connection to any loss, the burden of establishing defective advice, design, specification or provision by or on behalf of, the insured shall rest on the insured." (The court later found that there is a difference of interpretation between Amharic and English version of this section). On section 3(3.4) of the policy, the insured shall not admit liability for nor settle any claim nor incur any costs or expenses in connection therewith without the written consent of the company

which shall be entitled at any time to take over and conduct in the name of the insured the defense or settlement of any such claim. 'Abay' invalidated the claim before the court accordingly.

Holding of the Amhara National Regional State Supreme Court, the Federal Supreme Court, Appellate Bench

The Amhara National Regional State Supreme Court decided 'Abay' to pay ETB 1,534,965.44 (all claim amounts) that was used to demolish and reconstruct part of the defective work as per the PII. The court also held that the error in interpretation of the English version of the policy section 3(3.5) shall not release 'Abay' from responsibility. The court further held that it is legitimate CCCC subcontracted the rectification work in a rate he agreed before two years on the BoQ. The Federal Supreme Court also upheld the decision of the Amhara National Regional State Supreme Court when viewing the case on appeal.

Reasoning of the Amhara National Regional State Supreme Court, the Federal Supreme Court, Appellate Bench

The court established that indeed there was a design problem (by comparing the previous erroneous design with the modified corrected design). 'Abay' never repudiated that he provided PII cover but argued policy terms were not met. On the issue whether the insurance company should pay PI or not, the court pointed that since 'Abay' issued PII for CCCC, and it is already agreed that design error occurred, he is entitled for indemnification. On the issue 'Abay' mentioned about the subcontractors being selected without tender and whether CCCC engineers estimate would be taken as an evidence, the court ruled that since CCCC notified 'Abay' about the design error (although 'Abay' didn't bring his engineer immediately to cater for solution) and since the road is a high traffic road due to GERD, it was found that CCCC's subcontractors made the rectification work in a rate CCCC agreed before two years on the BoQ, hence it is not possible to say there is no competition.

Cause of the dispute

- Coverage denied by the insurer claiming policy terms and conditions aren't met (damage repaired before the arrival of the insurance companies' loss assessor).
- Error in interpretation of the English version of the policy

Type of insurance– Professional Indemnity Insurance

Amount of claim – ETB 1,534,965.44

Legal document used to solve the case (in the order of relevance to the case) **–** insurance policy

Lessons learnt –

When an Insurance Engineer takes considerable time to show up and assess a loss, it may have an adverse effect on the insurance company especially when the delay directly or indirectly influences significant projects like GERD.

Error in interpretation of a policy may not release an insurance company from responsibility. In most, if not all, instances insurance policies are prepared in English version and only when required before authorities that it will be interpreted to Amharic version. In case of disparity between the original English version and the interpreted Amharic version, the original shall override.

<u>Case Fifteen</u>: Abay Insurance S.Co et.al. vs. Kemise City Water and Sewerage Office (Federal Supreme Court Cassation File No. 131852**,** Judgment delivered on: April 8, 2017)

Facts

- Desu Trading (hereinafter called 'Desu') made an agreement with Kemise City Water and Sewerage Office (hereinafter called 'Kemise') on February 6, 2009 for a purchase of a grader with a contract price of ETB 2,501,250**.**00 to be delivered within 3 months.
- 'Desu' provided a performance bond amounting ETB 250,125.00 (which is 10% of the contract price) from Abay Insurance S.Co., (hereinafter called 'Abay").
- 'Desu' didn't deliver within the agreed time even though 'Kemise' made a price modification from the original.
- 'Kemise' sued 'Desu' to the Amhara National Regional State Supreme Court to compensate for losses as a result of non-performance of the contract (tender expenses of hiring another grader and rental expenses of another grader hired).

Holding of the Amhara National Regional State Supreme Court, Federal Supreme Court Appellate Bench, Federal Supreme Court Cassation Bench

The Amhara National Regional State Supreme Court decided 'Desu' to be liable to pay ETB 250,125.00 (10% of the contract price) because he didn't purchase and deliver the grader to 'Kemise' as per the contract between them. Being the performance guarantor, the court made 'Abay' to be liable for the amount. Additionally, the court rejected the consequential loss claimed by 'Kemise' because the works performed and the receipts made weren't authentic and they didn't exactly belong to Kemise City Water and Sewerage Office. The Federal Supreme Court Appellate Bench and the Federal Supreme Court Cassation Bench (a panel of three screening judges) upheld the decision of the Amhara National Regional State Supreme Court.

Reasoning of the Amhara National Regional State Supreme Court, Federal Supreme Court Appellate Bench, Federal Supreme Court Cassation Bench

According to the court it was shown on the contract between 'Desu' and 'Kemise' (Article 2.1) that 'Desu' agreed to deliver the grader within three months. He failed although a price modification was made and further a warning letter was given to him by 'Kemise' to abide

by the contract requirement. According to article 1771 of the Civil Code, where a party does not carry out his obligations under the contract, the other party may, according to the circumstances of the case, require the enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract and he may in addition require the damage caused to him by non-performance be made good. It was shown on article 2.4 of the contract that 10% of the contract price (amount equal to the performance bond) will be forfeited in case of non – performance.

With regard to rental cost of other grader (which was presented by 'Kemise' as a consequential loss because of non-performance by 'Desu'), it was found that the machinery rental contract and tender were not detailed and were made in the name of other government office in 'Kemise' city and don't necessarily reveal (prove) they were made by Kemise Water and Sewerage Office, therefore, 'Desu' isn't obligated to pay such costs.

Cause of the dispute – a performance bond forfeiture claim by a public body because of non – performance

Type of guarantee – Performance Bond

Amount of claim – ETB 250,125.00 plus consequential loss

Legal document used to solve the case (in the order of relevance to the case) **–** Contract Document, Civil Code Article 1771

Lessons learnt –

According to article 1771 of the Civil Code, where a party does not carry out his obligations under the contract, the other party may, according to the circumstances of the case, require the enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract and he may in addition require the damage caused to him by non-performance be made good (like forfeiture of the performance bond).

A claim for consequential loss should be verified with strong evidences like payment documents.

Table 4.1: *Summary of data presentation of the cases*

Case No	*Category*	*Date Judgment delivered*	*Disputing parties*		*Months judgment took*	*Claim amount (ETB)*	*Type of insurance*	*Cause of dispute*	*ADR used*	*Legal documents used*
1	Cassation	June 11, 2008	Insurer	Contractor	49	40,154.74	Motor	_ Payment of an outstanding premium	_	Commercial Code, Letters
2	Cassation	July 7, 2009	Insurer	Client/ Public Body	27	67034.47	Motor	_ Fraud	_	Commercial Code
3	Cassation	December 21, 2010	Insurer	Sea Carrier	25(minimum)	101,465.00	Marine	_ Failure to proof loss _ Applicable law/provision	_	Maritime Code, Civil Procedure Code, Bill of Lading, Letter of Credit
4	Cassation	March 31, 2011	Insurer	Contractor, Freight Forwarder, Carrier	_	2,223,293.80	Marine	_ Failure to proof loss _ Applicable law/provision	_	Regulation 37/98, Freight Forwarding and Ship Agency License Issuance, Commercial Code
5	Cassation	May 27, 2011	Supplier	Client	_	3,557,929.34	Performance Security	_ Performance bond forfeiture claim _ Applicable law/provision	_	Proclamation 430/2005, Federal Public Procurement Directive (June 2010), Contract Agreement
6	Cassation	March 20, 2012	Insurer	Client/ Public Body	_	1,101,890.00	Performance Bond	_ Performance bond forfeiture claim _ Applicable law/provision	Arbitration	Civil Code, Proclamation 110/1990, 57/1996 and 648/2009, directive NBE/SID/25/2002 and SID/24/2004, MoWUD Condition of Contract, FIDIC Red Book (1987)
7	Cassation	October 4, 2013	Insurer	Contractor	21	3,683,170.00	CAR	_ Whether the policy at hand covers the loss ocurred	Arbitration	Letter, Insurance Policy, Civil Code
8	Cassation	October 24, 2014	Insurer	Contractor	43	43,777.50	CAR	_ Notification of occurrence of risk	_	Insurance Policy, Commercial Code
9	Cassation	Ianuary 13, 2015	Insurer	Carrier	23	289,527.23	Marine	_ Period of limitation-calculation	_	Maritime Code
10	Appeal	October 23, 2015	Insurer	Client/ Public Body	_	3450.00	Fire and lightening (collision covered as an extension to the policy)	_ Period of limitation-impact of crime severity on period of limitation	_	Civil Code, Criminal Code
11	Appeal	December 28, 2015	Insurer	Contractor	42	106,021.56	Fire	_ Payment of an outstanding premium	_	Commercial Code
12	Appeal	May 6, 2016	Insurer	Contractor plus his insurer	_	563,902.80	Motor	_ Failure to proof loss	_	Civil Code, Criminal Code
13	Cassation	December 5, 2016	Insurer	Construction Machinery Rental Company plus his insurer	61	159,626.68	Motor	_ Failure to proof loss	_	Civil Code, Insurance Policy
14	Appeal	January 13, 2017	Insurer	Contractor	18	1,534,965.44	PII	_ Whether policy conditions are met _ Interpretation of the english version of the policy	_	Insurance Policy
15	Cassation	April 8, 2017	machinery supplier and Abay Insurance as intervener	Client/ Public Body	28	250,125.00	Performance Bond	_ a Performance Bond forfeiture claim	_	Contract Document, Civil Code

As summarized on *Table 4.1* above, this study analyzed fifteen cases from the Federal Supreme Court and chronologically ordered based on the date judgement was delivered (from June 11, 2008 to April 8, 2017). Eleven out of the fifteen cases are cassation files and the remaining four are appelate files. The cassation files are published and hence there is no offence of privacy and confidentiality. For the remaining four appeal cases, eventhogh not published, they will only be analyzed with regard to the most important causes of insurance coverage disputes, type of insurance and/or guarantee highly disputable, the use of ADR for such disputes, the use of insurance company dispute resolution schemes and the legal documents referred to solve such cases. Commenting on the rightfulness or acceptability of the decisions is not the central focus, there is no breach of confidentiality committed by the researcher in this regard.

A. Disputing Parties

As shown on *Table 4.2* and *Figure 4.1* below, 47% of the disputes were between insurer and a contractor. 20% of the disputes were between insurer and clients (public bodies). 13% of the disputes were between insurer and sea carrier and again 13% of the disputes were between a supplier and a public body/client. 7% of the disputes were between an insurer and a construction machinery rental company.

Table 4.2: *Dispute types between parties*

No.	*Disputing parties*	*Share*		*Interveners*
		number	*%*	
1	Insurer vs. Contractor	7	47	Insurance Company, Freight Forwarder and Carrier
2	Insurer vs. Clients/Public Body	3	20	Machinery Supplier
3	Insurer vs. sea carriers	2	13	_
4	Supplier vs. Public Body/Client	2	13	_
5	Insurer vs. Construction Machinery Rental Company	1	7	Insurance Company
	Total	*15*	*100*	

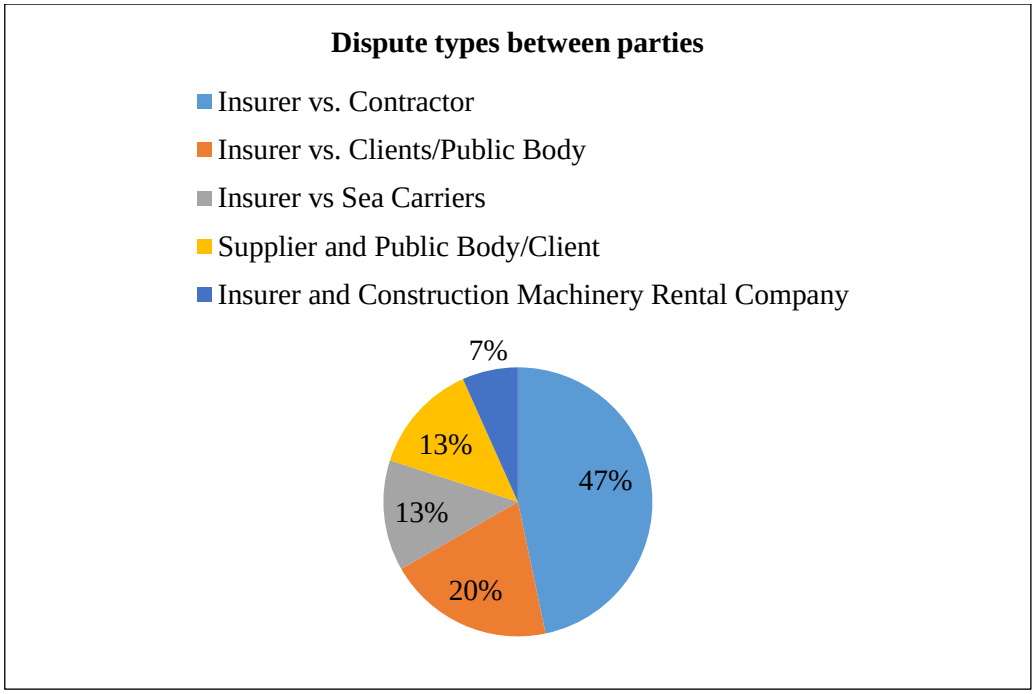

Figure 4.1: *Dispute types between parties*

It can be understood from *Table 4.3* and *Figure 4.2* below that the parties that involve in insurance and guarantee related disputes are insurers, contractors, public bodies, suppliers (material and machinery), construction machinery rental companies, freight forwarders and carriers. Insurers involvement in the dispute is 43% followed by contractors (23%), public bodies (17%), suppliers (7%) and sea carriers (7%) and finally by construction machinery rental companies (3%).

Table 4.3: *Disputing parties involvement to the dispute*

No.	*Party to the dispute*	*Share*	
		number	*%*
1	Insurer	13	43
2	Contractors	7	23
3	Clients/Public Body	5	17
4	Supplier	2	7
5	Carriers	2	7
6	Construction Machinery Rental Company	1	3
	Total (with frequency)	*30*	*100*

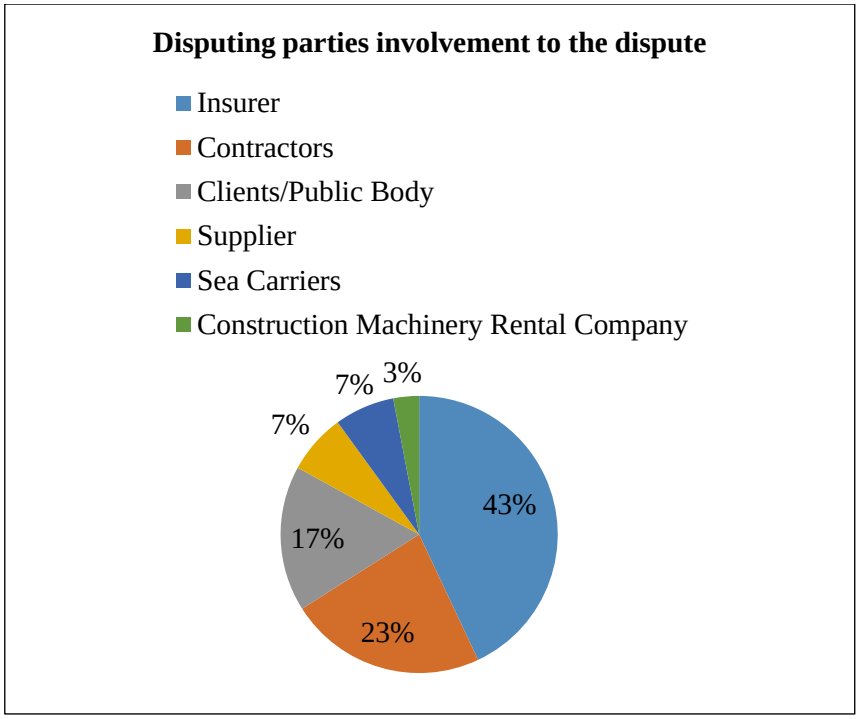

Figure 4.2: *Disputing parties involvement to the dispute*

B. Types of Construction Insurances Frequently Leading to Disputes

The types of insurances and/or guarantees frequently leading to disputes as can be seen from *Table 4.4* and *Figure 4.3* below are motor insurances (27%) followed by marine insurance (20%) and performance security/bond (20%). Then come CAR insurance and fire insurance (13% each) and lastly PII (7%). This is consistent to the fact that the most available insurance type in Ethiopia is motor insurance (Tigist, 2016) and hence lead to disputes (law of large numbers and an increased traffic accident rate may be the cause despite Ethiopia is having one of the lowest per capita car ownerships in the world). Parties in the construction need to import different construction materials and they need a marine insurance cover to cater for the risks that might happen while transporting the goods and this is the second disputable insurance type equally with performance bonds. Due to mandatory requirements of performance bonds by public bodies and private owners to safeguard the successful accomplishment of construction projects or construction materials and machineries supplies, performance bonds are available widely as compared to the other types and they are the second most important guarantees responsible for a dispute. CAR insurance covers come next.

Table 4.4: *Types of construction insurances frequently leading to disputes*

No.	*Type of Insurance/Guarantee Responsible for the Dispute*	*Share*	
		number	*%*
1	Motor Insurance	4	27
2	Marine Insurance	3	20
3	Performance Security/Bond	3	20
4	CAR	2	13
5	Fire Insurance	2	13
6	PII	1	7
	Total	*15*	*100*

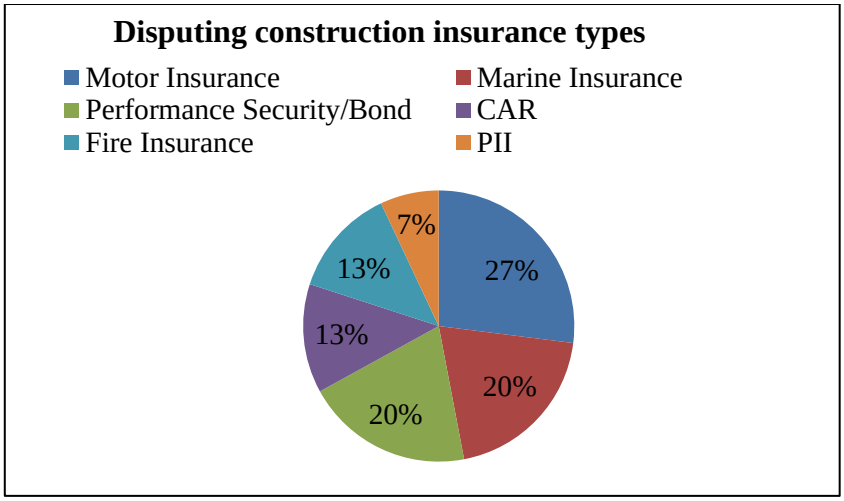

Figure 4.3: *Types of construction insurances frequently leading to disputes*

C. Causes of Consruction Insurance Coverage Disputes

As it can be seen from the *Table 4.5* and *Figure 4.4* below that the first cause of the dispute for the insurance/guarantee in construction is disagreement between the parties on the applicable law or provision for the issue at hand (conflict of laws to prevail for the case) (25%) followed by the insured's failure to proof loss (20%). This comprises disagreement between the parties on the amount of compensation and lack of documentation to support the amount requested. The third cause of construction insurance coverage dispute is performance bond forfeiture claims due to breach of performance of the debtor (15%). The fourth cause of the dispute is regarding the calculation, expiry etc. of period of limitation of a claim to claim loss (10%) and issues related to payment of outstanding premium (10%). Fraud (5%), whether policy at hand

covers a loss ocurred (5%), notification of occurrence of risks (5%) and meeting of policy conditions (5%) come next.

Table 4.5: *Causes of consruction insurance coverage disputes*

No.	*Cause of Dispute*	*Share*	
		number	*%*
1	Applicable law or provision for the issue at hand	5	25
2	Failure to proof loss	4	20
3	Performance bond forfeiture claims due to non-performance	3	15
4	Period of limitation	2	10
5	Payment of outstanding premium	2	10
6	Fraud	1	5
7	Whether policy at hand covers the loss occurred	1	5
8	Notification of occurrence of risk	1	5
9	Whether policy conditions aren't met	1	5
	Total (with frequency)	*20*	*100*

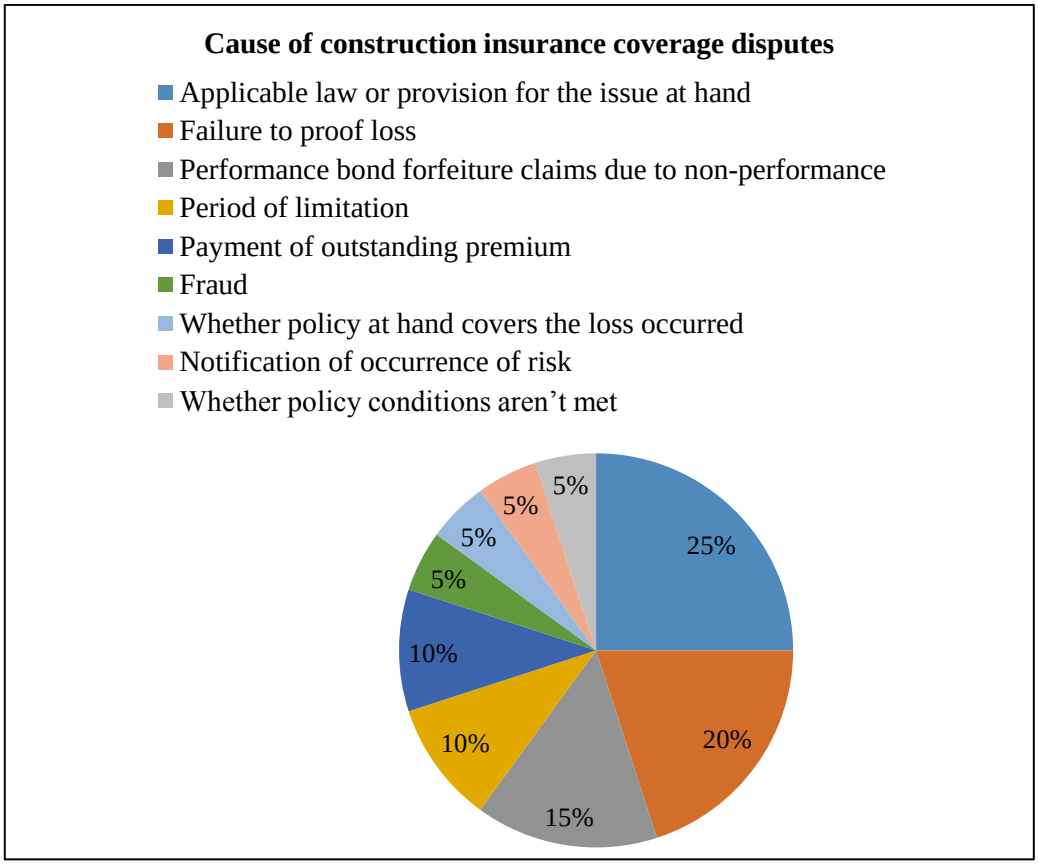

Figure 4.4: *Causes of consruction insurance coverage disputes*

D. The Use of Insurance Companies' Internal Claim Management for The Cases

The author's attempt to study the use of the insurance companies' internal claim management for the fifteen cases under investigation wasn't effective either due to poor data keeping of the insurance companies or because they weren't willing to disclose information. Hence it will be adhered to the finding of semi-structured interview for generalization in this regard.

In the fifteen cases under investigation, the claim amounts that were the source of the dispute varied from a minimum of ETB 3450.00 to a maximum of ETB 3,683, 170.00. The minimum claim (interms of amount) was initiated first to by an insurance company which implies the insurance company's internal claim management or ADR wasn't effective in settling the case.

Twelve of the fifteen cases discussed are between insurers and other parties. From the twelve cases, eight of them (67%) were brought to litigation by the insurance companies. Seven out of the eight cases brought to litigation by the insurers were decided for the insurers and one against them. This shows insurance is a business of litigation and the insurance companies have a strong legal advisors and the fact an insurance policy being a one sided contract could have helped them in winning cases in court . On the other hand four out of the twelve cases were brought to litigation by the other party and three of them were decided against the insurers (decided for the other party). These means the other parties referred the case to litigation because they were confident that they may win the case.

E. Use of ADR in Construction Insurance Coverage Disputes

Arbitration was used in two of the fifteen cases (13%) as an alternate dispute resolution. But it was found during the interview with insurance companies that there are always negotiations and mediations before any claim is referred to arbitration and litigation but they aren't effective due to different reasons. Hence, it can be said that the use of ADR is often disregarded.

F. Time Taken to Solve Construction Insurance Coverage Cases Through Litigation

With regard to the duration the judgements took from the date the case was filed for law suit to the date judgement was delivered, data of only ten cases were found out of which seven reached cassation and the remaining three were on appeal and they might be referred for cassation review. To be fair, the duration of those cases which the cassation

gave final decision should be compared. The longest duration was 61 months and the shortest was 23 months (see *Table 4.6* below).This practically shows how litigation is time taking and less effective. So whenever a party wants to solve a case through litigation, it is important to first calculate the money to lose if the case was to be decided against him (for example, if a one million birr claim takes three years to solve through litigation, using simple interest formula, and the legal interest rate of 9%, the losing party loses ETB 270,000 excluding other costs). Hence it is better to conduct feasibility analysis before going to court litigations as litigations take significant time (sometimes decades) especially in developing countries like Ethiopia.

Table 4.6: *Duration of settling construction insurance coverage cases through litigation*

No.	*Type*	*Duration the judgement took (Months)*
1	Cassation	49
2	Cassation	27
3	Cassation	25 (minimum)
4	Cassation	43
5	Cassation	23
6	Cassation	61
7	Cassation	28

4.2 Semi–Structured Interview with Insurance Companies

The main research methodology for this study is case study as discussed in Chapter Three. To overcome the common shortcoming of case studies (i.e. it only focuses on limited sample size and hence inadequate of persuasion), data was validated through interviews with insurance companies.

Eight insurance companies as described in sub-section 3.1.3 were selected purposively to validate the study. Claim and legal departments of the eight insurance companies were interviewed to ascertain the research validity. They were interrogated about the construction insurance and guarantee types frequently leading to claims (disputes in the furthest case), the causes for the claims/disputes, the mechanism of their internal claim management, the use of ADRs, litigation and finally their view on how to minimize the disputes. The results of the semi-structured interviews are summarized as follows.

A. Types of Construction Insurances Frequently Leading to Disputes

In all insurance companies under investigation, motor insurance is the main type of insurance frequently claimed and also converted to dispute if rejected under the insurers' internal claim management system. This is because motor insurance is the most widely used insurance type of all because of mandatory provisions and the insurance companies' collect 50 to 70 percent of their premiums from motor insurances. High traffic accident rate of Ethiopia has also contributed to more claims of motor insurances.

The second type frequently leading to disputes in construction are bonds. All companies give performance and advance payment bonds and they are the major source of disputes in Ethiopian construction industry. According to the interviewees, the contributing factors for frequent claims of performance bonds emanate from both contractors and employers. In most of the cases, they found right of way problems by employer's default to handover the projects on time and delay of interim payment by the employers have exacerbated the situation leading to default of performance by the contractor. They all agree that such disputes are very tedious and time taking. The least bidder type of tendering has also made some contractors to cut costs below the engineering estimate hence making them unable to complete the project with the agreed amount. They recommend employers to provide payment security to contractors to safeguard the proper payment of money as contractors provide performance bonds to safeguard the proper execution of the works. They noted further that before providing the bonds, they pay proper attention to the contractors' financial standing, contractor profile and they prefer to give the bonds to a contractor whom they have a prior business relation.

Apart from motor insurance and bonds, the insurance companies responded they have rarely experienced disputes with other types of insurances and it was difficult for them to rank. Workmen compensations especially are frequently claimed and they are resolved mostly by the insurance companies' before they reach disputes. Due to mandatory legal requirements, motor insurances and performance bonds are widely used and hence lead to disputes (law of large numbers). With regard to the insurance types, this finding is consistent with the case study finding and for the rest of the insurance types it is compulsory to adhere to the case study finding.

B. Causes and Contributing Factors of Construction Insurance Coverage Disputes

The general cause of insurance disputes in construction is a result of disagreement in settling claims and when the insurance company denies liability which is basically related to bad faith between the contracting parties. A Performance Bond forfeiture claim, a claim for compensation to damage (either directly by a client or through subrogation) and a claim by an insurance company for payment of premium were all asserted by the insurance companies to be the main causes of the dispute as consistent to the findings of the case study.

All insurance companies put 'lack of awareness' on the insurance business in Ethiopia to be a major contributing factor in general because of the insurance industry being at an infant stage and the types of insurances provided being the same and repetitive and characterized by bad faith (disingenuous claim requests by insured and disingenuous rejections of the claims by insurance companies). Some further noted understanding insurance technical terms and languages itself leave alone in Ethiopia, is difficult in the developed countries because of the complexities of the contents of the policy. They mention there are some insured's who go to the court to make the insurance company responsible for compensation greater than the sum insured (*see case 13* as an example). The understanding of insurance by lawyers etc. is very limited (*see case 13*, the Federal First Instance and Federal High Court making the insurance company and his client jointly and severally liable for the whole amount of the damage while the insurance company should have been made liable for the amount equal to the sum insured).

'Lack of awareness' according to the interviewees' is manifested through claiming for damage for the cause of the damage excluded in the insurance policy, concealment of true cause of a damage (although this could sometimes be a strategy by the insured to get compensated in bad faith, *see case 2* also), non-adherence to policy terms and conditions, misunderstanding on applicable law and its interpretation and conflict of laws (*refer cases 3,4,5,6,14*), lack of awareness on whether consequential losses are covered in the policy, lack of awareness on whose liability is a damages exceeding the sum insured, lack of awareness on period of limitation (its calculation, governing codes provisions for different types of insurances), lack of awareness on the effect and validity of policies made on-behalf of a third party (by an insurance broker). Delay in insurance companies' loss assessors (*see case 14* for example**)** in assessing damage is another contributing factor for the disputes.

The interviewees' noted default by the insured's to fulfill the necessary or relevant documents for the claim is another boosting factor for the disputes. It was found from the interviews that insurance companies practice in fixing premiums is defective due to the low skill of the underwriters aggravated by the complex nature of construction. Most of the insurance companies fix premiums evaluating the insured's company profile, claim history and prior business relation with the insured not by conducting detailed risk assessment for specific projects which become a source of dispute (same as the finding of Tigist (2016)). The system of insurance should be sustained by detailed system of risk analysis and this analysis should involve anticipating the likelihood of a particular loss and charging enough in premiums to guarantee that insured losses can be paid instead of charging premiums without having detail risk management plans and then failing to accept genuine claims because the premiums weren't accurately calculated. Failure to report loss to insurer within specified time frame is also the other cause to the disputes (*refer case 8 too*).

C. Insurance Companies' Internal Claim Management

With regard to their internal claim management, all companies responded they have an efficient claim handling system which they put it as the 'backbone of the insurance businesses'. They all described to have well trained and experienced claim officers, loss assessors and some have an online claim registration system to minimize the time elapsed until a claimant registers the claim physically. Urgent responding is though unavailable for claims settlements and mostly is time consuming and tedious although the insurance companies believe they have fast and reasonable claim management process. They all understand they still need to improve their claim management by evaluating their customers' satisfaction. They all noted that they reject claims (deny liability) based on the policy and applicable laws and as per the recommendation from their skilled advisory staffs. Contrary to this standing, when the insurance companies were asked about their opinion on whether insurance is a 'business of litigation', some responded, if they pay all the claims, it will be the end of the insurance business and hence there will be no institution to safeguard the risks of the business which endangers the existence of all businesses. The author of this study understood from this position of the insurance companies that their mind is set to 'protecting the insurance businesses' (as they refer it) and hence questioned their willingness to pay all genuine claims if made.

All insurance companies believe there are insurance awareness problems aggravated by an insurance policy being one sided contract. Hence they recommend an insured before accepting the policy to understand the terms, conditions and exclusions of the policy and get an advice from insurance brokers who work for their benefit. In developed countries, there are insurance policy advisors, insurance attorneys etc. but none in Ethiopia which needs to be established in the near future.

D. The Use of ADR in Construction Insurance Coverage Disputes

All insurance companies agree that the use of ADR is disregarded not only in construction insurance but in the insurance business in general. They all understand that ADRs are win-win, time and cost efficient and should be used as much as possible. They often try to negotiate with their clients on the amount of compensation for the damage before conducting a detailed loss analysis as this also takes considerable time of their company. So if the client agrees, that time will be saved and the officers may find themselves busy for other works. Most of the time insurance companies prefer negotiation to solve their disputes in order to maintain their customers and to preserve their future relationship with the insured and to preserve the good attitude of the public towards them. If they fail to agree, they will proceed to the other advanced kind of dispute settlement mechanism. Though most companies recognize arbitration in their policy as a means of dispute settlement, in effect, they start with mediation and some time if mediation fails to pull the parties together, court proceeding starts.

All insurance companies, include arbitration clauses in their policy for the dispute to be resolved by either 'any arbitral institution' or by parties appointed by both of them (the insurer and the insured). If there is an arbitration clause in their insurance policy a dispute that arises between them needs first to be taken to Arbitration. In terms of subject matters which were taken to arbitration, most insurance policies allow 'all differences' while others only 'differences in amount'. Most of the time 'AACCSA' serves as an arbitrator where the arbitration clause says 'any arbitral institution' and all are assertive with this institution as it views commercial cases with well – experienced and skilled arbitrators. But when arbitrators are appointed from both parties, they note the skills of the arbitrator selected by each party should be adequate to solve the case and should have a background to the insurance cases to endorse arbitration for good. Hence it was understood that negotiation is the most widely used type of ADR followed by mediation and arbitration.

With regard to the number of claims (those the insurance company denied liability) that went to litigation, it was difficult to find a precise number hence the author of this study asked the interviewees for a professional estimation of the share of construction insurance cases from the total of insurance cases that were resorted or still under court proceedings in the year 2009 E.C (2016/17 G.C). It was found to be within the range of two to five percent from the total insurance cases under litigation. These numbers seem small and may question the significance of this study. Basically, this number is a professional estimation not precise. Second there is a gap in the demarcation between construction insurances and other types of insurance. The interviewees when asked about construction insurances, they often don't recall suppliers supplying construction materials, equipment, machinery and plants and the insurances they purchase for mitigating the risks therein (while transported from ports, erected etc.), whereas, quite large money is involved in such transactions. Even taking the range as it is, settling the construction disputes is time taking and tedious due to the unique nature of construction exacerbated by lack of specialized construction lawyers and arbitrators to view the cases. Processed and summarized data of the construction insurances and cases resolved by litigation and ADR or internal claim management is either not available or is found fragmented or the companies aren't willing to disclose information.

E. What Needs to be Done to Encourage the Use of ADR

The interviewees' were also asked their opinion on what needs to be done to encourage the use of ADR in construction insurance disputes. The first point they noted is to increase arbitral institutions both in number and quality. By now there are only two arbitral institutions and there should be different arbitral institutions with specialization in different sectors (construction, insurance, commerce etc).

F. Ways to Minimize Construction Insurance Coverage Disputes

With regard to the insurance companies' views on the way to minimize construction insurance disputes, they noted it is the responsibility of all. The first is the insurers should prepare insurance policies in a clear and precise language so that the insured understands the terms, conditions and exclusions easily. The practice is the company's copy the policies from foreign countries and let alone the insured, some staffs of the insurance companies' don't understand the technical jargons therein. Even those terms are sometimes difficult for some lawyers to understand it and take their considerable

time in trying to understand it. The insurance companies should prepare seminars and symposiums for their customers which has a double advantage of advertising themselves plus minimizing the disputes because of misunderstanding of terms, conditions and exclusions. The insurance companies should calculate the risks cautiously or engage themselves in prudent underwriting evaluating the risks according to the nature of project, the types of procurement and construction contract. The insurers also need to have fast, reasonable and customer based claim management. Then what is expected from the insured is to read and understand each and every detail of the policies before accepting them and refer to professionals (if they find difficulties understanding them). As the purpose of insurance is to mitigate risks in any sort of business, and most graduates directly or indirectly are welcomed by different business companies (or as they may establish their own companies), incorporating insurance courses for students of any field might help in reducing the disputes by breaking the awareness gaps.

Chapter Five

Conclusions and Recommendations

The general objective of this research work was to study in detail about the methods used in resolving insurance coverage disputes in the Ethiopian construction industry. It was hoped that in trying to achieve the general objective, the causes of insurance coverage disputes, the types of insurances frequently leading to disputes, the role and use of the insurance company's internal claim management and the use of ADR in resolving the disputes will be answered as specific objectives. Hence, fifteen cases were identified and assessed to achieve the objectives in this research work. The case studies were again validated using interviews with insurance companies.

5.1 Conclusions

1. The parties that involve in construction insurance coverage disputes are insurers, contractors, public bodies, suppliers (material and machinery), construction machinery rental companies, freight forwarders and carriers respectively. Most of construction insurance coverage disputes are between insurers and contractors and between insurers and public bodies/clients.
2. The types of construction insurances frequently leading to disputes in Ethiopia are motor insurances, performance bonds, marine insurances, CAR insurances, fire insurance and PII respectively. Workmen compensations are also frequently claimed in addition to the above types and they are entertained mostly by the insurance companies' internal claim management before they reach disputes.
3. Conflict of laws to prevail for a construction insurance coverage dispute at hand is found to be the first cause of construction insurance coverage disputes followed by the insured's failure to proof loss in amount and supporting documents. Performance bond forfeiture claims, disputes regarding the calculation, expiry etc of period of limitation of a claim and issues related to payment of outstanding premium follow respectively. There are legal interpretation problems and especially there is a strong tendency of looking 'bonds' as 'insurance' even in the legal environment.
4. All insurance companies understand claim management as a backbone of the insurance business. However, fast responding of claims is unavailable and mostly is time taking and exhaustive. In the fifteen cases under investigation, the claim amounts that were the source of the dispute varied from a minimum of ETB 3450.00

to a maximum of ETB 3,683,170.00. The minimum claim (in terms of amount) may have an impact of pushed up legal costs disproportionate to the value of the dispute. The study implied that the insurance companies' mind is set to 'protecting the businesses' and are holding increasingly aggressive positions in resisting policy holder claims.

5. It can be said that the use of ADR in construction insurance coverage disputes is often disregarded although there are some efforts. Insurance companies prefer negotiation to solve their disputes in order to maintain their customers and to preserve their future relationship with the insured and to preserve the good attitude of the public towards them. Though most companies recognize arbitration in their policy as a means of dispute settlement, in effect, they start with mediation and some time if mediation fails to pull the parties together, court proceeding starts. All insurance companies include arbitration clauses in their policy for the dispute to be resolved by either 'any arbitral institution' or by parties appointed by both of them (the insurer and the insured).
6. There are no compulsory requirements in Ethiopian insurance industry (including construction insurances for parties in commercial disputes to participate in atleast mediation or settlement conference prior to moving forward with trial. Structurally, insurance litigation isn't linked to ADR systems.
7. There are no intra-industry dispute resolution schemes particularly suited the insurance sector in Ethiopia including construction insurance.
8. The formation of different insurance associations is vital to the development of the insurance sector. In Ethiopia too, Ethiopian Association of Insurers is established and is engaging in different policy amendment issues and one area strongly supported by the association is the movement to influence government policy to liberate insurance regulation from NBE. The association hasn't registered remarkable achievement in the area of awareness creation in insurance.
9. The availability of legal advisors specializing in construction insurance and reinsurance law, insurance litigation and counseling and claims handling is limited in Ethiopia.

5.2 Recommendations

1. There are insurance awareness problems exacerbated by an insurance policy being one sided contract. Hence an insured before accepting a policy should understand the terms, conditions and exclusions of the policy and get an advice from insurance brokers or policy advisors. All construction parties should further refer to the lessons learnt subsection under each case this study discussed to avoid the occurrence of similar such future disputes.
2. Insurance companies must preserve the fine line between investigating suspicious claims and harassing legitimate claimants and the need to comply with the time requirements for paying claims imposed by fair claim practice regulations. A dispute between a client and a financial service provider or one of its representatives, must first exhaust the internal complaint resolution and procedure of the provider.
3. Different ADR institutions should be established with a particular focus on negotiation, mediation and arbitration. State administered arbitration institutions which specialize in construction, insurance etc. should be available. The government should fund selected forms of ADRs after identifying selected sectors and types of businesses that would particularly benefit from the use of ADR. Different associations that are directly or indirectly linked to insurance, insurance companies, construction professionals and lawyers should encourage the use of ADR.
4. Parties in commercial disputes should be required to participate in atleast one ADR methods (mediation or settlement conference) prior to moving forward with trial taking US experience and Chinese experience as a model. In China, Supreme People’s Court of China jointly established the mechanism for linking insurance dispute litigation with mediation in some regions of China to establish a mediation system for insurance litigation for some cities. The local courts and insurance associations conduct this system.
5. The British practice of intra-industry dispute resolution independent from the government, the FOS, should be adapted to the Ethiopian insurance industry to resolve consumers' disputes with their financial service providers reducing the burden on courts and most importantly disputes are solved by those professionals close to the financial industry than those in court litigations. The FOS has served as a model for reform in many countries, including Australia, Canada, New Zealand, Ireland, India, and Japan.

6. The choice to solve disputes through litigation results in additional high cost and in some cases the cost of trying the case may exceed the amount of the judgment (legal fees, filing fees and cost that can be levied against the losing disputant), emotionally stressful because of its adversarial nature, and potentially counterproductive and takes a considerable time of the parties. The parties before going to court litigation should evaluate its feasibility.
7. The proper settlement of claims requires a sound knowledge of the law, principles and practices governing insurance contracts and, in particular, a thorough knowledge of the terms and conditions of the standard policies and various extensions and modifications thereunder. Legal advisors specializing in insurance and reinsurance law, insurance litigation and counseling and claims handling should be available and the government should work on creating a favorable environment for their development.
8. Insurance fraud investigating units comprising insurance associations, the bureau of crime investigations and different experts should be designed to fight insurance claims fraud by educating and training fraud investigators, a lesson to be taken from US experience.

Finally, areas of future research are suggested below.

Areas of Future Research

i. Impact of technological developments and changing environment and the capacity of the insurance companies in Ethiopia with regard to dispute resolution.
ii. Whether there is a need to devise a new legal framework to suit for the complex construction insurance.
iii. Proposal on a mechanism and structure of linking construction insurance disputes to ADR before going to trial.
iv. Role of lawyers, engineers and professional associations in minimizing construction insurance disputes.

Reference

1. Abebe Dinku. (2000*).* Insurance Requirements and Practices of Ethiopia's Construction Sector. Addis Ababa University, Department of Civil Engineering: Journal of EACA, Volume 17.
2. AIA Document A201. (2007). General Condition of the Contract for Construction, AIA
3. Aiiuja, H. N., Dozzi, S. P., Abourizk, S. M. (1994), Project Management Techniques in Planning and Controlling Construction Projects. New York: Jhon Wiley and Sons, Inc.
4. Association of British Insurers, (2017). UK Insurance and Long-Term Savings, the State of the Market, British Insurers
5. Berihun, A. (2017). Ethiopian Insurance Law, Doctrines and Practice. (1st Ed.)
6. Bilal, D. (2017). Ethiopia: Harnessing the Insurance Industry for Economic Development. The Ethiopian Herald.
7. Black H. (2009). Black's Law Dictionary. Minnesota: West Publishing.
8. Brandmeir, K., Grimm, M., and Holzhausen, A. (2017). Trend Watch; Global Insurance Markets – Current Status and Outlook. Allianz Research
9. Bunni, N. G. (2003). Risk and Insurance in Construction (2nd ed.). London: Spon Press.
10. Cambridge Business Dictionary. (2017): Cambridge University Press.
11. Civil Code of the Empire of Ethiopia Proclamation No. 161 of 1960. (1960). Addis Ababa: Berhanena Selam.
12. Civil Procedure Code Decree of 1965. (1965). Addis Ababa: Berhanena Selam.
13. Commercial Code of the Empire of Ethiopia Proclamation No. 166 of 1960. (1960). Addis Ababa: Berhanena Selam.
14. Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004. (2004).
15. De Beer, I. C., Mostert, F. J., Mostert, J. H. (2015). The Claims Handling Process of Engineering Insurance in South Africa, Risk Governance and Control: Financial Markets and Institutions, Volume 5, Issue 2
16. Denzin, N.K., and Lincoln, Y.S. (2000). Handbook of Qualitative Research (2nd ed.). Thousand Oaks: Sage Publications.
17. Esterberg, G. K. (2002). Qualitative Methods in Social Research: McGraw-Hill.

18. Ethiopian Council of Ministers. (1998). Regulation No. 37/1998. Freight Forwarding and Ship Agency License Issuance Regulation. Addis Ababa: Berehanena Selam.
19. Ethiopian Council of Ministers. (2011). Building Regulation No. 243/2011. Building Regulation. Addis Ababa: Berehanena Selam.
20. Ethiopian House of Representatives. (1970). Proclamation No. 281/1970. Control and Regulation of Insurance Business. Addis Ababa: Berehanena Selam.
21. Ethiopian House of Representatives. (1995). Proclamation No. 1/1995. A Proclamation to pronounce the coming to effect of the Constitution of the FDRE. Addis Ababa: Berehanena Selam.
22. Ethiopian House of Representatives. (2005). Proclamation No. 430/2005. Determining Procedures of Public Procurement Proclamation. Addis Ababa: Berehanena Selam.
23. Ethiopian House of Representatives. (2009). Proclamation No. 624/2009. Ethiopian Building Proclamation. Addis Ababa: Berehanena Selam.
24. Ethiopian House of Representatives. (2013). Proclamation No. 799/2013. Vehicle Insurance against Third Party Risks Proclamation. Addis Ababa: Berehanena Selam.
25. Federal Ministry of Construction and Urban Development. (2003). Ethiopian Building Directive No. 5/2003.
26. Federal Public Procurement Agency of Ethiopia (FPPA). (2006). Standard Bidding Documents for Works.
27. Federal Public Procurement Agency of Ethiopia (FPPA). (2011). Standard Bidding Documents for consultancy services.
28. Federal Public Procurement Agency of Ethiopia (FPPA). (2011). Standard Bidding Documents for works.
29. FIDIC. (March 2006). MDB Harmonized GCC for Construction for Building and Engineering Works Designed by the Employer: Multilateral Development Bank.
30. Glynn, R. (2004). ADR for Insurance Disputes. IMIA Conference: Marsh Ltd.
31. Gould, N. (2003). Insurance. Available on www.fenwickelliott.com and accessed on February 7 2017.
32. Hailu Zeleke. (2007). Insurance in Ethiopia: Historical Development, Present Status and Future Challenges. Addis Ababa: Master Printing Press.
33. Hodkinson, P. and Hodkinson, H. (2001). The Strengths and Limitations of Case Study Research, Paper presented to the Learning and Skills Development Agency

conference, Making an Impact on Policy and Practice. Cambridge: University of Leeds.

34. Hollingdale M., Mc Comish S. and Luttrell D. S. (2009). Australian Construction Law: A Review of Recent Developments and their Implications. Australia: Allens Arthur Robinson.
35. Institute of Company Secretaries of India (ICSI). (2014). Study Material, Professional Programme, Insurance Law and Practice. Module 3, Elective Paper: Tan Prints.
36. Kuschke, B. (2014). Dispute Resolution in Insurance: The South African Ombud, University of Pretoria
37. Lock, D. (2004). Project Management in Construction. England: Gower Publishing Limited
38. Maritime Code of the Empire of Ethiopia Proclamation No. 164 of 1960 (1960), Addis Ababa: Berhanena Selam.
39. Mekdelawit Y. (2014), an Assessment of Claim Settlement of Motor Insurance in the Case of Tsehay Insurance S.Co. St. Mary's University, Faculity of Business, Addis Ababa.
40. Mendelowitz, M. (2014). Resolving Consumer Insurance Complaints in the UK, the Financial Ombudsman Service. Norton Rose Fulbright LLP. London.
41. Merritt, F. S. and Ricketts, J. T. (2001). Building Design and Construction Handbook (6th ed.). USA: McGraw Hill.
42. Microsoft Corporation. (2009). Microsoft Encarta.
43. Ministry of Finance and Economic Development. (June/2010). Federal Public Procurement Directive.
44. Ministry of Works and Urban Development. (1994). Standard Conditions of Contract for Construction of Civil Work Projects.
45. NBE. (1996). Directive No. SIB/12/1996. Licensing and Supervision of Insurance Business, Licensing of Insurance Loss Assessors and Loss Adjustors.
46. NBE. (2004). Directive No. SID/24/2004. Licensing and Supervision of Insurance Business Amendment of Prohibition of Issuance of Certain Types of Bonds by Insurance Companies.
47. NBE. (2007). Directive No. SIB/30/2007. Licensing and Supervision of Insurance Business, Licensing of Insurance Agent.

48. NBE. (2010). Directive No. SIB/31/2010. Licensing and Supervision of Insurance Business, Licensing of Insurance Broker.
49. NBE. (2013). Directive No. SIB/34/2013. Licensing and Supervision of Insurance Business,
50. Niekerk, J. (2010). Insurance Law, Department of Mercantile Law, University of South Africa)
51. Oxford Dictionary of Law. (2002). (5th Ed.). Oxford: Oxford University Press.
52. Richard, F., David, L., Robert, N., Sydney, U. (2002). Construction Management in Practice (2nd ed.). United Kingdom: Blackwell Science Ltd. Richter, I. E. (2000). The Project Neutral: Neutralizing Risk, Maintaining Relationships and Watching the Bottom Line: Construction Business Review.
53. Rogan, P. (ed.) (2015). The Insurance and Reinsurance Law Review, US. (3rd ed.): Law Business Research Ltd
54. Schwarcz, D. (2009) Redesigning Consumer Dispute Resolution; A Case Study of the British and American Approaches to Insurance Claims Conflict, Tulane Law Review Volume 83
55. Skipper, D. H. (1997). Foreign Insurers in Emerging Markets; Issues and Concerns. Washington: International Insurance Foundation.
56. Stake, R. E. (1995). The Art of Case Study Research: Perspectives on Practice. Thousand Oaks, CA: Sage.
57. Tefera, E. and Mulugeta, G. (2009). Alternative Dispute Resolution, Teaching Material. The Ethiopian Justice and Legal System Research Institute
58. Tigist Gonfa. (2016). Study of Insurance Practices in Ethiopian Construction Industry. M.Sc. thesis, School of Civil and Environmental Engineering, Addis Ababa Institute of Technology, Addis Ababa.
59. Wanner, L. (2011). Delivery of Quality Insurance: The Journal of Business and Economics Vol.1.
60. www.scor.com accessed on February 7, 2017
61. Yin, R. K. (2009). Case study research: Design and Methods (4th Ed.). Thousand Oaks, CA: Sage.

Annex A

Semi – Structured Interview Questions (for insurance companies)

1. Which insurance types are claimed frequently?
2. What are the causes for the claims/disputes?
3. What is the mechanism of your internal claim management?
4. Do you use ADR and which type is used frequently?
5. What is your comment on insurance cases resolution through ADR, litigation and what are the legal backgrounds?
6. Is insurance a business of litigation?
7. What should be done to increase the use of ADR?
8. What should be done to minimize insurance related disputes?

Annex B (Amharic Decision Version of Case Two)

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መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ለአቤቱታው መነሻ የሆነው ጉዳይ የመድን ዋስትና ውልን መሠረት ያደረገ ክርክር የሚመለከት ነው፡፡ ከመዝገቡ እንዳየነው ተጠሪ ለአመልካች መኪና የመድን ዋስትና ሰጥቷል፡፡ መኪናው ሲሸከረከር በነበረ ጊዜ በመገልበጡ ጉዳት ደርሶበታል፡፡ ተጠሪም የገባውን የመድን ዋስትና ግዴታ መሠረት በማድረግ ገንዘቡን ወጪ አድርጎ መኪናው የተገለበጠው በሹፌሩ ሳይሆን በብልሽት ምክንያት አገልግሎት መስጠት አቁሞ በነበረበት ጊዜ የተበላሸውን ፍሬን እያስተካከለ የነበረው መካኒክ ሥራውን ሲሞክር መሆኑን ስለደረሰኩበት ኃላፊነት ሳይኖርብኝ ለጥገና ያወጣሁት ገንዘብ ሊመለስልኝ ይገባል በማለት በአመልካች ላይ ክስ መስርቷል፡፡ አመልካች ለክሱ በሰጠው መልስ ክሱ በንግድ ህግ ቁ 674(1) ወይም (2) መሠረት በይርጋ ቀሪ ሆኗል ሲል የመጀመሪያ ደረጃ መቃወሚያ አቅርቧል፡፡ የስረ-ነገር ክርክር በማንሳትም ተከላክሏል፡፡ ክሱን ያስተናገደው የፌደራል መጀመሪያ ደረጃ ፍ/ቤት የግራ ቀኝ ወገኖችን ክርክር ከመረመረ በኋላ የተጠሪን ጥያቄ ሙሉ በሙሉ በመቀበል ክስ የቀረበበትን ገንዘብ ከነወለዱ እና የጠበቃ አበል ጋር እንዲከፈለው ወስኗል፡፡ በዚህ ውሳኔ ሊይ ይግባኝ የቀረበለት የፌደራል ከፍተኛ ፍ/ቤትም ውሳኔውን አፅንቶታል፡፡

የሰበር አቤቱታው የቀረበው በዚሁ ላይ ነው፡፡ አመልካች ታሕሣሥ 23 ቀን 2001 ዓ.ም በጻፈው ማመልከቻ በስር ፍ/ቤቶች ውሳኔ ተፈጸመ ያለውን መሠረታዊ የሕግ ስህተት በመግለጽ አቤቱታውን አቅርቧል፡፡ በበኩላችንም የአመልካችን የይርጋ ክርክር የታለፈው በአግባቡ ነው ወይ? የሚለውን ጭብጥ በመያዝ ተጠሪን አስቀርበን ክርክሩን ሰምተናል፡፡

እንደምንመለከተው በዚህ የሰበር ችሎት ውሳኔ ሊሰጥበት የሚገባው የክርክር ጭብጭ ተጠሪ በአመልካች ላይ የመሠረተው ክስ በይርጋ ቀሪ ሆኗል ወይስ አልሆነም? የሚለው ነው፡፡ ይህ ጭብጥ ግራቀኝ ወገኖችን ያከራከረ ወይም ግራቀኝ ወገኖች የተለያዩት የሕግ አግባብ /የፍ/ብ/ሥ/ሥ/ሕግ ቁ.246 (1)/ በመሆኑ አግባብነት ካለው ሕግ ጋር ተገናዝቦ የሚታይ ይሆናል፡፡ በሌላ በኩል ግን ወደሕግ ከመሄዱ በፊት ከዚህ የተያያዘው የፍሬ ነገር አግባብ መመርመሩ ተገቢ ይሆናል፡፡

በግራ ቀኝ ወገኖች ክርክር እና በሥር ፍ/ቤቶች ውሳኔ እንደተመለከተው ተጠሪ ክሱን ያቀረበው ሚያዝያ 3 ቀን 1999 ዓ.ም ሲሆን ለክሱ መነሻ የሆነው ጉዳት ደረሰ የተባለው ደግሞ ግንቦት 12 ቀን 1994 ዓ.ም ነው፡፡ ይህ ጊዜ ማለትም ጉዳቱ በደረሰበት እና ክሱ በቀረበበት መሃል ያለው ሲታሰብ አራት ዓመት ከአስር ወር በላይ ነው፡፡ ይህ እንግዲህ በፍሬ ነገር ረገድ

የተረጋገጠው እውነታ ሲሆን፣ እውነታው ከየትኛው ሕግ ጋር ሲገናዘብ ነው ለይርጋው ክርክር አወሳሰን አግባብነት የሚኖረው የሚለውን ደግሞ ቀጥለን እንመለከታለን፡፡

ቀደም ሲል እንደተገለጸው ተጠሪ ገንዘቡ ሊመለስልኝ ይገባል በማለት ወደክስ ሊያመራ የቻለው የመድን ሽፋን ባልሰጠሁበት ሁኔታ የወጣ ነው የሚል ምክንያት መሠረት በማድረግ ነው፡፡ አመልካች ሁለት የፍሬ ነገር አግባቦችን በመጥቀስ ክሱ በንግድ ሕግ ቁ 674 መሠረት በይርጋ ቀሪ ሆኗል በማለት ተከራክሯል፡፡ የፍሬ ነገር አግባቦቹም የመጀመሪያው አደጋው ከደረሰበት ቀን አንስቶ ክሱ እስከቀረበበት ቀን ድረስ ያለውን ጊዜ የሚመለከት ሲሆን፣ ሁለተኛው ደግሞ ተጠሪ የአደጋውን መንስኤ ካወቀበት ግንቦት 26 ቀን 1996 ዓ.ም ጀምሮ ክሱ እስከ ቀረበበት ቀን ድረስ ያለውን ጊዜ የሚመለከት ነው፡፡ በዚህ መሠረትም ክሱ በንግድ ሕግ ቁ 674(1) ወይም (2) መሠረት በይርጋ ቀሪ ነው ሊባል ይገባል ብሏል፡፡ ተጠሪ በአመልካች ክርክር የተጠቀሱት የፍሬ ነገር አግባቦች ትክክል አይደለም የሚል ክርክር የለውም፡፡ የሚከራከረው ያቀረብኩት ክስ ያለአግባብ የተከፈለን ገንዘብ እንዲመለስ የሚጠይቅ በመሆኑ ተጠሪ በጠቀሰው ሕግ መሠረት በይርጋ ቀሪ አይሆንም፡፡ ሕጉ ለተያዘው ክርክር አግባብነት የለውም በማለት ነው፡፡

ተደጋግሞ እንደተገለጸው የግራቀኝ ወገኖች ግኑኝነት መነሻው የመድን ዋስትና /የኢንሹራንስ/ ውል ነው፡፡ ተጠሪ መኪናውን ያስጠገነው የውል ግዴታ እንዳለበት በማመን ነው፡፡ በኋላ ግን የጉዳቱን አደራረስ ወይም ሁኔታ ባውቅ ኖሮ መኪናውን አላስጠግንም ነበር፡፡ ጉዳቱ የደረሰው በመድን ዋስትና ውሉ ባልተሸፈነ ሁኔታ ነው የሚል ምክንያት አንስቶአል፡፡ ይህ አይነቱ የተጠሪ ክርክር ከተገባው ውል ውጪ በተሸሸገ ምክንያት ወይም በሐሰት በቀረበ ጥያቄ መሠረት እኔም ልሳሳት ችያለሁ ከሚል ተለይቶ የሚታይ አይደለም፡፡ በተሸሸገ ወይም በሐሰት ቃል የቀረበ ጉዳይ ያጋጠመ ሲሆን፣ የይርጋው ዘመን የሚታሰበው ኢንሹራንስ ሰጪው የተሸሸገውን ወይም በሐሰት የቀረበውን ቃል ካወቀበት ቀን ጀምሮ እንደሆነ በንግድ ሕግ ቁ. 674(2) ተደንግጎአል፡፡ የይርጋው ዘመን ሁለት ዓመት እንደሆነም በዚሁ ቁጥር ንኡስ ቁ (1) ተመልክቶአል፡፡ተጠሪ ክሱን ያቀረበው የተደበቀ ነገር መኖሩን ካወቀ ከሁለት ዓመት በላይ ቆይቶ እንደሆነም በፍሬ ነገር ረገድ ተረጋግጦአል፡፡ በመሆኑም አመልካች የንግድ ሕጉን ድንጋጌ መሠረት በማድረግ መከራከሩ ተገቢ ሲሆን የተጠሪ ክርክር ግን የሕግ መሠረት ያለው አይደለም፡፡ ሲጠቃለል ተጠሪ ክሱን ያቀረበው በሕጉ በይርጋ ቀሪ ከሆነ በኋላ በመሆኑ አቤቱታ የቀረበበት ውሳኔ በሕጉ አተረጓጎም ረገድ መሠረታዊ የሕግ ስህተት ያለበት ነው ለማለት ችለናል፡፡

ውሳኔ

1. የፌደራል መጀመሪያ ደረጃ ፍ/ቤት በመ.ቁ.86581 ታሕሣሥ 9 ቀን 2000 ዓ.ም የሰጠው ውሳኔ እና የፌደራል ከፍተኛ ፍ/ቤት በመ.ቁ 63225 ህዳር 23 ቀን 2001 ዓ.ም የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕግ ቁ 348(1) መሠረት ተሽሮአል፡፡
2. ተጠሪ በአመልካች ላይ የመሠረተው ክስ በይርጋ ቀሪ በመሆኑ አመልካች ገንዘቡን እንዲመልስ የሚገደድበት የሕግ ምክንያት የለም ብለናል፡፡
3. ወጪና ኪሣራ በተመለከተ ግራ ቀኝ ወገኖች የየራሳቸውን ይቻሉ፡፡ መዝገቡ ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

Annex C (Amharic Decision Version of Case Five)

የሰ/መ/ቁ. 60951

ቀን 19/9/2003

ዳኞች፣ ሐጎስ ወሌደ

አልማው ወሌ

አሊ መሀመድ

ነጋ ዱፍሳ

አዳነ ንጉሴ

አመልካች - የኢትዮጵያ መንገዶች ባለስልጣን ነገረ ፈጅ አቶ ሳሙኤል ተገኔ፣ ቀረቡ

ተጠሪ - ካንትሪ ትሬዲንግ ኃ/የተ/የግል ማህበር ፣ አልቀረቡም

መዝገቡን መርምረን የሚከተለው ፍርድ ሰጥቷል፡፡

ፍርድ

የሰበር አመልካች በስር የፌደራል ከፍተኛ ፍ/ቤት ተከሳሽ ሲሆን ተጠሪ ደግሞ ከሳሽ ነው፡፡ ክሱም ለመንገድ ስራ የሚያገለግሉትን የተለያዩ የአስፓልት ውጤቶችን እስከ ተከሳሽ ሳይቶች ድረስ ለማቅረብ ተከሳሽ መ/ቤት ያወጣውን ጨረታ ተወዳድሬ በማሸነፍ የሥራ አፈፃፀም ዋስትና (contractual security) የጠቅላላ ሥራ ዋጋ 10% ብር 9,559,525.37 ከወጋገን ባንክ የተሰጠ ዋስትና አስይዤ ስለእቃውም አቅርቦት ከተከሳሽ መ/ቤት ጋር እንደ አውሮፓ አቆጣጠር ሰኖቴምበር 20/2007 ውል የገባን ሲሆን ከሳሽ ከገባሁት ግዴታዎች የአስፓልት ውጤቶችን አቅርቤ Ac 60/70 ተብሎ ከሚታወቀው የአስፓልት አይነት ማቅረብ ከሚገባኝ 8.276 ሜትሪክ ቶን ውስጥ 3,829.5 ሜትሪክ ቶን ብቻ አላቀረብኩም፡፡ ምክንያቱም በውሉ ይደርሳሉ ተብሎ ያልተገመቱ ጉዳዮች ውሉን በከፍተኛ ሁኔታ በማናወጣቸዉ ሲሆን ከተከሳሽ ጋር በመወያየት በቅድሚያ የተቀበልኩትን 10,224,989.13 ብር ተመላሽ በማድረግ ውሉ ተቋርጧል፡፡ ሆኖም ተከሳሽ መ/ቤት ለመልካም አፈፃፀም ዋስትና ካስያዝኩት ፋይናንሻል ጋራንቲ ቦንድ ውስጥ ላስረከብኩት የአስፓልት ውጤት መጠን ብር 3,557,729.34 በመቁረጥ ቀሪውን ገንዘብ እንደሚመልስልኝ ገልጿል፡፡ ስለሆነም ተከሳሽ ብር 3,557,729.34 ያስቀረብኝና ለተከሳሽ ባቀረብኳቸው የአስፓልት ውጤቶች ብር 497,735 ኪሣራ የደረሰብኝ በመሆኑ የተጠቀሰው ገንዘብ ወጪና ኪሳራ ተጨምሮ እንዲከፍለኝ ይወሰንልኝ የሚል ነው፡፡

ለክሱ ተከሳሽ የሰጠው መልስ ከሳሽ ኪሳራ ገጥሞኛል ይበል እንጂ ደረሰብኝ የሚለው ኪሣራ አስቀድሞ ሊገመት የሚችል ነው፡፡ ተከሳሽ መ/ቤት ለሚሰራው እና ለሚያስጠግነው መንገድ በእቅድ የሚሠራ በመሆኑና ከሳሽም ማቅረብ የሚገባቸውን የአስፓልት ውጤቶች በግዜ ካለማቅረቡ የተነሳ በተከሳሽ ላይ ከፍተኛ ጉዳት ደርሷል፡፡ Ac 60/70 ከተባለው የአስፓልት ውጤት ውስጥ 3829.5 ሜትሪክ ቶን እስካሁን ድረስ አላቀረበም፡፡ ተከሳሽም ለደረሰበት ጉዳት ከሳሽ ለመልካም ስራ አፈፃፀም ዋስትና ካስያዘው ገንዘብ ውስጥ ብር 3,557,927.34 መውሰዱ አግባብነት አለው ይህ ለመልካም ስራ አፈፃፀም ዋስትና የተያዘው ገንዘብ ለሚደርሰው ጉዳት እንደሚውል በውላችን የተስማማነው ጉዲይ ነው፡፡ በውሉ ምክንያት ኪሳራ ብር 497,735 ደርሶብኛል በማለት እንዲከፈለው የጠየቀውም ቢሆንም ተቀባይነት የለውም፡፡ ምክንያቱም በውላችን በማናቸውም ሁኔታ የዋጋ ማስተካከያ እንደማይደረግ ተስማምተናል በማለት የከሳሽ ክስ ውድቅ እንዲደረግ ጠይቋል፡፡

የግራ ቀኙን ክርክር የመረመረው የሥር የፌ/ከ/ፍ/ቤትም ከሳሽ ለማቅረብ የውል ግዴታ ከገባው የአስፓልት ውጤት ውስጥ 3829.5 ሜትሪክ ቶን አለማስረከቡን አምኗል፣ ውሉም በግራ ቀኙ ስምምነት የተቋረጠ ስለመሆኑ የቀረበ ማስረጃ የለም፣ ከሳሽ ከአቅም በላይ የሆኑ ምክንያቶች ናቸው በማለት የዘረዘራቸው ምክንያቶች በፍ/ህ/ቁ 1792/2/አንፃር ሲታዩ ከአቅም በላይ የሆኑ ምክንያቶች ናቸው የሚባሉ አይደሉም፣ተከሳሽ በደብዳቤ እንደገለፀው የመልካም ሥራ አፈፃፀም ዋስትና ገንዘብ ቀንሶ ያስቀረው ከሳሽ ያስረከበውን እና ያላስረከበውን መጠን በማመጣጠን ሲሆን ይህን ተከሳሽ በራሱ መወሰኑ ተገቢነት ያለው አይደለም፡፡ የተከሳሽ መ/ቤት ኪሳራ ደርሶበታል ቢባል እንኳን በፍ/ቤት ክስ ቀርቦ ከሚያስወስን በስተቀር የመልካም

ሥራ አፈፃፀም ዋስትና ለደረሰበት ኪሣራ መቀነስ የለበትም ሲል ቀንሶ ያስቀረውን የመልካም ሥራ አፈፃፀም ዋስትና ገንዘብ ብር 3,557,927.34 ለከሳሽ እንዲመልስ ሲወስን ከሳሽ በተጨማሪ ኪሣራ ገጥሞኛል ሲል የጠየቀውን የኪሳራ ገንዘብ ብር 497,735 ተከሳሽ ሊጋራ አይገባውም ብሏል፡፡

የሥር ተከሳሽ በሥር የፌ/ከ/ፍ/ቤት በሰጠው ውሳኔ ቅር በመሰኘት ይግባኝ ለጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ያቀረበ ሲሆን ይግባኝ ሰሚው ችሎት የሥር ከፍተኛ ፍ/ቤት የሰጠውን ውሳኔ የሚነቀፍ አይደለም ሲል በፍ/ሥ/ሥ/ህ/ቁ 348/1/ መሰረት አጽንቷል፡፡

በሥር ፍ/ቤት ውሳኔ አመልካች መሰረታዊ የሆነ የህግ ስህተት ተፈፅሟል በማለት የቅሬታ ነጥቦች ለዚህ ፍ/ቤት ያቀረበ ሲሆን በዋናነት የጠቀሣቸውም ለዚህ ለተያዘው ጉዳይ አግባብነት ያለው የመንግስት የግዥ ስርአት ለመወሰን የወጣው የአዋጅ ቁጥር 430-97 ሆኖ እያለ ፍ/ቤቱ አግባብነት የሌለውን የፍትሃብሄር ህግ ቁጥር 1790/1/ እና 1799 ለውሳኔው መሰረት ማድረጉ ተገቢነት የለውም፣ ለውሳኔው አግባብነት አለው እንኳን ቢባል የበሰለ የጉዳት ካሳ (liquidated Damages) በተመለከተ በውሉ ጠቅላላ ክፍልና ልዩ ሁኔታ አንቀጽ 27 የተስማማንበት ጉዳይ ስለሆነ የፍትሐብሄር ህግ ቁ. 1894 እንደተደነገገው አመልካች ስምምነት በተደረሰበት ጉዳይ ላይ የጉዳቱን ልክ ሆነ መጠን የማስረዳት ሀላፊነት የለበትም፡- ስለሆነም ተጠሪው ካስያዘው የመልካም ስራ አፈፃፀም ዋስትና ገንዘብ በስምምነቱ መሰረት ቆርጦ የመውሰድ መብት አለው፡፡

ይህ ሆኖ ሳለ ይህንኑ ገንዘብ አመልካች በፍ/ቤት ክስ አቅርቦ ማስወሰን አለበት የተባለው በፍ/ህ/ቁ 1731፤ በውሉ አንቀፅ 18/2/ እና በመንግስት እቃ ግዢ መመሪያ አንቀፅ 11/14/2 መሰረት ተቀባይነት የለውም የሚሉ ናቸው፡፡

ለሰበር አቤቱታ ተጠሪው በሰጠው መልስ ከአመልካች ጋር የነበረው ውል በመቋረጡ ላስረከበው እቃ ለሚደርሰው ጉዳት ማካካሻ የሚከፈለውን ካሳ ስምምነት ያላደረገ በመሆኑ የሥር ፍ/ቤቶች ያልቀረበውን እቃ በተመለከተ የካሳ መጠን አመልካች ክስ አቅርቦ ከሚያስወስን በቀር ጉዳት መኖሩንም ሆነ የካሳውን ልክ ራሱ ወስኖ ሊወስድ እንደማይችል የሰጡት ውሳኔ በፍ/ህ/ቁ 3200 መሰረት ህጋዊ ነው፣ አመልካች ተጠሪ በውሉ አንቀፅ 27 መሰረት የተስማሙትን ዘግይቶ ለቀረበ ዕቃ የሚከፈል መቀጫን እንጂ ውሉ በመቋረጡ ላልቀረበ ዕቃ የሚደርስ ጉዳትን በተመለከተ አይደለም፣ ተጠሪ ላስረከበው ዕቃ የተረጋገጠ ጉዳትም ቢሆን ኪሳራ ሊከፍል አይገባም፣ አመልካች በውሉ አንቀፅ 27 መሰረት ሊከፈለኝ የሚገባውን መቀጫ በውሉ አንቀፅ 18 መሰረት ከዉል ማስከበሪያ ላይ የመቀነስ መብት አለኝ በማለት ያቀረበው ቅሬታ የህግ መሰረት የለውም በማለት የሥር ከፍ/ፍ/ቤትም ሆነ የፌ/ጠ/ፍ/ቤት አመልካች ከዘረዘራቸው የቅሬታ ነጥቦች አንፃር የፈፀሙት የህግ ስህተት የለም ሲል ተከራክሯል፡፡

የግራ ቀኙ ክርክር ከዚህ በላይ የቀረበው ሲሆን እኛም ተጠሪው ለመልካም ስራ አፈፃፀም ዋስትና ካስያዘው ገንዘብ ውስጥ ባልፈፀመው የውል ግዴታ መጠን አመልካች ቀንሶ ማስቀረቱ በአግባቡ ነው ወይስ አይደለም የሚለውን ጭብጥ ይዘን ክርክሩን እንደሚከተለው መርምረናል፡፡

ለዚህ ለተያዘው ጭብጥ ከአመልካች በኩል የቀረበው ክርክር በአዋጅ ቁጥር 430/97፣ የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ሐምሌ 1997 ባወጣው የመንግስት ዕቃ ግዥ መመሪያ በአመልካችና ተጠሪ መካከል በተደረገው ውል መሰረት ተጠሪው ለመልካም ሥራ አፈፃፀም ዋስትና ካስያዘው ገንዘብ ውስጥ ባልተፈፀመው የውል ግዴታ መጠን የመቀነስ መብት አለኝ የሚል ነው፡፡ ተጠሪው ግን አመልካች ለመልካም ስራ አፈፃፀም ዋስትና ከተያዘው ገንዘብ ውስጥ በራሱ ስልጣን ቀንሶ ለማስቀረት አይችልም ሲል ተከራክሯል፡፡ ተጠሪው ለዚህ ክርክር አግባብነት አለው በማለት በዋናነት የጠቀሰውም የፍ/ብ/ህ/ቁ 3200 ነው፡፡ የተጠቀሰው የፍ/ብ/ህ/ቁ 3200 ከአስተዳደር መ/ቤቶች ጋር የሚደረገውን ውል የሚመለከት ሲሆን ድንጋጌው በመርህ ደረጃ የቅድሚያ ልዩ መብት እንደማይኖር የሚናገር ነው፡፡ በዚሁ ህግ መሰረትም የአስተዳደር መ/ቤቱም

ተዋዋዩ ውሉን ባለመፈፀሙ የሚያስቀጣ ጥፋት አድርጓል በማለት በገዛ ራሱ አንድ ውሳኔ ለማድረግ ወይም በተዋዋዩ ግዴታ አለመፈፀም ወይም ለመፈፀም በመዘግየቱ ምክንያት የሚፈለግበትን ኪሣራ ልክ በገዛ ራሱ ለመወሰን አይችልም፡፡

ይሁን እንጅ ለዚህ ለተያዘው ጉዳይ አግባብነት ያላቸው የመንግሰት የግዥ ሥርአትን ለመወሰን የወጣ አዋጅ ቁጥር 430/97 እና የመንግስት የግዥ መመሪያ እንዲሁም ግራ ቀኙ የገቡት ውል እንጅ የተጠቀሰው የፍትሀብሄር ህግ ድንጋጌ አይደለም፡፡ ምክንያቱም በህግ አተረጓጎም ረገድ ለዚህ ለተያዘው ጉዳይ የፍ/ህጉ አጠቃላይ ህግ ሲሆን የመንግስት የግዥ ሥርአትን ለመወሰን የወጣው አዋጅ ቁጥር 430/97 ልዩ ህግ በመሆኑ ከግዥ ጋር ተያይዞ ለሚነሳ ክርክር ተፈፃሚ የሚሆነው ይኸው አዋጅ ነው፡፡

አዋጅ ቁጥር 430/97 አንቀፅ 43 ስለ ውል ማስከበሪያ (contract security) የሚደነግግ ሲሆን አቅራቢው በውሉ መሰረት ባለመፈፀሙ በግዥ ፈፃሚው አካል ላይ ለሚደርሰው ጉዳት ማካካሻ የሚውል ማስከበሪያ ለግዥ ፈፃሚው አካል መስጠት አለበት ይላል፡፡ የግራ ቀኙ ተዋዋዮችም ይህንኑ አስገዳጅነት ያለውን የህግ ድንጋጌ መሰረት በማድረግ በውላቸው የመልካም ስራ አፈፃፀም ዋስትና ያካተቱ ሲሆን ተጠሪው በውሉ መሰረት ማስረከብ የሚገባውን Ac 60/70 የተባለውን የአስፓልት ውጤት ቀንሶ በማስረከቡ በአመልካች ላይ ጉዳት መድረሱን ክርክሩ ያመለክታል፡፡ ይህ በመሆኑ አመልካች በውሉ አንቀፅ 18/2/ እንደተጠቀሰው በውሉ መሰረት ተጠሪው ግዴታውን ባለመፈፀሙ የተነሳ ለተፈጠረው ጉድለት መያዣ ከነበረው ከመልካም ሥራ አፈፃፀም ዋስትና ገንዘብ ቀንሷል፡፡ ሐምሌ 1997 የገ/ኢ/ል/ሚኒስቴር ያወጣው የግዥ መመሪያ አንቀፅ 11/5/ም ቢሆን አቅራቢው ዕቃውን አጠናቅቆ ባለማስረከቡ ርክክቡ ባልተፈፀመበት ግዢ ሊይ በየቀኑ 0.1 ወይም 1/1000 መቀጫ እንደሚከፍል ይናገራል፡፡

መመሪያው መቀጫ የውሉን ዋጋ 10% የሚበልጥ በሚሆንበት ጊዜ ግዥ ፈፃሚው ውሉን የመሰረዝ መብት እንዳለው እና የውሉ አፈፃፀም መዘግየት በግዥ ፈፃሚ ስራ ላይ ችግር የሚያስከትል ከሆነ ግዥ ፈፃሚው የመቀጫውን መጠን 10% ሳይጠብቅ ውሉን መሰረዝ እንደሚችል ጭምር በቁጥር 11.7/5/ /ሰ//ሐ/ ይገልፃል፡፡

በመሆኑም ከአዋጁ አንቀፅ 43፣ ከመመሪያው ቁጥር 11.7/5/ /ሀ-ሐ/ እንዲሁም ከውሉ አንቀፅ 18፣27.1 ይዘት አንፃር ሲታይ አመልካች ለመልካም ሥራ አፈፃፀም ዋስትና ከተያዘው ገንዘብ ባልተፈፀመ ውል ግዴታ መጠን ቀንሶ መውሰዱ አግባብነት አለው፡፡ የመልካም ስራ አፈፃፀም ዋስትና የሚያዘውም አቅራቢው በውሉ መሰረት ግዴታውን ባለመፈፀም የተነሳ ግዥ ፈፃሚው ላይ ለሚደርሰው ጉዳት ተገቢውን መቀጫ አቅራቢው ከዚሁ ገንዘብ እንዲከፍልና ውሉን አክብሮ በውሉ በተገለፀው ጊዜ ውስጥ ግዴታውን እንዲፈፅም ታስቦ ነዉ፡፡ ስለሆነም አመልካች ለመልካም ስራ አፈፃፀም ተጠሪው ያስያዘውን ገንዘብ ራሱ ቀንሶ የአስፓልት ውጤቱ ባለመቅረቡ የተነሳ ለተፈፀመው ጉድለት ማስቀረት አይችልም በማለት በስር ፍ/ቤት የተወሰነዉ መሰረታዊ የህግ ስህተት ያለበት ነው፡፡

ው ሣ ኔ

1. የፌደራል ከፍተኛ ፍ/ቤት በመ/ቁ 79497 በቀን 30/4/2002 በዋለው ችሎት የሰጠው ፍርድ እንዲሁም የፌ/ጠ/ፍ/ቤት በመ/ቁ 52052 በቀን 24/1/2003 የሰጠው ውሳኔ በፍ/ሥ/ሥ/ህ/ቁ 348/1/ መሠረት ተሻሽለዋል፡፡

2. ተጠሪው ለመልካም ስራ አፈፃፀም ዋስትና ካስያዘው ገንዘብ አመልካች ቀንሶ ያስቀረውን ብር 3,557,929.34 /ሶስት ሚሊዮን አምስት መቶ አምሳ ሰባት ሺህ ዘጠኝ መቶ ሃያ ዘጠኝ ከሰላሳ አራት ሳንቲም ለተጠሪው ሊመልስ አይገባም ብለናል፡፡

3. የዚህን ፍ/ቤት ወጪና ኪሳራ አመልካችና ተጠሪ የየራሳቸውን ይቻሉ፡፡

4. መዝገቡ የተዘጋ ስለሆነ ወደ መዝገብ ቤት ተመላሽ ይሁን፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

Declaration

I, the undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university, and that all source of materials used for the thesis have been duly acknowledged.

Declared by:

Name:

_____

Signature:

_____

Date:

_____

Confirmed by advisor:

Name:

_____

Signature:

_____

Date:

_____