



ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
SCHOOL OF LAW
LEGAL AND PRACTICAL CHALLENGES IN THE
IMPLEMENTATION OF COMESA YELLOW CARD
SCHEME: THE CASE OF ETHIOPIA

BY: GETU MELKIE TILAHUN

SEPTEMBER, 2020

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**A THESIS SUBMITTED IN PARTIAL FULFILLMENT FOR THE REQUIREMENT OF
MASTER'S DEGREE IN BUSINESS LAW (L.L.M)**

SEPTEMBER, 2020

ADDIS ABABA

DECLARATION

I hereby declare that this research is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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YELLOW CARD SCHEME: THE CASE OF ETHIOPIA**

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ACRONOYMS

CB.....	Council of Bureau
COMESA.....	Common Market for Eastern and Southern Africa
DCEO.....	Deputy Chief Executive officer
ECOWAS.....	Economic Commission for West African States
EIC	Ethiopian Insurance Corporation
EU	European Union
HB.....	Handling Bureau
IB.....	Issuing bureau
MTPL.....	Compulsory Motor Third Party Liability Insurance
MULPOC.....	Multinational Programming and Operational Centers
NB.....	National Bureau
NBD.....	National Bureau of Djibouti
NBE.....	National Bureau of Ethiopia
PTA.....	The Preferential Trade Area
SADC.....	Southern Africa Development Council
TP	Third Party
UK.....	United Kingdom
UNEC.....	United Nation Economic Commission
UNISC.....	United Insurance Share Company
YC.....	COMESA Yellow card
YCS.....	COMESA Yellow card Scheme

ABSTRACT

As regional motor third party liability insurance schemes involve parties, laws and institutions of different member states, Claims handling of cross-border traffic accidents is a complex process. Involving different stake holders and legal issues, the Yellow Card scheme of COMESA which operates in more than 13 countries couldn't be free from challenges in its implementation.

Thus the main theme of this study is to identify possible legal and practical challenges in the implementation of the YCS in Ethiopia and to forward possible way outs.

The study concludes that, YCS is not clear as to, who is TP in the scheme. YCS in particular and the COMESA in general doesn't have a comprehensive conflict of law rule. Claim handling procedure of the YCS follows a one line claim handling process and it is not in the interest of visiting victims.

The liability limit incorporated under Ethiopian MTPL proclamation is not compatible with the assumptions in the scheme and it is both against the interest of foreign drivers and Ethiopian victims.

Following the signing of the Protocol, states were entrusted with the responsibility to recognize the validity of the YC in their territories and to enact laws and regulations for the establishment of YCS; particularly for the designation of its NB. In a member state where single state-owned insurance company has the monopoly of all insurance operations, the government of that party to the Protocol may designate that company to act as it's NB. Though the current situation in Ethiopia doesn't allow state monopoly at all, EIC is still acting as NBE.

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND OF THE STUDY

The advent of mechanically propelled vehicles in the nineteenth century led to the call for legislation to protect others and road users.¹The road traffic act of 1930 introduced compulsory motor insurance for the first time in the UK.²

Having the aim of protecting victims of motor accidents, compulsory motor third party liability insurance schemes (hereinafter MTPL) were developed at national and regional levels. From regional compulsory motor vehicle insurance schemes; the yellow card Scheme of Canada, the Green Card System in Europe, the Orange Card of the Arab countries and the brown card of the ECOWAS are a case in points.

Carrying similar objective, the COMESA yellow card scheme (hereinafterYCS) was established in 1986 after 14 countries signed the Protocol on the Establishment of the Third-Party Motor Vehicle insurance Scheme (hereinafter the Protocol) in Addis Ababa.³ Subsequently, on April 26, 1987 the Agreement on the implementation of the TP Motor Vehicle Insurance Scheme, known as the Inter-Bureau Agreement (here after Inter-Bureau Agreement) was signed in Lusaka.⁴This was in conformity with the provisions of the Protocol by National Bureaus (hereinafterNB) designated by governments to administer the operations of the Scheme in their countries and the ratification of the Protocol by 11 member countries.⁵These were: Burundi, Ethiopia, Kenya, Rwanda, Swaziland, Somalia, Tanzania, Uganda, Zambia and Zimbabwe. The COMESA yellow card (hereinafterYC) was implemented and started its operations in the above member States while DR Congo, Malawi Tanzania and non COMESA member countries joined the scheme later.⁶

¹Michael Poll and Graham Williams, CII motor insurance, M94 2018-2019, page 1/12

² Ibid

³COMESA in Brief, Growing Together for Prosperity, Published by Corporate Communications of COMESA September 2018, p. 20

⁴Ibid

⁵Ibid

⁶Ibid

The YCS is operational in 13 countries and over 200 insurance companies in the region are participating in the scheme.⁷ The YC is essentially a regional MTPL that provides legal liability cover and compensation for road traffic accidents caused by visiting motorists.⁸ The liability cover offered under this scheme is limited to the statute provisions on road traffic MTPL award limits of the country being visited.⁹

As regional schemes involve parties, laws and institutions of different member states; Claims handling of cross-border traffic accidents is a complex process.¹⁰ The rules governing the handling and settling of such accidents often requires in-depth knowledge of a wide range of fields of expertise such as the applicable law on liability and compensation, insurance law, the laws which make the scheme, private international law and last but not least; the functioning of the various agreements between national organizations of motor insurers and bureaus are some of the areas.¹¹ Involving such different stake holders and legal issues, the YCS which operates in more than thirteen countries in the COMESA region could not be free from challenges in implementation.

Therefore, the purpose of this research is to examine and point out possible legal and practical challenges which are faced in the implementation of the YCS in Ethiopia.

1.2. STATEMENT OF THE PROBLEM AND RESEARCH QUESTIONS

Article 3 of the Protocol states that, each NB shall handle claims arising from accidents caused in its country by holders of cards issued by the NB of other state parties to the Protocol. With this, the Protocol seems to give an exclusive authority to handle claims to the NB of the country in which the vehicle accident has occurred. Furthermore, by way of definition and explanation, the (2015) operation manual of the YCS (hereinafter the manual) reiterates the authorization of NBs to handle claims which occur in their territory irrespective of other considerations.¹² Therefore, when a vehicle accident occur

⁷Ibid

⁸Ibid

⁹Ibid

¹⁰Luk De Baere, Frits Blees; Insurance Aspects of Cross-Border Road Traffic Accidents; Eleven International Publishing ,2019, p. 1

¹¹Ibid

¹²Section 3 Article 3.of the operation manual of the YCS states that; When an accident occurs in a country which is party to the Protocol, in which a holder of a YC is involved and which may give rise to a claim against the policy holder, the NB of

between citizens or vehicles registered in a single country, after crossing border, the NB of the country in which the accident occurred is considered to be the only authorized bureau to handle such claims. However, when an accident occur between Ethiopian registered vehicles in a COMESA member states, the victims and, in most cases, motor comprehensive local insurers receive and pay compensation in their own country. This practice seems contrary to the Protocol and manual which requires compensation to be handled by the NB of the country in which the accident occurred. Due to the above mentioned practice, Ethiopian motorists and local insurers are facing problems to recover their expenses and exercise their subrogation rights within the YCS. Or at least there is no clear understanding over the matter. Similarly, vehicle owners and drivers who caused an accident abroad and liability insurers of them are being asked to settle claims domestically contrary to YCS claims handling procedures and court litigations are undergoing in Ethiopian courts. For such problems and contradictions, some people argue that, the very purpose of the YCS is protecting own citizens/residents from accidents of tourist vehicles and hence, the scope of the cover doesn't go beyond covering one's citizen from vehicle accidents inflicted by a tourist vehicle.¹³ Others say the YCS protects all victims who sustain accidents by a tourist vehicle irrespective of citizenship/residency. This way or that way, the YCS and its claim handling procedure has become a debating issue and an emerging problem either from scope of application or from private international law perspectives. To make it worse, Ethiopia as a land locked country which uses routes of neighboring states sustains plenty of accidents among and between its own vehicles on the roads of its neighboring YCS member Countries like Djibouti, Sudan, Kenya, and possibly in Eritrea and Somalia too. Therefore, it is one of the reasons that triggered this research work with the aim of clarifying the YCS, from scope and private international law perspectives.

The YCS defines itself as an equivalent cover to the MTPL of a member country being visited.¹⁴ Most of the states (especially the Franco phone states) that participates in the scheme have unlimited MTPL

the country in which the accident occurred shall handle the claims irrespective of whether the claim has been notified or not by the insured motorist to the IB.

¹³ Interview with, Asmare Bayou ,Senior attorney at Ethiopian Insurance Corporation and Elias Endalew senior attorney at united insurance share company/ February 2020

¹⁴Ibid 6, article 1.2 of the operation manual states that, The YC is an equivalent of a policy of insurance recognized as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the participating states party to the Scheme, in which accidents have occurred in respect of vehicles from other member countries.

covers.¹⁵ However under Ethiopian MTPL Proclamation, the amount of compensation for property damage, death and bodily injuries is limited to relatively a low amount; which is Up to Birr 40,000 for death and bodily injury, and an amount not exceeding Birr 100,000.00 in respect of damage to property.¹⁶This is also another controversial issue raised by Ethiopian victims and foreign vehicle owners when foreign vehicles inflict damage in Ethiopia. The proclamation only expects drivers of any foreign registered vehicle to possess YC or an equivalent proof of insurance coverage which may not be less than the limit of liability provided for in the proclamation.¹⁷This shows that, to cross Ethiopian borders and drive on Ethiopian roads, foreign vehicles under the YCS or any foreign vehicle is only expected to fulfill the minimum requirements of the proclamation. This consideration of the legislature seems contrary to the national interest of the country and it is one of the factors that triggered this research work.

The designation of the state owned Ethiopian Insurance Corporation (EIC) as NB of Ethiopia (hereinafter NBE) since the beginning of the YCS is not also free from critics both from market and effective national and member insurance representations.

Therefore taking the above statement of problems into account, the following are the research questions to be addressed in the study.

1. Are the instruments governing the YCS clear and adequate regarding the scope of coverage?
2. Would the scheme be free from conflict of laws of member states?
3. How does the YCS treat the case of visiting victims?
4. Are the requirement put on foreign vehicles by the Ethiopian MTPL proclamation compatible with the YCS and the national interest of the country?
5. Would the assignment of EIC as NBE best serve the interest of the Nation and member insurance companies?

¹⁵ Interview, with Mrs. Asmiya Gebregiorgis, Principal Operation Officer at NBE, (Addis Ababa 6, February 2020)

¹⁶Ethiopian Vehicle Insurance against Third Party Risks Proclamation No. 799/2013 article 16

¹⁷Ibid, article 26

1.3. OBJECTIVES OF THE STUDY

1.3.1. GENERAL OBJECTIVE

The general objective of this research is to examine and point out the legal and practical problems in the implementation of the YCS in Ethiopia. Moreover, the research will try to forward possible recommendations and appropriate measures to rectify the problems.

1.3.2. SPECIFIC OBJECTIVES

This study will try to achieve the following specific objectives.

- To explain the nature and purpose of MTPL and cross-border vehicle insurance aiming at clarifying the YCS.
- To analyze the legal instruments of the YCS aiming at showing possible gaps and creating unified understanding on the instruments.
- To examine the clarity and adequacy of instruments of the YCS against practical cases and domestic laws of Ethiopia.
- To suggest possible ways out to those legal and practical problems identified in the process.

1.4. SIGNIFICANCE OF THE STUDY:-

It is aimed that this study will help YCS institutions to reconsider the adequacy and appropriateness of current legal and institutional frameworks of the YCS; and thereby to push for amendments and additional agreements. It is believed that the research will add to expand the frontiers of knowledge on the cross-border MTPL in general and the YCS in particular. It is also believed that, it will serve as a reference material for academicians, insurance professionals and practicing lawyers. For legislators it will inform the legal gap in the area, so that, it could trigger amendments on local laws in line with the YCS and finally it could trigger further research works in the area.

1.5. SCOPE OF THE STUDY

This research will primarily focus on exploring and analyzing legal and practical challenges in the implementation of the YCS in Ethiopia. Related and relevant domestic laws and settlement of cases are parts of the study. The research examines neither legal nor practical challenges in other signatory states of the YCS. When it is appropriate and available court cases disposed in other countries in relation to the YCS will be considered.

1.6. METHODOLOGY OF THE STUDY

To conduct this research, both doctrinal and empirical research approaches are employed. To address this, as primary sources instruments of the YCS which includes but not limited to; the COMESA Treaty, the Protocol, the Inter Bureau agreement, the manual, guidelines and relevant laws of Ethiopia will be covered. Information to be collected through interview from two individuals from the NBE based up on their position, selected individuals (Two lawyers) from local insurance companies who had experienced cases of such natures and if possible one individual from YC secretariat office (through Email correspondence) will be employed as primary source of data. The researcher followed purposive qualitative approach in selecting the interviewee because the YCS is not in a common attention for all insurance employees. And even at NBE level, it is administered by few individuals assigned in the department. Thus this approach is preferable or it is a must. As secondary source relevant Books, journals, court decisions and others will be consulted. As the green card system of Europe is the oldest and more developed at Economic community level, its relevant experiences and legislations may be raised and taken as a benchmark in suggesting alternative solutions for the YCS.

1.7. LIMITATIONS OF THE STUDY

I have faced different challenges in conducting the study. These challenges, among others, include absence of materials and absence of works in the area of the study, shortage of time and inability to make assessment and interview of foreign National Bureaus are few of them.

1.8. ORGANIZATION OF THE PAPER

The thesis consists of four chapters. Chapter one is proposal of the research. In chapter two, liability insurance, MTPL insurance and its cross-border implementation and few regional cross-border motor insurance schemes are roughly discussed. In chapter three; the legal and institutional frameworks of the YCS is discussed. In chapter four, possible legal and practical challenges in the implementation of the YCS in Ethiopia are raised and, possible findings and recommendations are forwarded in the form of conclusion and recommendation.

CHAPTER TWO

THE CONCEPT OF COMPULSORY MOTOR THIRD-PARTY LIABILITY INSURANCE AND ITS CROSS-BORDER ASPECTS

2.1. LIABILITY INSURANCE: ESSENCE AND DEVELOPMENT

Liability insurance provides an indemnity to the insured's in respect of their legal liability to other third parties (TP). Such obligation to reimburse a TP arises as a result of a breach by the insured of certain rights of another TP. The goal of liability insurance is to compensate TP victims and it thereby reduces the financial losses that may come to wrongdoers from paying compensations. The scope of a liability insurance policy is to protect against a civil liability. Civil liability can arise out of the breach of statutory duty or contract.

The basis of liability laws in Europe can be traced back to Roman times and Lex Aquilia (286 BC).¹⁸ This is the first written law on liability and adequate compensation for pecuniary and non-pecuniary damages.¹⁹ The historical development of liability insurance is, however, more recent than the legal background.²⁰ In England, modern insurance developed along three main lines – marine, life and fire. All other types of insurance were grouped together as 'accident insurance' covering risks such as burglary, explosion or road and railway accidents.²¹ Liability risks were not seen as different from other losses arising from accidents, such as property damage or personal accident.²² Accident insurance, including non-marine liabilities, originated in France in 1825; 50 years earlier than in England.²³ On 23 August 1821 the Paris Police issued an ordinance requiring the drivers of Paris horse driven carriages to contribute to a central fund to compensate third-party victims of driving accidents.²⁴

¹⁸Christopher Parsons; From Accident to Liability – A brief history of Liability Insurance Journal of Insurance Research and Practice as Cited on; Dian Lear ,Massimo Vascotto ; CII Liability insurance M96 study text 2019-2020.p 12

¹⁹ Ibid

²⁰ Ibid

²¹ Dian Lear ,Massimo Vascotto ; CII Liability insurance M96 2019-2020 page 14

²² Ibid

²³ Ibid

²⁴ Ibid 23

Another type of risk connected to technological development was the risk arising from rail way accidents, which, to this day, is a risk considered with great care by liability underwriters and is subject to specific insurance requirements.²⁵ The high number and frequency of railway fatalities in those early pioneering days led to the creation of personal accident insurance.²⁶ In this case, the insurance of liability was opposed by the authorities' on the grounds of public policy, this was in 1846. However, by 1855, attitudes had been changed and liability insurance was offered, although it was withdrawn again shortly afterwards, as it was seen as unprofitable.²⁷ Curiously, the latter still holds true for many liability insurers, who see this risk as undesirable in their book of business.²⁸

Another feature of the industrial revolution in Britain, apart from the development of the railway, was the use of steam boilers in all types of industries. This type of machinery was prone to explosion due to still developing engineering knowledge and the absence of safety legislation and risk management. Once again, the concern for public policy and order stifled the creation of liability insurance for the risk of explosion of steam boilers, which at the time killed indiscriminately employees as well as anyone being within its proximity at the wrong time.

2.2.ATTRIBUTES OF COMPULSORY LIABILITY INSURANCE

As insurance is a tool to transfer risk from the insured to the insurer, the demand to be insured is expected to be the insured's own wish. However, the demand for liability insurances may equally emanate from the imposition by law; which makes the cover of a certain liability risk compulsory.

There is a considerable variety as to what constitutes mandatory or compulsory insurances.²⁹ The duty to insure can be established by law or regulations relating to the exercise of a profession/activity.³⁰ It may be laid down by the legislature, by state agencies or by professional bodies or other self-governing bodies.³¹ It sometimes forms part of a code of conduct which, although not binding in the strict sense, creates a standard of good practice, the breach of which may be sanctioned by disciplinary

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Final Report of the Commission Expert Group on European Insurance Contract Law, European commission Directorate General for Justice, 2014 page 65

³⁰ Ibid

³¹ Ibid

or other measures.³²The number and types of compulsory insurances differ from country to country even though only the very few like the motor vehicles, air carriers, maritime claims and insurance intermediaries are mentioned as compulsory liability insurances.³³ In addition, there is a common core of liability risks subject to a duty to insure under the national laws of all or most Member States which includes technical risks such as those of nuclear installations, oil pollution or space launching, but also liability risks arising from nature, like, from dangerous dogs or wild animals; a third group targets specific professional activities such as that of lawyers or architects³⁴.Outside of these common core there is a great variety of compulsory insurance and their number is much higher in some states like 80 in Italy, 120 in France and around 400 in Spain.³⁵

2.3. COMPULSORY MOTOR THIRD-PARTY LIABILITY INSURANCE (MTPL)

Motor vehicle insurance also known as vehicle or car insurance, is insurance purchased for cars, trucks, and different road vehicles.³⁶Motor insurance is extensively practiced all over the world. In the Ethiopian context, we can categorize motor insurance in to two categories; the comprehensive insurance cover and the TP insurance cover.³⁷ A comprehensive motor insurance cover basically covers own damages that may occur to the vehicle itself and it may or may not contain a TP insurance cover. As the name own damage itself indicates, comprehensive insurance cover, primarily gives an insurance cover to the loss and damages that may happen to the motor vehicle itself and other bundle of covers could be added with the choice of the contracting parties and the name comprehensive represents such bundle of covers. The other category which is MTPL; is a form of liability insurance entered in to by an insured, for the protection of TP victims of an accident which is in fact a TP to the contract. Its primary objective is to supply protection against physical harm resulting from traffic collisions and property damage arise there-from.³⁸ Should the person who owns or uses the

³² Ibid

³³ Ibid

³⁴ Final report of EU Directorate (n29)

³⁵ Ibid

³⁶Rakshith and Dr. A,Sreelatha;Road Safety and Liability under Accidental Claim ,International Journal of Pure and Applied Mathematics Volume 120 No. 5 2018, 1413-1427ISSN: 1314-3395 (on-line version) page url: <<http://www.acadpubl.eu/hub/Special Issue 1413>> accessed 03/21/2020

³⁷ See, Motor insurance policy of the Ethiopian Insurance Corporation.

³⁸Ibid 35

vehicle is responsible for the accident, the insurer pays the victims bodily injury death or property compensation claims.

As noted in the background of this research; the advent of mechanically propelled vehicles in the nineteenth century led to the call for legislation to protect others and road users. Widespread use of automobiles began after the First World War in the cities.³⁹ Cars were relatively fast and dangerous by that time, yet there was no compulsory form of car insurance anywhere in the world.⁴⁰ A compulsory car insurance scheme was first introduced in the United Kingdom with the Road Traffic Act of 1930.⁴¹ This ensured that all vehicle owners and drivers had to be insured for their liability for injury or death to third parties whilst their vehicle was being used on a public road. Germany enacted a similar legislation in 1939.⁴² In many jurisdictions, it is compulsory to have vehicle insurance before using or keeping a motor vehicle on public roads. Most jurisdictions relate insurance to both the car and the driver; however, the degree of each varies greatly.⁴³

Motor insurance is probably the most important type of insurance sold in developing countries and may be the first class of insurance with which the general public has an acquaintance.⁴⁴ In most countries, MTPL insurance is compulsory in order to protect the public.⁴⁵ MTPL insurance has been introduced in the formerly centrally planned economies only in the past decade, and it is poorly understood.⁴⁶ Motorists are inclined to view it as a form of tax that they are at liberty to evade, rather than as a protection against their personal liability, a concept that is not familiar to the general public.⁴⁷ MTPL insurance is a financial protection system built to prevent any grievance that third parties could face, due to lack of solvency of first party who caused bodily injury or property damage following any event

³⁹ The Bucharest University of Economic Studies faculty Of Business Administration in Foreign Languages; insurance and reinsurance Available at ;<https://www.academia.edu/10140943/Motor_Insurance> last accessed on 3/21/2020

⁴⁰ Ibid

⁴¹ We can conclude that the Road Traffic Act, 1930 of United Kingdom had not only introduced legislation as to the use of motor vehicles, it also introduced and made motor TP insurance compulsory. See part two article 35(1) of the act.

⁴² Ibid 21

⁴³ Ibid

⁴⁴ Serap Gönülal; Motor Third-Party Liability Insurance in Developing Countries Raising Awareness and Improving Safety, World Bank publication 2009 p. 1

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid 3

related to a car accident.⁴⁸ The Ethiopian Government promulgated MTPL insurance law for the first time as Proclamation no.559/2008 in 2008 and it was later revised and replaced after 5 years on service by Proclamation no. 799/2013.

From this we can conclude that; because of the increase in automation and consequential losses to lives and properties due to accidents, compulsory law was brought and MTPL insurance became famous throughout the world.

2.4.PURPOSE AND FUNCTIONS OF MTPL INSURANCE

The UN Sustainable Development Goals for Road Safety (September 2015) was specifically aimed to halve the number of global deaths and injuries from road traffic crashes by 2020. However, as this report highlights, road deaths are still on the rise with an estimated 1.35 million lives lost on roads globally in 2016 and up to 50 million people injured.⁴⁹ The impact on families, communities, countries and health systems is extreme and the scale of the response does not match the scale of the problem.⁵⁰

Therefore, MTPL insurance is made compulsory out of a desire to protect the public from certain risks, which are becoming more important as the size and power of motor fleets grew.⁵¹ The community needs to understand that persons who drive cars (which have been described as “weapons of destruction” with more accuracy than is often admitted) collectively give rise to extensive injury and damage across societies.⁵² In the century following the invention of the motor car, MTPL insurance has gradually raised awareness of the responsibilities of the driver, counter balanced with compensation payments to the injuries caused, improved community responsiveness to the need to improve safety and in contrast, countries without compulsory MTPL insurance have made much slower progress in all of these important matters.⁵³ Hence the purpose of compulsory MTPL insurance is mainly the protection of the

⁴⁸SerapGönülal, Motor Third-Party Liability Insurance ;World Bank primer series on insurance issue 16, September 2010 page 1 ,available at:< www.worldbank.org/nbf> last accessed on 04/17/2020

⁴⁹ ‘The Global Status Report on Road Safety’, World Health Organization (WHO), 2018, <<https://www.irap.org/2018/12/world-health-organisation-who-releases-the-global-status-report-on-road-safety-2018/>> accessed on 24/04/2020.

⁵⁰Ibid.

⁵¹Serap Gönülal (n 44), pp 211

⁵² Ibid

⁵³Ibid

society from vehicle accidents and their consequential social crisis on the innocent victims and the society.

2.5. CROSS-BORDER INSURANCE IN GENERAL

Cross-border insurance contract is a contract concluded between an insurer and an insured, whose domicile is in different countries.⁵⁴ But ‘cross-border’ activities could also cover situations in which both an insurer and an insured were located in the same country but the risk was located in another state.⁵⁵ A car insured in one state can be driven to another state and a civil liability arising from an accident in that other state will be an issue of cross-border insurances.

Cross-border insurance can be considered from both supply and demand sides.⁵⁶ Insurers may wish to explore market opportunities and sell their product in another State and Consumers’ cross-border demand is the other factor for cross-border insurance covers for various reasons.⁵⁷ We can call this cross-border insurance driven by demand and supply interaction.

2.6. MTPL INSURANCE AND ITS CROSS-BORDER DEVELOPMENT

Insurance is voluntary, but it can also arise as a consequence of obligations to insure in such cases the cross-border insurance is a result of neither supply nor demand driven. As the aim of compulsory insurance is protecting the public from unwanted consequences, the enforcement is strict. In the case of MTPL insurance, persons who drive crossing border of a country is expected to comply with such compulsory legislations. Such duties at each border of states would be a cumbersome task for drivers and would be against the fundamental objectives of most international and regional organizations; which encourage an open market among member states and freedom of movements across countries. MTPL insurance requirement in this sense is, therefore, a barrier to interstate trade and before the creation of Common Markets, border crossings were lengthy and tedious, with document checks being required as a motorist passed from countries to countries.⁵⁸ Among other things, border officials were required to ascertain that a motorist to produce evidence of acceptable MTPL insurance certificates and though such

⁵⁴ Final report of the Commission Expert Group (n29), pp.10

⁵⁵ Ibid

⁵⁶ Final report of the Commission Expert Group (n29), pp.11

⁵⁷ Ibid

⁵⁸ Don Mc Isaac; Motor Third-Party Liability Insurance in Europe, World Bank primer series on insurance issue 16, September 2010 page 190 ,available at <www.worldbank.org/nbfi> last accessed on 03/17/2020

coverage was routinely available, it was neither automatic nor obligatory.⁵⁹ Thus, in order to create freedom of movement across national boundaries, it was necessary to establish a system whereby MTPL insurance coverage was automatically extended to cover the motorist's activities from states, both at home and in any other states.⁶⁰ Therefore, worldwide the development of cross-border MTPL insurance is directly connected and necessitated by the facilitation of interstate trade and freedom of movements across national boundaries. We can conclude that, as a response to avoid trade barriers and encouragement of freedom of movement plenty of regional MTPL insurance schemes had been developed throughout the world. Very few from the prominent regional MTPL insurance systems are discussed in the next few topics.

2.7.THE GREEN CARD SYSTEM OF EUROPE

The green card system was availed, long before the formation of the EU itself, by the Inland Transport Committee (ITC) of the UNEC for Europe in 1949.⁶¹ The system was designed to facilitate the movement of vehicles from states to states within Europe.

Under the idea central insurance organizations of states with compulsory motor liability insurance would introduce a certificate guaranteeing liability insurance.⁶² The program also required national organizations to make an agreement among each other enabling them to settle claims among themselves for accidents caused by foreigners, in lieu of involving the foreign insurance companies directly.⁶³ An individual arranging MTPL insurance in his country could request an international certificate of insurance, known as a green card.⁶⁴ This card signifies that the insurance company would honor claims from third parties in other countries for loss or damage caused by that vehicle⁶⁵.

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ The Inland Transport Committee (ITC) is the UN platform for inland transport to help efficiently address global and regional needs in inland transport. (taken from ; <<https://www.unece.org/trans/main/itc/itc.html>> last accessed on 04/ 24/ 2020

⁶² Don Mc Isaac (n58)

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

The card is equivalent to the national motor insurance certificates of all the countries that a vehicle visits.⁶⁶ It serves as an easily recognizable proof of TP insurance that can be presented in the event of an accident when traveling outside.⁶⁷ The card itself offers no insurance cover, rather, it serves as proof that the minimum legal requirements for TP liability insurance as prescribed for any of the countries visited are covered by the insured's own motor policy.⁶⁸

The green card system operates in more than 40 countries of Europe.⁶⁹ It has been instituted in many countries of Europe that were not originally part of the EEC and in some that are still not parts of the EU.⁷⁰

To enable the green card system function, NIBs were established in each participating country.⁷¹ In most cases, the claims of any TP victim will be settled by the National Insurance Bureau (NIB) in the country where the accident occurred; the NIB of that country will then recover the amount paid out in claims from the foreign insurance company that insured the motorist responsible for the accident, either directly or through the intermediation of the NIB in the driver's home country.⁷²

2.8.THE BROWN CARD SYSTEM OF THE ECOWAS

The ECOWAS Brown Card Scheme was established by Protocol A/P1/5/82 on the 29 may 1982.⁷³The main objective for the scheme is to guarantee victims of road accidents a prompt and fair compensation of damages caused by non resident motorist from ECOWAS member states visiting their territory.⁷⁴ The Scheme functions through a network of 14 (fourteen) NBs disseminated in each member countries and Each NB makes the Brown Card available to resident motorists and carry out investigations and settlements of claims arising from accidents incurred by Card holders with in its territory.⁷⁵ Facilitation of free movement of international motorists within the community, enhancing the development of trade

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Don Mc Isaac (n58) pp.193

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ <<https://www.ecowas.int/specialized-agencies/ecowas-brown-card/>>last accessed on 03/26/2020

⁷⁴ Ibid

⁷⁵ Ibid

and tourism exchanges among states, establishing a common scheme for the settlement of claims arising from free movement of goods and persons within ECOWAS are among the major objectives of the Brown Card.⁷⁶ Holding a Brown Card provides full cover to motorist for a prompt, fair and immediate settlement for accident that they may have caused outside their country and the motorist holding the Card is treated as if the basic insurance policy were underwritten with a company operating in the country visited by the motorist or through which it transits in the ECOWAS member Countries.

⁷⁶. Available at, <<http://www.browncard.org/Avantages.html>>, last accessed on 03/26/2020

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAME WORK OF THE COMSA Yellow Card Scheme

3.1.THE PREFERENTIAL TRADE AREA .VS. THE COMESA

ECA, set up, five sub-regional MULPOC's, following the recommendation of the Lagos Plan of Action to expand intra Africa trade.⁷⁷ These centers were for Eastern and Southern Africa, West Africa, Central Africa and the Great Lakes Community comprising Burundi, Rwanda and Zaire⁷⁸. It was recommended that PTA with similar arrangements be established within each MULPOC area not later than December 1984.⁷⁹The MULPOC for Eastern and Southern Africa, based in Lusaka, Zambia, successfully negotiated a treaty for the establishment of the PTA for Eastern and Southern Africa in 1981.⁸⁰

Based on past experiences and member states determination to move forward with cooperation to bring about sustainable growth and development, the strategy for the 1990s was to bring about full market integration beginning with the transformation of the PTA into the COMESA and finally PTA was transformed in to COMESA in 1994.⁸¹

The transformation from PTA to COMESA was evolutionary. It can be discerned from the 1994 COMESA establishment treaty, COMESA is the successor of the PTA. The basis which laid the PTA was strengthened and grew to a new stage in the process of economic integration.

3.2. THE PROTOCOL AND THE EMERGENCE OF THE YELLOW CARD SCHEME

With the goal of promoting and achieving the aims and objectives of the common market, the COMESA member states undertook to adopt MTPL insurance scheme in both the PTA and the COMESA Treaties. They agreed also to work on the development and cooperation of transport and communications.⁸² Accordingly, the Council of Ministers (CM) at its sixth meeting, which was held in

⁷⁷Appendix 2C: The PTA of Eastern and Southern Africa, FAO online publication, available at;<<http://www.fao.org/3/w5973e/w5973e06.html>> , p.1, last accessed on 5/29/2020

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid pp. 8

⁸¹ Ibid

⁸² COMESA establishment treaty article 3 (e) and article 85

Bujumbura, on July 1985, decided that MTPL insurance Scheme be established.⁸³ Recalling these COMESA treaty provisions and mentioning the decision of the CM, the Protocol came into being in 1986.⁸⁴ The Protocol contains 19 provisions and the higher contracting parties agreed the Protocol to form an integral part of the then PTA Treaty.

Following the ratification of the Protocol, an agreement for the implementation of the MTPL insurance Scheme, known as the Inter-Bureaux Agreement was signed on April 26, 1987 by National Bureaus (NBs) authorized by states to administer the operation of the Scheme in their respective territory.⁸⁵ The COMESA MTPL insurance Scheme, popularly known as the Yellow card (YC), was then launched on 1st July 1987.⁸⁶

The main objective of the Protocol was to establish MTPL insurance Scheme providing at least minimum guarantees as those required by the laws in force in the territories of the state parties to the Protocol when vehicles insured are transiting the territories of other contracting state parties.⁸⁷ YC is an insurance card that shall be issued by the NB of COMESA Member States, and shall serve as an evidence of MTPL insurance cover obtained in accordance with the laws and regulations in force in the country where an accident occurred.⁸⁸

3.3. RESPONSIBILITIES OF PARTICIPANTS UNDER THE PROTOCOL

The Protocol has classified participants of the YCS as; principal and subsidiary. The signatory member states are identified as principal participants, while Insurers that undertook insurance operations against liability risks in respect of motor vehicle accidents are identified as subsidiary participants.⁸⁹

Apart from setting the structures and the working frameworks of the scheme, the Protocol, mentioned responsibilities to the participants. Member States have the responsibility, to recognize the validity of the YC in their territories and to enact laws and regulations for the establishment of the scheme, and,

⁸³ COMESA inbrief (n3)

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ The protocol , article, 2

⁸⁸ Ibid , article, 1

⁸⁹ Ibid, article 4(2)

particularly, for the designation of NB.⁹⁰ NB means a government designated agency in each Member State that shall be responsible for the management and control of the YCS.⁹¹

The main obligation of a subsidiary participant is to issue to its policy holders YC guaranteeing such policy holders an adequate cover against MTPL risks that they may incur in countries they visit and shall reimburse NB and contribute for the operating expense of the NB and CB.⁹² NB is authorized to take measures on these participants if they fail to meet their obligations, which includes, ceasing supply of new YC.⁹³

3.4. DISTINGUISHING FEATURES OF THE YELLOW CARD

The YC is basically a card or a paper colored yellow and it serves as a pass permit for motorists when they travel through the COMESA member countries. The YC shall be recognized as a valid certificate of insurance in the territories of the parties to the Protocol in which the production of such a certificate is required, within the national territory or at borders, as a requirement for movement of motor vehicles.⁹⁴ The card shall contain particular information about the vehicle, the issuing NB and the insurance company that is committed to insure the potential risk. As an insurance policy bears different particulars, the Protocol also mentioned some mandatory particular information that the YC should contain.⁹⁵

In the YC context, the word “insurer” refers to an insurance company, which undertook in return for a consideration, to pay on behalf of the insured a sum of money when the insured causes a traffic accident in a COMESA member country. A Policy Holder is defined as: “a legal or a natural person holding an insurance policy on account of premium paid for the coverage of the liability in respect of insured motor vehicle.”⁹⁶

The YC is valid for one specific vehicle and shall in no circumstances be transferable to another vehicle.⁹⁷ The card contains the name list of the member countries and the motorist is responsible to

⁹⁰ Ibid, article 5(1)(a)

⁹¹ Ibid, article 1,

⁹² Ibid, article 5(2)

⁹³ The manual ,article 6.1

⁹⁴ The protocol ,article 7(1)

⁹⁵ Ibid, article 6

⁹⁶ The protocol, article 1

⁹⁷ Ibid article7 (2)

inform the issuing insurance company, at the time of applying for the YC.⁹⁸All other countries which are not applied for cover by the policy holder should be then deleted from the YC.⁹⁹The Card is standardized and uniform in appearance throughout the YCS region, so that, it can be readily identified and accepted as a certificate of insurance within the participating countries.¹⁰⁰

The guarantee provided by the YC covers the liability incurred by the holder of the card in accordance with the laws of each member country which he visits.¹⁰¹Notwithstanding the terms of insurance policy under which it is issued, the card shall provide all the guarantees required by the laws or regulations governing MTPL insurance in the country in which the accident occurred.¹⁰² For a party in whose territory insurance is not compulsory by law, the guarantee provided by the COMESA YC shall correspond to the TP liability of the motorist in accordance with the laws and regulations in force in the country where the accident occurred.¹⁰³The Protocol also gives recognition for the application of other laws to determine motorist liability in the absence of MTPL insurance laws. However, the manual states that; the YC is an equivalent of a policy of insurance recognized as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the participating states in which accidents have occurred in respect of vehicles from other member countries.¹⁰⁴These provisions of the YCS invites arguments, especially on the coverage of the YCS as countries like Ethiopia use different laws to determine tort liability arising from motor vehicles.

The YC shall be issued for a period of time determined in advance, irrespective of the number of journeys to be performed; the period in question shall not go beyond the expiry of the primary policy.¹⁰⁵The manual, however, restricts the period to a maximum of 12 months.¹⁰⁶ Though the Protocol used the term “primary policy”, it doesn’t carry a definition as what the term refers to. Article 3(3) of the Protocol states “the COMESA YC should be issued by a NB and the card shall be issued to

⁹⁸ The manual , article 2.8

⁹⁹ Ibid

¹⁰⁰ Ibid , article 1.2.2

¹⁰¹ The protocol article 6(5)

¹⁰² Ibid article 6(6).

¹⁰³ Ibid article 6(8).

¹⁰⁴ The manual (n12)

¹⁰⁵ The protocol article7(2)

¹⁰⁶ The manual article 2.6

motorists through the insurers with whom they have taken out a valid liability insurance policy when driving in their own country”. The provision indicates that, the YCS is operational along with a local MTPL insurance policy. Hence, from this, the term “primary policy” refers to the local MTPL insurance policy of a given motor vehicle. Similarly the manual states that, any legal or natural person is eligible to be issued with a Yellow card if the vehicle to be covered by the YC is insured under a current primary policy.¹⁰⁷

Except for some convenience to the motorists or policy holders, the researcher didn’t find a reason for making the YC dependant up on a local MTPL insurance policy. There is no connection between the two insurance schemes as one operates with in a territory of a given country and the other out of that territory.

3.5.FUNCTIONAL INSTRUMENTS OF THE YELLOW CARD SCHEM UNDER COMESA

COMESA, as common market, has more than 20 member states and the YCS is operational only in 13 countries.¹⁰⁸ As can be read from the COMESA treaty, adoption of minimum insurance coverage was one single issue within the objective of development and cooperation of transport and communications in member states. In every field of cooperation COMESA has bulk of instruments and technical committees. Thus, identification of the concerned instruments of the YC under the hub of COMESA Treaty is needed.

The legal instruments for the YCS, among others include; the COMESA Treaty (1994), the Protocol (1986), Inter-Bureau Agreement (1987), the Constitution of the Reinsurance Pool (2007), the Guidelines for the NBs and member insurance companies on the implementation of the YCS (1999), and the Operation Manual (2015).

It was in the Protocol that, the contracting parties agreed to set up a body known as the Council of Bureau (CB) which is tasked to multiple functions for the realization of the scheme. Article 18 of the Protocol seems to be an important and basket provision which mandates the CB to have, a general function, orientation, co-ordination and supervision role over the whole operation of the YCS. Therefore, guidelines and operation manuals are considered to be developed by the CB or program

¹⁰⁷ Ibid article 1.4

¹⁰⁸ COMESA in brief (n3)

coordinators of the YCS on its behalf. Each instruments mention in their preamble the meeting and decisions of the CB which enabled their enactments.

The Manual combines the Procedures Manual on the use of the YC revised in 1994 and reviewed in 2006, together with the Operational Manual for the YC reinsurance pool issued in 1998.¹⁰⁹ The manual states that the objective of issuing a combined manual is to provide a comprehensive and up to date guideline to be used by NB and their member insurance companies in their day-to-day activities.¹¹⁰

When the YC started, most countries in the region pursued government-driven economic policies often to the exclusion of the private sector.¹¹¹ Most economic sectors including the insurance industry were dominated by state-owned enterprises.¹¹² With the advent of economic reforms in the region, leading to liberalization and privatisation, there were more private companies in the insurance industry that have become subsidiary participants to the YC.¹¹³ There was, therefore, a need to streamline the system at national level to ensure that it is in line with the developments being experienced in the region and the guideline was enacted as a model reference for each NB to be used in developing rules and regulations, in consultation with the member insurance companies.

3.6. INSTRUMENTS OF THE YELLOW CARD SCHEME UNDER ETHIOPIAN LAWS

The COMESA or the former PTA and the Protocol were introduced during the Dergue regime. Following the signing of the Protocol, states were entrusted with the responsibility to recognize the validity of the YC in their territories and to enact laws and regulations for the establishment of the card scheme, particularly for the designation of its NB. It is also stipulated that the designation of each NB shall be determined by the legal provisions in force in the territory of a party to the Protocol and its mode of operation shall be determined by the legal instrument by which it is designated.¹¹⁴

Though the researcher tried to find a law enacted by the then government, the endeavors did not bear fruit. The researcher did contact officials at the NBE and they have similar problem of finding the

¹⁰⁹ The manual ,preamble

¹¹⁰ Ibid

¹¹¹ The Guidelines, preamble

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ The protocol ,article 8

legislation if any¹¹⁵. Article 9 of the Protocol allows that in a country where one single state-owned insurance company has the monopoly of all insurance operations, the government of that state party to the Protocol may designate that company to act as the NB of that country. It is presumed that, the Ethiopian Insurance Corporation (EIC), which was the only state owned insurance company, is designated as the NBE. However, beside the absence of legislation, the Bureau is not able to trace even a letter of assignment that it had been assigned as the NBE at the time.¹¹⁶ Though the researcher is not able to trace a ratification proclamation, the Ethiopian parliament has indirectly given recognition for the operation of the YC in the previous Proclamation No. 559/2008 and the current proclamation No.799/2013.

3.7.INSTITUTIONAL FRAMEWORKS OF THE YELLOW CARD SCHEM

3.7.1. THE COUNCIL OF BUREAU (CB)

The composition of the CB comprises one representative and an alternate representative designated by each NB.¹¹⁷The Chairman and Vice Chairman should be selected on a rotation basis from among the representatives for a period of one year.¹¹⁸The CB shall meet once a year and extraordinary meetings will be held at the request of any of the NB and half the number of members of the CB will constitute a quorum.¹¹⁹

The CB is responsible for the coordination and supervision of the legal, administrative and financial operation of the Scheme. It is the supreme body for orientation, co-ordination, and supervision of the whole legal, administrative and financial operations of the YCS.¹²⁰

The CB also plays an important part in the development, research, and any amendment of the YCS.¹²¹ It decides on the admission of new countries to the Scheme and it determines its annual budget and fixes the annual contribution to be paid by NB.¹²²It is also an institution for dispute settlement between NBs as to the implementation of the provisions of the Protocol.

¹¹⁵ Interview with Mr. Fikry Abdulmejid, Deputy CEO at EIC & co-coordinator of NBE, (Addis Ababa, 02 May, 2020)

¹¹⁶ Ibid

¹¹⁷ The protocol ,article 16(1)

¹¹⁸ Ibid article 16(2)

¹¹⁹ Ibid, article,17

¹²⁰ Ibid, article 18

¹²¹ Ibid

¹²² Ibid

3.7.2. NATIONAL BUREAUS (NBs); ROLES AND RESPONSIBILITIES

National Bureau (NB) is a government-designated agency in each participating states and is responsible for the management and control of the YCS. Such Bureaus are similar in all regional cross-border MTPL insurance schemes. As an instance, the Green Card System of Europe established NIBs in each EU member country and the Bureau is the focal point of communication and is authorized to issue the Green Card and to handle claims that arise within its respective territory.¹²³ Similarly the Brown Card system of the ECOWAS also set up NB with similar role and responsibility in its member countries.¹²⁴

The day-to-day activities concerning the YC are the responsibilities of the NB in each Member State. The Protocol orders each NB to be composed of insurers authorized by the local supervisory authorities for insurance against motor vehicle liability risks.¹²⁵ The NB shall be financed by the contributions of members and the amount and method of payment of contributions shall be determined by the NB itself.¹²⁶ The withdrawal of designation of a NB is possible at the initiative of the government that is a party to the Protocol.¹²⁷ The NB generally plays two roles as: an Issuing Bureau (hereinafter IB) and as a Handling Bureau (hereinafter HB) in a given member state.

3.7.2.1. ROLES OF NATIONAL BUREAU (NB) AS AN ISSUING BUREAU (IB)

The functions of the NB include the following; supplying the YC to insurers, arranging for the printing of the YC and allocating to each of them a serial number and keeping records of YC supplied to member insurance companies¹²⁸.

IB means the NB, which issued YC to an insurer and which has the responsibility for the payment of claims arising under the Scheme.¹²⁹ Issuing YC is the mandate of the NBs and shall provide the YC forms to insurers which are members of the NB and which request to be supplied.¹³⁰ The role of the NB as an IB depends on accidents which are caused abroad by holders of the YC issued.

¹²³ Don Mc Isaac (n58) pp. 193

¹²⁴ Protocol A/P 1/5/82 on the establishment of an ECOWAS BROWN CARD relating to MTPL. (1982), article 1 and et.al

¹²⁵ The protocol, article 4(2)

¹²⁶ The protocol, article,10(1)

¹²⁷ Ibid, article,11

¹²⁸ Ibid, article 12(a)

¹²⁹ The inter bureau agreement,article1 (h)

¹³⁰ The protocol, article 12(a)

The NB as an IB shall arrange with each other NB of the contracting state parties for the receipt of statements and claims concerning accidents caused in the territory of such other contracting parties by policy holders, to proceed with the investigation of such accidents and to pay compensation on request, supported by the usual documents of proof.¹³¹ The NB as an IB is also responsible to reimburse free of transfer or exchange charges a HB which has paid compensation in the currency of its own country.¹³²

3.7.2.2. ROLES OF NB AS HANDLING BUREAU (HB)

As a HB, the NB shall act in the best interests of the IB as soon as it is informed of an accident caused in its country by the holder of YC issued by the NB of another contracting state.¹³³ It shall undertake necessary verification concerning the circumstances of the accident and on the basis of the findings, take any administrative or non-judicial action that it deems necessary in processing the claim.¹³⁴ At the judicial level, the HB is entitled to take any steps to institute or to contest a legal action.¹³⁵

3.8. THE REINSURANCE POOL OF THE YELLOW CARD

The reinsurance pool was setup to increase the credibility and success of the Scheme by adding its efficiency in the processing of claims by HB and the settlement of claims up to the limit determined by the members.¹³⁶

The reinsurance pool was set up to resolve problems which affected the smooth operation of the Scheme on August 2007. Membership of the pool is composed of the NBs in the participating Member States.¹³⁷

Thus, the pool is an arrangement established by the CB and its members to enhance the efficacy and profitability of the Scheme. It provides reinsurance cover for loss over and above the claims settlement authority limit of the NB and the reinsurance cover create additional capacity for the Scheme.¹³⁸

¹³¹ Ibid, article 12(b)

¹³² Ibid, article 12(d);

¹³³ Ibid, article 14(a)

¹³⁴ The manual article 3.3

¹³⁵ The manual article 3.4 & article 4.5

¹³⁶ Constitution of the Reinsurance pool, 2007, preamble

¹³⁷ Ibid, article 2(1)

¹³⁸ The manual , article 1.9& et.al

Primary insurance companies shall cede 30% of the premium earned on each and every YC issued to the Pool.¹³⁹The pool provides a clearing facility for reimbursement of claims between the Handling and Issuing Bureaus.¹⁴⁰

The Pool is not separate entity for the YC rather it operates as a unit under the umbrella of the PTA Reinsurance Company (ZEP-RE).¹⁴¹ZEP-RE was established by an agreement of Heads of States and government of the COMESA region on 21st November 1990 in Mbabane.¹⁴² The company was officially launched in 1992 and commenced operations on January 1993 with its headquarters in Nairobi.¹⁴³ It is tasked with the responsibility of promoting trade, development and integration in the insurance and re-insurance sector.¹⁴⁴

3.9.CLAIMS HANDLING AND SETTLEMENT PROCEDURES

When an accident occurs in a country which is party to the Protocol, in which a holder of YC is involved and which gives rise to a claim against the policy holder, the NB of the country in which the accident occurred shall handle the claims irrespective of whether the claim has been notified or not by the insured motorist to the IB.¹⁴⁵ The IB shall receive all claim notifications on behalf of the insurer and the NB which issued the YC.¹⁴⁶

The HB shall handle YC claims in line with the normal claims handling practices of insurance companies which includes; receiving notification, carrying out an underwriting verification, conduct investigations, carry out an assessment and evaluation of loss, conduct negotiations, etc.¹⁴⁷

The HB shall notify the IB of the claim reported and give a detailed report of the accident. The HB shall handle and settle claims which do not exceed COM\$15,000 without prior authorisation from the Issuing Bureau.¹⁴⁸When the claim amount exceeds \$15,000 the HB is required to obtain authorization

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Interview with Asmiya (n15)

¹⁴² COMESA in brief (n3), pp.10

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ The manual , article3.1

¹⁴⁶ Ibid, article4.1

¹⁴⁷ Ibid article3.1

¹⁴⁸Ibid article3.5

from the IB. The HB is empowered to accept service of legal process against the insured. It shall arrange legal defence of the suit. The legal fees and expenses incurred shall be charged to the insurers through the accounts of the IB. The HB shall not be responsible for handling of claims and payment of legal fees when the insured and/or the IB employ legal defence without the written consent of the handling bureau.¹⁴⁹

3.10. NATIONAL BUREAUS AND REINSURANCE POOL SETTLEMENT LIMITS

Where the settlement of a claim is equal to or below COM\$15,000 per claim, the HB shall effect payment without prior authorisation from the IB, and advise the IB who shall reimburse the HB. The HB shall claim for reimbursements through the Reinsurance Pool Clearing Facility, from the IB for settled claims below or equal to COM\$15,000.¹⁵⁰

Where the claim settlement amount exceeds COM\$15,000 up to the limit of COM\$50,000 the Reinsurance Pool shall settle in full the total amount of the claim.¹⁵¹The Reinsurance Pool Manager shall arrange an appropriate reinsurance cover on behalf of NB and their members for losses in excess of the Reinsurance Pool's limit of COM\$50,000 on each claim up to an unlimited liability for TP death/bodily injury, and a limit of liability of COM\$1,000,000 for property damage.¹⁵² The Reinsurance Pool shall clear reimbursement of claim settlements not exceeding COM\$15,000 between the HB and IB.¹⁵³

¹⁴⁹ The manual , article, 4.5

¹⁵⁰ Ibid , article,4.6

¹⁵¹ Ibid article 4.12.3

¹⁵² Ibid , article,3.11.2

¹⁵³ Ibid article4.10

CHAPTER FOUR

LEGAL AND PRACTICAL CHALLENGES IN THE IMPLEMENTATION OF THE YCS IN ETHIOPIA

4.1. AMBIGUITY ON THE SCOPE OF COVERAGE

As noted in the statement of the problem; an argument which is raised by some individuals is that, the YCS is not functional when accidents occur between citizens of same countries.¹⁵⁴ Their argument lies on, for instance, the state of Djibouti would not bother about an insurance scheme which would serve two Ethiopians, for the mere occurrence of a traffic accident within its territorial jurisdiction.¹⁵⁵ We should not expect the COMESA member states to come to a table to deal with a problem which involves citizens of the same country.¹⁵⁶ When two Ethiopian motorists collided in another COMESA member state, indeed they may not be worried about the remedies abroad.¹⁵⁷ They may not stay and enter in to litigation in a country in which they are visitors.¹⁵⁸ Moreover it is not unusual that, cross country motor vehicle owners insure their motor vehicles through an own damage comprehensive insurance policies in their base territory.¹⁵⁹ Insurance claims then proceed in the normal insurance claim practice and most of the time the liability for tortfeasors is to be established by insurer's action in court by way of subrogation in case of property damages.¹⁶⁰

Having these arguments in mind and to clarify the issue, the researcher raised the arguments to the representative of NBE in an interview and a person from COMESA office of secretariat through email correspondence.¹⁶¹ The question was that; does the YCS cover cases of traffic accidents between citizens of a given country? Is the issue under the scope of the YCS coverage?

Both answered in the positive that the YCS gives cover for citizens of same country if an accident happened between themselves in any of the member states. One argued using a conventional definition

¹⁵⁴ Interview with Mr. Asmare Bayou ,senior insurance attorney at Ethiopian insurance corporation ,(Addis Ababa, 28 Feb) 2020,

¹⁵⁵ Interview with Mr. Elias Endalew , senior insurance attorney at United insurance company, (Addis Ababa 15 Feb 2020,

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Ibid

¹⁵⁹ Interview with Mr. Asmare (n153)

¹⁶⁰ Ibid

¹⁶¹ Email from Mr.Debebe Tessema, a Senior Insurance officer in COMESA Office of Secretariat from Lusaka & Interview with Mr.Fikry (n114)

of TP as, “any party other than the owner and the driver of the car is considered to be a TP.”¹⁶² While the other argued using a cross definition stating that:

Under the MTPL laws of Member States, the term TP is commonly defined as any person other than the insured himself, his driver, members of his family or employees and TP beneficiaries and compensation are determined according to the law of the member state where the accident occurred.¹⁶³

However, both answers and explanations are not supported by the provisions of the YC instruments. In practice however, there have been occasions where Djibouti vehicles which were engaged in a traffic accidents in Ethiopia had been compensated by the NBE even though both the victim and the tortfeasor were from Djibouti.¹⁶⁴

Therefore, the answers and the practice at the NBE, shows that, traffic accidents which involve nationals/residents of same member state in the COMESA are subject to the YCS, given the accident is occurred abroad in member states. But the ambiguity in the YCS will continue unless a clear definition is provided as to who are third parties in the scheme. None of the instruments has clearly defined beneficiaries of the scheme. As the purpose of Cross-border MTPL is to create freedom of movement across national boundaries by extending automatic MTPL to cover the activities of motorists from states both at home and in any other states, a clear demarcation should be made between home and interstate affairs.

Moreover a country like Ethiopia which uses limited neighboring routes experiences plenty of accident among heavy trucks of its own transporters and vehicle owners. About 99% of all foreign vehicles that go into Djibouti are Ethiopian registered, and all had the YC.¹⁶⁵ There was a daily average traffic of about 800 vehicles between the Ethiopia and Djibouti border in 2014.¹⁶⁶ Currently an estimated number of

¹⁶² Interview with Mr.Fikry (n114)

¹⁶³ Email from debebetamene@gmail.com to author (June 10, 2020)

¹⁶⁴ A truck plate no.687D62/336D57(owned by STEDER GROUP TRANSPORT SARL) knocked down truck plate no. 313D56 (MEROUGE TRANSIT SERVICE SARL) on 07/08/2019 in Ethiopia; the claim was presented to the NBE and the NBE has effected a total of compensation birr 403,000.00 to (MEROUGE TRANSIT SERVICE SARL).

¹⁶⁵ Report On The Study Of Low Limits Of TP Liability And Other Issues Affecting The Implementation Of The YCS COMESA 37th Meeting Of The TMC ;On The YC Reinsurance Pool Nairobi, Kenya 4-5 September, 2014 pp.10

¹⁶⁶ Ibid

1,200 took voyages to Djibouti per day and lot of collision accidents occur between Ethiopian vehicles in the territory of Djibouti.¹⁶⁷ The absence of definition for the word “TP” in the YCS instruments has therefore become a source of confusion and arguments as to the scope and extent of coverage of the YCS. To mention some, the Protocol and the Intergovernmental Bureau Agreement have tried to define some clear terms like “Motor Vehicle” and similar others. Nonetheless, failure of the instruments to hold definition as to who are “third parties” to the YC holders and who are legible to claim compensation under the YCS have left gaps in the instruments and the problem have become prevalent as accidents are still happening between Ethiopian motorists abroad and there is a belief that it is a home affair. Obviously the word “TP” is not a term which explains itself in every legal context and generally, the failure of the YCS to demarcate home and interstate affairs has created ambiguities for stake holders.

4.2. DOMESTIC MOTOR INSURANCE CLAIM PRACTICE IN ETHIOPIA

In Ethiopia, the normal claim practice of a traffic accident is or follows:-

1. When a vehicle accident occurs, the victim will amicably solve his claim with the tortfeasors or MTPL insurer or he may bring a court action against the tortfeasor and the MTPL insurer.¹⁶⁸
2. If the victim has a comprehensive motor insurance cover, he may claim compensation from his own insurer and legally transfer his right of compensation from the tortfeasor to his comprehensive insurer through the doctrine of subrogation.¹⁶⁹

In fact, when an accident occurs between Ethiopian motorists abroad, they are largely inclined to report accidents to their comprehensive insurers and the insurers simply prefer to bring back the damaged property from member countries and the normal domestic claim practice proceeds.¹⁷⁰ Insurer who compensated the victim then proceeds against the party who is held liable for the occurrence of the accident locally. The trend is prevalent in relation to the YCS and the NBE is being receiving such claim for payments.¹⁷¹ However this trend is departing from the YCS claim handling procedure and it

¹⁶⁷ Interview with Mr. Fikry (n114)

¹⁶⁸ Ethiopian MTPL proclamation (n16) ,article 17

¹⁶⁹ The 1960 Commercial code of Ethiopia article 683(1)

¹⁷⁰ Interview with Asmiya (n.15): the reason is that they cannot afford the expenses in foreign currency and new market and legal system is a problem to them.

¹⁷¹ Interview with Mr. Fikry (n114)

makes us to raise a question on the legal frame work of the YCS both from this domestic claim practice of Ethiopia and private international law perspectives.

4.3. PRIVATE INTERNATIONAL LAW AS AN ISSUE IN THE YCS

A usual road traffic accident scenario might involve two vehicles which collide, causing property damage and, potentially, some personal injury.¹⁷² The non-contractual claims which could arise from such a scenario might include a claim by the driver of one vehicle against the driver of the other.¹⁷³ If both vehicles are registered in the country in which the accident occurs and both drivers are habitually resident there, the situation is a purely domestic one which does not give rise to any questions of choice-of-law.¹⁷⁴ Any claim arising as a result of the accident would be dealt with in accordance with the law of the country concerned.¹⁷⁵ However, if this scenario takes on a cross border nature so that one of the vehicles is from a country foreign to the place where the accident occurs, a question arises as to which law should be applied and to which court the claim should be brought.¹⁷⁶

The YCS and the COMESA in general doesn't have a comprehensive conflict of law rules. The YCS claim handling procedure follows a one line claim handling process in which the NB of the country of accident handles, pays and in any case assigned to receive a court summon to employee defenses for litigations on behalf of tortfeasors.¹⁷⁷ This procedure of the YCS may perfectly works when the accident is occurred on residents of a country being visited. In such scenario the victim can negotiate with NB of his residency or in case of disagreement, the victim can institute a court action against the NB of his residence. Courts of the state visited would assume jurisdictions and apply the law of the state and COMESA instruments without objections.

However the problem comes when a traffic accident occurs between citizens of same country abroad and they want to settle the claim in their country of residence like the one trending in the domestic claim practice of Ethiopia. In such cases the normal expectation of parties to the accident would come

¹⁷² Jenny Papettas, The Law Applicable to Cross Border Road Traffic Accidents; A thesis submitted to the University of Birmingham for the degree of DOCTOROFPHILOSOPHY, School of Law University of Birmingham September 2013.

p.12

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ n133 &134

in conflict with the claim handling procedure of the YCS. Under the Protocol, if, an accident occurs in Djibouti between two Ethiopian visiting motorists, the relevant applicable law will be the law of Djibouti and the NBD is solely authorized to handle such claim. Should the case proceed to litigation, Djibouti courts are indirectly chosen as a forum to the litigation. Because of this, Controversies have arisen. Local conflict of law rules seems to be in clash and we are witnessing the problem surfacing in court litigations.

4.3.1. PRACTICAL COURT CASES REPRESENTING THE PROBLEM

Though not finally disposed the researcher has found five court cases which have similar facts pending in front of the Federal High Court of Ethiopia. When the researcher conducted this study, two of the cases have passed the preliminary objection stage and the court has ruled on the objections. The rulings are not final in Ethiopian law system, but the concern of the litigants and the problem of the YCS can be inferred from the ruling on the preliminary objections. For this purpose the researcher briefly presented one of the cases as follows:-¹⁷⁸

The plaintiff claimed a recovery of Birr 2,410,974.00 from the defendants as vehicle registered in the name of the defendants caused a collision accident on another vehicle insured by the plaintiff in Djibouti. Because of the accident, trailer of the vehicle and 46,385.00 liters of Benzene had been damaged and the plaintiff had made compensation to this as per its insurance policy.

The defendants were served with summons from the court and submitted written pleading admitting the occurrence of the accident and prayed for an order of intervention of United Insurance S.C (UNISC).The latter also submitted its written defense pleading and asked for an order for the intervention of the NBE and the court ordered the same.

Both interveners raised objection as to the judicial jurisdiction of the court and they reiterated absence of liability on their sides. UNISC alleged that, when an accident occurs in Djibouti, the responsibility to compensate victims is either that of the NBD or the NBE. Hence UNISC prayed to be released from the litigation as per article 244(2) (d) of the Ethiopian Civil Procedure Code (CPC). NBE on its part alleged that, as per the Protocol, its annexes and manuals, such proceedings should be entertained by the laws of Djibouti and the judicial jurisdiction on the case should be that of a court which is found in

¹⁷⁸ Nile insurance S.C vs. Mr. Dawit Girma and Seblewengiel Kidane: The Federal High court of Ethiopia, Lideta Bench Civil Suit file. No.210781, Addis Ababa

Djibouti. In addition when such accidents occur in Djibouti, the only authorized NB is the NBD, either to entertain the claim or conduct litigation. The court then investigated the preliminary objection and gave the following rulings;-

Regarding the objection of the 1st Intervener (UNISC); the court mentioned the introduction part and art 3(b) (I) of the COMESA Guidelines. It said Member insurance companies are contracting parties and they are participants of the Scheme. In addition as per section 9 of the Guideline and article 5(2) (b) of the Protocol, insurance companies have an obligation to reimburse NBs after compensation is effected on their behalf. More over the 1st intervener has a contractual obligation as per article 1731(2) of the Ethiopian Civil Code of 1960; therefore the preliminary objection was not accepted.

Regarding the 2nd intervener (NBE), the court made a more detailed analysis and similarly rejected the objection. The court confirmed that as the accident occurred in Djibouti it is subject to private international law. The court has jurisdiction as per article 11(2) (A) of the Ethiopian Federal Court Establishment Proclamation 25/1995. The NBE has argued the case to be referred to Djibouti, however the court has failed to take stance on that. The court reiterated that, though the case has foreign elements, most of the connecting factors are connected to Ethiopia. For instance the defendant, the plaintiff and the interveners are all Ethiopian citizens or residents. Thus Ethiopia is the convenient forum to conduct the litigation. Should the litigation conducted in Djibouti, it would be against the interest of justice and convenience of the parties. Regarding the applicability of laws the court held that, as it is the power of the court to make choice, the objection doesn't hinder it from proceeding over the case and cited article 9(4) of the FDRE Constitution which allows the court to apply conventions and instruments adopted by Ethiopia.

The second objection of the NBE was that as per article 14 of the Inter Bureau Agreement the NB which has the authority to handle the claim and conduct litigation is the NB of Djibouti. However the court interpreted this provision as “the provision says the NB of the country of accident may bring an action on the insured and that doesn't say it shall defend a suit.” Finally the court take the position that when a

vehicle which holds a YC incur damage abroad it can ask compensation from the NB of its own country. In summary, NBs which are established in each member countries have to coordinate and assist the common benefit and goal of the scheme. Hence the court rejected the objection raised by the second intervener and ordered its stay in the proceeding as a party liable for the claim of the plaintiff.

From the above case, it can be observed that the judge has focused on the convenience of the litigants in ruling on the judicial jurisdiction of the court and the mandate of NBs.

To articulate the issue more clearly, the researcher has made an attempt to find similar court cases in other member states and managed to get a case disposed by a Kenyan court and is presented as follows:-¹⁷⁹

A Bus registered in Kenya had inflicted an accident on the plaintiff in Tanzania and the plaintiff had secured a judgment in lower courts of Kenya for compensation against the bus owner. The suit was filed to settle this judgment that had been previously entered against the Defendants (local insurance company that has insured the bus) in Kenya. The Defendant's case was that, it had not covered the risk alleged by the Plaintiffs because, its liability was limited to claims arising in Kenya and since the claim occurred outside of Kenya in Tanzania; the plaintiffs should only look for compensation under the YCS in Tanzania.

The court framed an issue of whether or not the Defendant could avoid settling the said judgment on the ground that the claim arose in Tanzania and was covered by YC policy which was valid and in place at the time of the material accident.

Then, the court roughly discussed the legal and institutional frameworks of the COMESA and mentioned article (3) of the Protocol. Claims on behalf of member states shall be settled by each NB and that the legal, administrative and financial operation of the scheme shall be coordinated by a CB. The provisions of this Article

¹⁷⁹ JJ (a minor suing through JKG and JMJ His father and mother as next friend as 1st plaintiff) vs. General Accident Insurance Company Ltd Mililani Law Courts, Civil Suit No 205 Of 2016 The High Court of Kenya at Nairobi; available at <http://www.kenyalaw.org> , accessed ,Feb 2020

is mandatory due to the use of the word “shall”. So there will be no discretionary application of the provisions where there is a Yellow card cover. Going further, the Manual of the YCS and Reinsurance Pool provides the procedure for lodging, handling and settlement of a claim. The Constitution of Kenya provides that:-“The general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”As signatory of the Agreement and the Protocol, Kenya is bound by the provisions therein. Once an insured has YC and an accident occurs outside the jurisdiction of the country, the NB of the country where the accident occurred, processes the claim and in this case, that bureau was the NB in Tanzania. The applicable cover at the material time of the accident was under the COMESA YCS as the accident occurred in Tanzania. For the foregoing reasons, the Plaintiffs’ suit did not have merit and dismissed with costs to the Defendant.

In short the case in Kenya was dismissed with the reason that; the jurisdiction and applicable laws are that of Tanzania in which the accident had occurred.

In the two court cases from Ethiopia and Kenya the judges have held two different positions in the implementation of the YCS. The researcher then forwarded the questions in the cases to his interviewees. The interviewees responded that, such claims should be submitted and entertained in the country of accident.¹⁸⁰They have the same stand with the decision of the court of Nairobi. In their response they stressed that NBE has no authority to handle claims, unless the accident has occurred in Ethiopia and a foreign vehicle is involved.¹⁸¹The NBE shall be called upon the reimbursement stage to settle payments to the other NB which handled the claim.¹⁸² If litigation is to proceed it has to be made in the country of accident.¹⁸³ Acting outside of this procedure would lead to non reimbursement from reinsurance pool and if the NBE is to pay such claims it would have no legal basis to recover from the reinsurance pool and the insurer.¹⁸⁴So such accidents must be reported to the NB of country of the accident, so that the NB of that country as the HB, can handle the claim to the victim according to the

¹⁸⁰ Interview with Mr. Fikry & Mrs Asmiya (n114&n15)

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

law of the country. Then, after settlement of the claim to the victim, the NB of the state, seeks reimbursement from an insurance company, through the NB which issued the YC, if the claim amount falls less than US\$ 15,000. However, if the claim amount exceeds \$15,000, the NB of the accident seeks reimbursement directly from the Pool Managers on the account of the Franchise Excess of loss Reinsurance Treaty program.”¹⁸⁵ In addition the researcher had asked to reflect on the decision of the Nairobi court and the response was that agree with the decision.

From this the researcher learned that claims which results from cross-border traffic accidents between Ethiopian nationals shall be entertained in the country in which the accident had happened, if not, the victim or his insurer would lose the compensation from the scheme. In this regard the NBE has a firm stand and officially rejected claims presented to it¹⁸⁶. Local insurance companies similarly avoid claims of the same kind having the NBE as their shield though they have issued the YC. Literally the response given by all interviewees was similar with the decision given by the Nairobi court. On the other hand, the decision given by the Federal Court of Ethiopia seems to smash the provision of the YCS.

4.3.2. POSSIBLE WAY OUTS FOR THE ISSUE OF PRIVATE INTERNATIONAL LAW IN THE YCS

Judicial jurisdiction is the power of the courts of a particular nation or state. One must start with the basic principle that the territorial sovereign has jurisdiction on every case in his territory.¹⁸⁷ It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States that it should possess jurisdiction over all persons and things within its territorial limits and in all cases civil and criminal arising within these limits.¹⁸⁸ This universally recognized principle of international law is the foundation upon which all jurisdictional doctrine is built.¹⁸⁹ Broadly speaking, conflicts arise because other legal principles permit a State legitimately to exercise jurisdiction in cases involving acts committed or situations existing in the territory of another State.¹⁹⁰ Since that other State has jurisdiction as the territorial sovereign, two different States might claim jurisdiction over the same

¹⁸⁵ Email from debebetamene@gmail.com to author (June 10, 2020) (n160)

¹⁸⁶ Interview with Mr. Fikry & Asmiya (n15 & n114)

¹⁸⁷ John M. Raymond, the Exercise of Concurrent International Jurisdiction: "Move with Circumspection Appropriate
"Boston College Industrial and Commercial Law Review p. 1

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Ibid

situation.¹⁹¹ A State has jurisdiction when a constituent element of an offense took place within its territory or may subject a national to its laws wherever its national may be.¹⁹²

In Ethiopia there are no written provisions of law governing this kind of jurisdiction.¹⁹³ Ethiopian courts will exercise judicial jurisdictions in “*personam*” where the defendant is an Ethiopian national or domiciliary, the act which is the subject matter of the suit occurred in Ethiopia or the defendant has consented to the exercise of jurisdiction in Ethiopia.¹⁹⁴ Though Ethiopia has no comprehensive rule of private international law the judicial jurisdiction of the country could be driven from Bilateral or Multilateral agreements if any or from custom.¹⁹⁵ Accordingly Ethiopian courts shall have judicial jurisdiction when the defendant is Ethiopian national or domiciliary.¹⁹⁶ In one hand Ethiopia as signatory of the YCS is responsible to enforce instruments of the YCS and on the other hand the inconvenience on victims and tortfeasors of its national needs reconciliations. The domestic court practice of judicial jurisdiction is also contradictory with the one line claim handling procedure of the YCS.

For instance in the green card system, Where an action is brought against the tortfeasor or the owner of the vehicle who is domiciled within the EU, the defendant should be sued alternatively in the courts of his place of domicile or in the courts of the place where the harmful event occurred.¹⁹⁷ The current system under the Motor Insurance Directives (MIDs) has grown out of the green card scheme which was begun in 1949 by the UN.¹⁹⁸ The final (6th MID) incorporated Special provisions for visiting victims.¹⁹⁹ Injured parties in a Member State other than that of their residence may present a claim to the compensation body in their Member State of residence i.e. (NIB). The latter body shall pay such

¹⁹¹ Ibid

¹⁹² Ibid 171 p. 251

¹⁹³ Robert Allen Sedler, The Ethiopian civil procedure; Hailesilasie I university, 1968 ,pp 19

¹⁹⁴ Ibid p.20

¹⁹⁵ Migicon Construction LTD ,Engineer Mulugeta Asefa Vs Titagegn Fitawo and four persons, Federal supreme court Cassation division of Ethiopia, Addis Ababa file.no123200 Vol.21 p. 197

¹⁹⁶ Ibid

¹⁹⁷ Articles 2 and 5(3) of the Brussels I Regulation

¹⁹⁸ Ibid 136

¹⁹⁹ DIRECTIVE 2009/103/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Of 16 September 2009; Art 20 and et.al

compensations and shall be reimbursed from the NIB in the Member State in which the insurer which issued the policy operates or it can be subrogated to the injured party in his rights against the person who caused the accident or his insurer in the Member State of residence of the injured party.

Private international law is not only about court's jurisdiction. it also contain an issue of choice of laws. In the green card system, the applicable law for traffic accident is the internal law of the State where the accident occurred.²⁰⁰ However where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred, the internal law of the State of registration of the vehicle is applicable to determine liability.²⁰¹ Similarly where at least two vehicles are involved in an accident and where all vehicles are registered in the same state then the internal law of the State of registration of the vehicles is applicable to determine liability²⁰²

In conclusion, the claim in cross-border traffic accident would not always end with the substantive and procedural framework of a given regional scheme like conflicts exhibited in the implementation of the YCS in Ethiopia. More or less the sole authorization of the NB of the country of accident for all claims handling purposes including litigation irrespective of other connecting factors and possible inconveniences is unwise. There are various scenarios which test such claim handling systems. Victims may prefer to bring claims in their own country of residence and tortfeasors may be sued in their domiciliary. Hence the YCS of COMESA should develop a comprehensive and pragmatic rule of conflict of laws which would best serve the interest of state parties and their citizens

4.4. THE LOW LIMIT OF LIABILITY IN THE ETHIOPIAN MTPL LAW; A CHALLENGE IN THE IMPLEMENTATION OF THE YCS

The Protocol states that guarantee provided by the YC covers the liability incurred by the holder of the card in accordance with the laws of each member country which he visits.²⁰³ The provision doesn't make any special reference to any law; it generally referred all laws which makes holder of the card liable for a traffic accident. Notwithstanding the terms of insurance policy under which it is issued, the card shall provide all the guarantees required by the laws or regulations governing MTPL insurance in

²⁰⁰ The Hague Convention on the Law Applicable to Traffic Accidents of 04 May 1971, article 3

²⁰¹ Ibid article 4(a)

²⁰² Ibid article 4(b)

²⁰³ The protocol article 6(5)

the country in which the accident occurred.²⁰⁴This statement restricts terms and conditions which are lesser than the one determined by the compulsory motor vehicle insurance declaration of a country being visited. For a party in whose territory insurance is not compulsory by law, the guarantee provided by the YC shall correspond to the TP liability on the motorist in accordance with the laws and regulations in force in the country where the accident occurred.²⁰⁵ The Protocol also gives recognition for the application of other laws to determine motorist liability in the absence of MTPL insurance laws.

However the manual of the YCS states that; the YC is an equivalent of a policy of insurance recognized as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the participating states in which accidents have occurred in respect of vehicles from other member countries.²⁰⁶

Under the Ethiopian MTPL Proclamation, the amount of compensation to be covered by vehicle insurance policy against TP risks does not exceeding Birr 40,000.00 in respect of the death or injury to one person and an amount not exceeding Birr 100,000.00 in respect of damage to property.²⁰⁷

Therefore after introduction of compulsory MTPL insurance in Ethiopia, Djiboutian motor owners who drive in Ethiopia feel that the new law has disadvantaged them.²⁰⁸ Because of the low limit of the Ethiopian MTPL cover, the Djiboutian local insurers start successfully to limit their liability to the low limit stipulated by the Ethiopian MTPL proclamation.²⁰⁹As a result accident victims in Ethiopia prefer to impound a vehicle as lien against a higher and more equitable compensation amount which they are entitled to claim under the Ethiopian law.²¹⁰ This obliges the Djibouti motorist to buy additional cover beyond the YC coverage and this usually takes too long and defeats the purpose of efficient facilitation

²⁰⁴ The protocol article article6(6)

²⁰⁵ Ibid article 6(8)

²⁰⁶ The manual , article 1.2.1

²⁰⁷ Ethiopian MTPL proclamation(n16)article 16

²⁰⁸ Report on the Study of Low Limits of TPL and Other Issues Affecting the Implementation of the YCS 37th meeting Of the TMC; On the YC Reinsurance Pool Nairobi, 2014 pp.10

²⁰⁹ Ibid

²¹⁰ Ibid

of cross border transportation and trade as envisaged in the Protocol.²¹¹ For the foregoing reasons, Djiboutian transport operators find it to be quite challenging operating into Ethiopia.²¹²

Similarly the problem was equally felt by the NBE. When a car accident occurs in the eastern part of Ethiopia, Police and tribal leaders arrest a car, and should the liability of the foreign vehicle exceed the low limit stipulated on the MTPL proclamation of Ethiopia, the NBE enters in dilemma to take responsibility to order the release of such vehicle.²¹³ Because of such self defeating operation of the scheme and because of the low liability limit of Ethiopia MTPL proclamation, the NBE had resorted to Bilateral and reciprocity agreements with countries like Djibouti.²¹⁴

The main problem with low limit of the MTPL of Ethiopian proclamation is that its enactment was aimed at reducing social crisis which arose from traffic accidents.²¹⁵ The Civil Code allows victims of a vehicle accident to claim an equivalent compensation from vehicle owners and drivers.²¹⁶ The victim would not stop claiming until he is fully compensated from vehicle owners and drivers. Despite these clear provisions, the MTPL proclamation requires the YC holder and other foreign vehicles to have an equivalent cover stipulated for domestic vehicles.

Basically the Protocol of the YCS is a bit ambiguous as to the amount of the YC cover. The manual enacted for its implementation however opted necessarily to equate it to local MTPL insurance law limits in the respective member states being visited. In fact, countries like Ethiopia uses different laws to determine liability regarding torts arising from motor vehicles. The Ethiopian legal regime of tort is almost totally based on the civil code provisions and incompatibility between the two is therefore inevitable.

Article 6 of the Protocol is believed to be the primary agreement which incorporated the intention of signatory states. Article 6 seems to be an inclusive provision which refers to the YC to cover all liability which emanate from the laws of a country being visited. The expression 'laws' don't refer to a separate or a single legislation. Hence the provision of the manual which restricts the YCS to a local

²¹¹ Ibid

²¹² Ibid

²¹³ Interview with Asmiya (n15)

²¹⁴ Ibid

²¹⁵ Ethiopian MTPL proclamation (n16), preamble

²¹⁶ The 1960 Civil Code of Ethiopia, article 2091

MTPL insurance law limits could have been contested, as it is a secondary instrument to the Protocol. However the miscellaneous provision of Ethiopian MTPL Proclamation which has repeated the expression of the manual could hinder the opportunity to raise an otherwise argument on the manual itself.²¹⁷

From the Protocol, article 2 seems a provision which backs the manual and the arguments which equates the YCS with local MTPL. The provision state that:

The contracting parties undertake to establish by this Protocol a compulsory MTPL providing at least minimum guarantees as those required by the laws in force in the territories of the parties to this Protocol when the vehicles insured are transiting the territories of other contracting parties.

Article 2 of the Protocol should be read and understood as it only sets minimum levels and does not in any way restrict the implementation of anything above the minimum. Even recently the COMESA secretariat office had requested the NBE and other member states which have a low limit of liability to submit an improved limit for the approval of the CB.²¹⁸ Hence the Ethiopian MTPL proclamation is both against the interest of foreign drivers and Ethiopian victims. It puts foreign motor vehicle owners and Ethiopian victims to a weaker position. Especially imposing 40,000 and 100,000.00 birr limit for body and property damage knowing that the automatic Reinsurance Pool limit of compensation is \$50,000 on each claim up to an unlimited liability for TP death/bodily injury, and a limit of liability of \$1,000,000 for property damage is so foolish and it is obviously against the national interest of the Country.

4.5. CRITICS ON THE AUTHORIZATION ETHIOPIAN INSURANCE CORPORATION (EIC) AS NATIONAL BUREAU OF ETHIOPIA (NBE)

Article 9 (1) of the Protocol urges each NB to be composed of insurers authorized by the local supervisory authorities for insurance against MTPL risks. Such insurers are identified as subsidiary participants. In principle the Protocol gives an indirect recognition for member insurance companies to take part in the NB of their state. The word “composed of” reflects this intention of the Protocol. From the power given to the NB, we can learn that they are not merely agents, rather they play crucial role

²¹⁷ Ethiopian MTPL proclamation (n16) article 26

²¹⁸ Interview with Mr. Fikry (n114)

in the development of the Scheme and they are central organisations in representing insurers in their countries by signing instruments of the YCs and contributing to the annual budget of the CB.²¹⁹

Considering such big national representation and an agency to all insurers, the researcher has made a visit to the NBE and he found out that, the NBE being a department under the additional responsibility and headship of the General Insurance Office DCEO of the EIC and it contains not more than 3 staffs and they are employees of the EIC. The head of the NBE believes that the Bureau is an independent entity which has its own seal and is accountable to the Ministry of Finance.²²⁰ It is obvious that EIC is constituted by council of minister regulation but there is no act which formed an entity called NBE in the country.

In the YCS context the activities performed by the CB which contains representative of NBs has an effect of rule making or a treaty making effects. Representative of the NBE participates in meetings of the CB, representing the nation. But such individuals are not government officials or duly assigned personnel for such privileges. If the effect of their possible engagements was to remain at EIC level, raising the concern would have been futile but their engagement is applicable on all insurance companies in Ethiopia. Hence the absence of a clear representation and legislation is not only a question of legality; it also reduces the commitment and confidence of representatives.²²¹

The other possible debate would be; how could NB represented by a single market actor serve the interest of all? The researcher has made an interview with the Bureau and the response was that; there were complaints from member insurance companies on one occasion at a meeting organized by them. However their response to the question was based on quality of services of the Bureau and playing down its role as a mere liaison office.²²² But the NBE is entrusted with a supervisory, disciplinary and power to terminate membership and to take legal action on insurance companies which may fail to meet their obligations.²²³

²¹⁹Protocol A/P 1/5/82 (n124)

²²⁰Interview with Mr. Fikry (n114)

²²¹ Ibid

²²² Interview with Mr. Elias (n154)

²²³ The protocol, article 1

Generally In the eye of a reasonable person, the authorization and continuation of a state owned Insurance Corporation as NBE in the presence of other 16 and more privately owned insurance companies as a direct competitor in the insurance industry doesn't make a sense.²²⁴

The Guidelines of the YCS state that; when the system started, most countries in the region pursued government-driven economic policies often to the exclusion of the private sector. With the advent of economic reforms in the region, leading to liberalization and privatisation, there are more private companies in the insurance industry that have become subsidiary participants to the YCS. There is therefore a need to streamline the institutional, coordination, management, and operational aspects of the system at national level to ensure that it is in line with the developments being experienced in the region.²²⁵

Hence the current setup of the NBE doesn't go with the intention of the Protocol and above all our current situation doesn't encourage for the arbitrary continuation of the same. As stated in the guidelines many of the member states had been using the permissive provision of the Protocol, but now many of them managed to change their NB from state owned monopoly insurance companies to a separate National Bureaus.²²⁶ The Protocol also provided procedures for Withdrawal of Designation and Replacement of the NB by member states.²²⁷

²²⁴ Interview with Mr. Elias (n154)

²²⁵ Interview with Mrs. Asmiya (n.15)

²²⁶ Ibid

²²⁷ The protocol ,article 11

4.6. CONCLUSION AND RECOMMENDATION

4.6.1. CONCLUSION

Liability insurance provides an indemnity to the insured's in respect of their legal liability to other TPs. Such obligation to reimburse a TP arises as a result of a breach by the insured of certain rights of another TP. The main purpose of liability insurance is to compensate the victim and at the same time to protect the wrongdoers from the financial consequences of their negligent acts or breach of duties.

As insurance is a tool to transfer risks from the insured to the insurer, the demand to be insured is expected to be the insured's choice. However, the demand for liability insurances may equally emanate from the imposition by law, which makes the cover Compulsory.

Motor insurance is extensively practiced all over the world. A comprehensive motor insurance policy basically covers own damages that may occur to the vehicle itself; Whereas, MTPL insurance is for the protection of TP victims.

The Road Traffic Act, 1930 of UK 1st introduced legislation as to the use of motor vehicles and made MTPL insurance compulsory. Motor insurance is probably the most important type of insurance sold in developing countries and may be the first class of insurance with which the general public has an acquaintance. The Ethiopian Government promulgated MTPL insurance law for the 1st time in 2008 and it was revised and replaced in 2013.

Cross-border insurance is a result of insured's and insurers demand and supply interaction. However cross-border MTPL insurance is not a result of such interactions. As the aim of compulsory insurance is protecting the public from unwanted consequences, persons who drive crossing border of a country are expected to comply with such compulsory legislations. Such duties at each boarder of states would be onerous for drivers and would be against the fundamental objectives of international and regional organizations. Thus, to create freedom of movement across national boundaries, it was necessary to establish a system whereby MTPL insurance coverage was extended automatically to cover the activities of motorists from states, both at home and in any other states. Therefore, the development of cross-border MTPL insurance is directly necessitated by interstate trade and freedom of movements across national boundaries. As a result, plenty of regional MTPL insurance schemes came in to being and YCS of COMESA is one of them.

The YCS was established in 1986 and is operational in thirteen countries and over 200 insurance companies in the region are participating in the scheme.

As regional schemes involve parties, laws and institutions of different member states; Claims handling of cross-border traffic accidents is a complex process. Involving different stake holders and legal issues, the YCS which operates in more than 13 countries couldn't be free from challenges in implementation. Thus this study has come up with the following legal and practical challenges in the implementation of the YCS in Ethiopia:-

- The YCS is not clear as to, who is TP in the scheme. None of the provision has defined beneficiaries of the scheme. Failure of the instruments to hold definition as to who are “third parties” to the YC holders and who are legible to claim compensation, is a gap and it is a prevalent problem as accidents are happening between Ethiopian motorists abroad and there are thinking that it is a home affair not subject to the YCS. Obviously the word “TP” is not a term which explains itself in every legal context.
- From practice and interviews, the YCS covers accidents which occur between national/residence of same country during their visit in COMESA member states. But still in this regard, the sole authorization of the NB of the country in which the accident occurred is affecting the interest and convenience of such parties to process their claim within the YCS claim handling procedures.
- A usual road accident scenario might involve two vehicles which collide, causing property damage and, potentially, some personal injury. If both vehicles are registered in the country in which the accident occurs and both drivers are habitually resident there, the situation is purely domestic one. However, if the scenario took on a cross border nature so that one of the vehicles is from a country foreign to the place where the accident occurs, a question arises as to which law should be applied and which court a claim should be brought. However YCS in particular and the COMESA in general don't have a comprehensive conflict of law rule. Claim handling procedure of YCS follows a one line claim handling process in which the NB of the country of accident handle, pay and in any case assigned to receive a court summons to conduct litigations on behalf of tortfeasors. When an accident occurs between Ethiopian motorists they are largely engaged on a measure to report to their comprehensive motor insurers and simply prefer to bring back the damaged property from member countries and normal claim practice proceeds. Then insurance company who compensated the victim exercises its subrogation right on the other party who is held liable for the accident. The trend is

prevalent to the YCS and the NBE receives similar claim questions in the normal claim handling practice of the country.

- From the interviewee's, NBE has no authority to handle such claims, unless the accident has occurred in Ethiopian and a foreign vehicle is involved. This looks a challenge or it is a cumbersome process for traders and cross country motorists in the YCS because it forces to entertain their claims in a country to which they are visitors.
- However the EU follows pragmatic approaches in the green card system. The (6thMID) incorporated a Special provisions concerning compensation for injured parties following an accident in a Member State other than that of their residence. Such visiting victims are entitled to present a claim to the compensation body in their Member State of residence. The compensation body which has compensated the injured party in his Member State of residence is entitled to claim reimbursement from the compensation body in the Member State in which the insurer which issued the policy is established or if it has same residence from the insurer itself.
- Similarly in the green card system of EU, The law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country, the law of that country shall apply. The Hague convention on the Law Applicable to Traffic Accidents States that, the applicable law for traffic accident is the internal law of the State where the accident occurred. However where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, for a victim whose habitual residence is in a State other than that the accident occurred, the internal law of the State of registration of the vehicle is applicable to determine liability. Similarly where at least two vehicles are involved in an accident and where all vehicles are registered in the same state then the internal law of the State of registration of the vehicles is applicable to determine liability.
- In the green card system, regarding court jurisdictions, If a victim is usually resident in the same state as the car is registered, which will likely be the place where the owner and the driver are also habitually resident, the place where the vehicle is registered and insured and the place where the after effects of the accident are likely to be felt, then a number of important connecting factors will indeed converge in one place and the Judicial jurisdiction or power of the courts would go to courts of such

particular nation or state. However the YCS claim handling procedure has no such considerations. The Ethiopian courts however will exercise judicial jurisdictions where the defendant is an Ethiopian national or domiciliary or are expected to strictly apply provisions of the YCS. Hence the YCS is recommended to make adjustments and to come up with special provisions on its claim handling process by allowing visiting victim to present their claims in the court of their residence.

- The main objective of the Protocol was establishing MTPL insurance Scheme providing at least minimum guarantees as those required by “the laws” in force in the territories of the parties to the Protocol when the vehicles insured are transiting the territories of other contracting parties. During the signing and ratification of the YCS, Ethiopia follows compensation equivalent to damage principle and the same continued. However in the manual of YCS the extent of YC cover is made equivalent to the Compulsory MTPL of the country being visited. After the Ethiopian government enacted MTPL law liability of insurer is limited to a low amount. Should the liability of foreign vehicle exceed the low limit stipulated on the MTPL proclamation, there is no way that the NBE to take replacement of foreign tortfeasor to handle claims of victim in its territory. The Protocol doesn't incorporate provisions which oblige a given state to reduce or incorporate liability limit in their MTPL, rather it states that the coverage shall be equivalent to the liability of the motorist as per the law of the country of accident. Hence the proclamation is both against the interest of foreign drivers and Ethiopian victims.
- Following the signing of the Protocol, states were entrusted with the responsibility to recognize the validity of the YC in their territories and to enact laws and regulations for the establishment of YCS, particularly for the designation of its NB. It is also stipulated that the designation of each NB shall be determined by the legal provisions in force in the territory of a party to the Protocol and its mode of operation shall be determined by the legal instrument by which it is designated. Where one single state-owned insurance company has the monopoly of all insurance operations, the government of that party to the Protocol may designate that company to act as it's NB. At the beginning many of the member states were in command economy and have used permissive provision of the Protocol, but now many of them managed to change their NB from state monopoly insurance companies to a separate entity. Though the current situation in Ethiopia do not allow state monopoly at all, EIC is still acting as NBE. There is therefore a need to make a proper national and member ship representation at national level to ensure that it is in line with the developments being experienced in the country and in the YCS.

4.6.2. RECOMMENDATION

Based on the above conclusions, the researcher recommends the following:

- The Protocol and other implementing procedures of the YCS shall have to give a clear definition for key terms like the word “Third parties” and the scope of coverage regarding citizens of a same nation;
- Making visiting victims subject to a one line claim handling procedure is not in the best interest of visiting victims who are not residents of the state of accident. The YCS and member states NBs shall initiate the inclusion of special provisions for visiting victims like the EU motor insurance directive (MID) and the Hague convention for choice of laws for traffic accident.
- The YCS is advised to develop a comprehensive choice of law and choice of forum procedures which could solve the issue of conflict of laws by accommodating other additional connecting factors in authorizing NBs, choice of laws and choice of forums. As Ethiopia is a land locked country it is exposed for such cases and hence NBE representatives are highly advised to bring the case to a table for consideration in meetings of the CB as early as possible.
- As far as the problem is concerned; beside the endeavors to solve the problem at the YCS level, in collision accidents between two Ethiopian registered Vehicles abroad, Ethiopian based local insurers are advised to consider mutually divined remedy (Memorandum Of Understanding) out of the current YCS claim handling procedures to best serve their clients by establishing a reciprocity arrangement between themselves, for claims which are lesser than US\$ 15,000 which ought to be fully covered by themselves at the end of day.
- There is an argument that, the liability cover offered under the YCS is limited to the statute provisions of MTPL award limits of the country being visited. As far as the aim of member states to the scheme is giving protections for victims from an accident inflicted by foreign vehicles, the amount of compensation is recommended to be equivalent to the damage sustained by the victim. The liability limit shall not only be hanging on the liability limit of domestic MTPL coverage. Unless otherwise victims would be compensated partially and they would resort to other private actions against the foreign tortfeasor.
- The liability limit incorporated under the Ethiopian MTPL law is not compatible with the assumptions in the scheme. The intension of the proclamation is reduction of local crisis rather than compensation. During the ratification of the YCS Ethiopia follows compensation equivalent to damage principle and the same system of compensation continued. Under Ethiopian context the

greatest amount of compensation is to be recovered from the tortfeasor. However the YCS is not advised to follow the same ways of compensation that is being used in the purely domestic claim cases. Once the foreign vehicle caused an accident and the NBE intervention for partial or low limit as per the domestic law on behalf of foreign tortfeasor would endanger the interest of the Ethiopian victims. As like detained vehicle would be released as per the YCS and the victim would have almost no chance to secure the remaining amount of compensation from the foreign tortfeasor by soliciting its assets abroad. Hence the MTPL proclamation must put a demarcation between the requirement for domestic vehicles and foreign vehicles. It would serve both the interest of victims and foreign motor owners, if the YCS and an insurance cover for foreign motor vehicles are made in parallel to the civil code limit of liability or in another word limit of MTPL cover for foreign vehicle should better be unlimited.

- Finally The Ethiopian government and member insurance companies of the YCS are recommended to establish separate NBE which can equally serve the insurance companies. The government is expected to make contribution for the development of the scheme by enacting legislations and making the right combinations of resource and experts in the area. Except for the personal endeavors of employees of EIC, the NBE is not in a position to assist the improvement of the scheme and it is not filled by individuals who have the legal and political backing of the government to make negotiation and enter agreements which could have a legal consequence on the country as a whole. From another angle, being a NB without a vote of confidence from other private insurance companies and having a rule making privilege on direct competitors would give undue advantage in the eye of customers. Hence private insurance companies are advised to make pressure on the government and the government is also advised to constitute a neutral NBE to best serve the interest of insurance companies and thereby to increase its power in the area.

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ጉዳዩ ኢንሹራንስን የሚመለከት ሲሆን ከሳሽ ግንቦት 7 ቀን 2010 ዓ/ም ባቀረበው የክስ አቤቱታ ንብረትነቱ የ1ኛ ተከላሽ የሆነ ጎታች የሰሌዳ ቁጥሩ 3-85668አ.ት ተሽከርካሪ እና ንብረትነቱ የ2ኛ ተከላሽ የሆነ ተሳቢ የሰሌዳ ቁጥሩ 03-25818አ.ት በአቶ ንጉሱ ግርማ ሲሽከረከር በ01/08/2009 ዓ/ም በጅቡቲ ሀገር ከሳሽ በፖ.ሊ.ሲ ቁጥር ፒ/17/010/06/6006/10/178 የሞተር መድን ሽፋን የሰጠውን እና በፖ.ሊ.ሲ ቁጥር ፒ/17/030/04/4005/15/2 የጭነት ኢንሹራንስ የሰጠውን የሰሌዳ ቁጥር 3-44919አ.ት ተሳቢ 3-14735አ.ት የሆነ ተሽከርካሪን በመግጨት ከፍተኛ ጉዳት አድርሶ በዚህ አደጋ ጎታቹ ተሽከርካሪ ከጥቅም ውጪ ሲሆን ተሳቢው ላይ ጉዳት ከመድረሱም በተጨማሪ በተሽከርካሪው የተጫነው ነዳጅ 46,385 ሊትር መ.ሱ ለመ.ሱ ፈሳል ለደረሰው አደጋም ጥፋተኛው የተከላሾችን መኪና ሲያሽከረከር የነበረው ሹፊር መሆኑን የጅቡቲ የብሄራዊ ሀገር ክፍል ጦር የላከው ማስረጃ ያረጋግጣል።



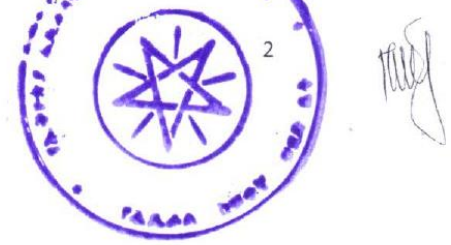
በመሆኑም ከላሽ በደንበኛው ላይ የደረሰውን ጉዳት በራሱ ባለሞያ አስመርምሮ የአደጋ መነሻ ከቀነሰና ጎታቹ ላይ የደረሰው ጉዳት የማይጠገን በመሆኑ ቅሪት አካሉን በብር 660,580(ስድስት መቶ ስልሳ ሺህ አምስት መቶ ሰማኒያ) ከሸጠ በኋላ የተሽከርካሪውን ዋጋ ብር 2,100,000(ሁለት ሚሊዮን አንድ መቶ ሺህ)፣ የተሳቢውን የጥገና ዋጋ ብር 352,650(ሶስት መቶ ሀምሳ ሁለት ሺህ ስድስት መቶ ሀምሳ) እንዲሁም ከተሽከርካሪው ለፈሰሰው ነዳጅ ዋጋ ብር 612,750(ስድስት መቶ አስራ ሁለት ሺህ ሰባት መቶ ሀምሳ) እና ከጉዳቱ ጋር ተያያዥ ለሆኑ ወጪዎች በድምሩ ብር 2,410,974(ሁለት ሚሊዮን አራት መቶ አስር ሺህ ዘጠኝ መቶ ሰባ አራት) ለደንበኛው የክፈል በመሆኑ ገንዘቡ ከተከፈለበት ከ20/04/2010 ዓ/ም ጀምሮ ከሚታሰብ 9% ወለድ ጋር እንዲሁም ከላሽ በክሱ ምክንያት ያወጣውን ወጪ ተከላኾች ለከላሽ እንዲፍሉ እንዲወሰን ዳኝነት የጠየቀ ሲሆን የሰነድ ማስረጃዎችን ከክሱ ጋር አያይዞ አቅርቧል።

ተከላኾችም መልሳቸውን ያቀረቡ ሲሆን 1ኛ ተከላሽ ጥቅምት 27 ቀን 2011 ዓ/ም ባያያዘው መልስ ላይ የ1ኛ ተከላሽ ተሽከርካሪ በሕብረት ኢንሹራንስ ኩባንያ አ.ማ የመድን ሽፋን የተሰጠው በመሆኑ ኢንሹራንሱ (1ኛ ጣልቃ ገብ) ወደክርክሩ ጣልቃ እንዲገባ በመጠየቁ እና ፍ/ቤቱም ጥያቄውን ያመነበት በመሆኑ በፍ/ብ/ስ/ህ/ቁ 43 መሰረት ወደ ክርክሩ ጣልቃ ገብቶ እንዲከራከር አሟልቷል።

1ኛ ጣልቃ ገብ በበኩሉ ታህሳስ 18 ቀን 2011 ዓ/ም ባቀረበው የመከላከያ መልስ ከላሽ ያቀረበው ክስ የCOMESA ብሄራዊ ቢሮን የሚመለከት በመሆኑ ኢትዮጵያ የሚገኘው ብሄራዊ ቢሮ (2ኛ ጣልቃ ገብ) በፍ/ብ/ስ/ህ/ቁ 43 እና በCOMESA ፕሮቶኮል መሰረት ጣልቃ ገብቶ እንዲከራከር የጠየቀ ሲሆን ፍ/ቤቱም የ1ኛ ጣልቃ ገብን ጥያቄ በመቀበል በኢትዮጵያ የሚገኘው ብሄራዊ ቢሮ ወደ ክርክሩ ጣልቃ ገብቶ እንዲከራከር ትእዛዝ ሰጥቷል።

በመቀጠልም 1ኛ እና 2ኛ ጣልቃ ገቦች በመከላከያ መልሳቸው ላይ የመጀመሪያ ደረጃ መቃወሚያዎችን አንስተዋል።

1ኛ ጣልቃ ገብ ያነሳው መቃወሚያ ከኢትዮጵያ ውጪ በCOMESA አባል ሀገራት ውስጥ 1ኛ ተከላሽ ለሚያደርሰው አደጋ ቢጫ ካርድ (yellow card) የሰጠ ቢሆንም ጅቡቲ ለደረሰው አደጋ ካላ የሚከፍለው ኢትዮጵያ ወይም ጅቡቲ ያለው ብሄራዊ ቢሮ በመሆኑ 1ኛ ጣልቃ ገብ በጉዳዩ እንዲገባ የሚያስገድደው የህግም ሆነ የውል መሰረት ባለመኖሩ በጉዳዩ ውስጥ ገብቶ መከራከር እንደሌለበት በመግለፅ በፍ/ብ/ስ/ህ/ቁ 244/2011 መሰረት ከክርክሩ ለወጣ ይገባል የሚል ነው።

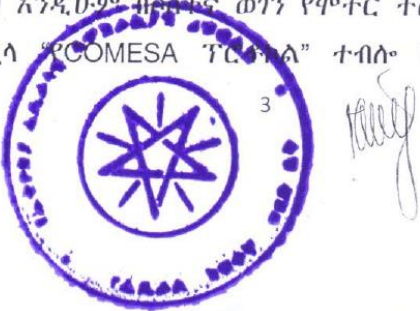


2ኛ ጣልቃ ገብ ያቀረባቸው መቃወሚያዎች በCOMESA ስምምነት እና የስምምነቱ አባሪ በሆኑ ፕሮቶኮሎች፣ ስምምነቶች እና የአሰራር ማነ-ዋል መሰረት አደጋው የሚስተናገደው ጉዳት በደረሰበት ሀገር ህግ ማለትም በጅቡቲ ህግ መሰረት እንጂ በኢትዮጵያ ህግ ባለመሆኑ ይህ ፍ/ቤት ጉዳዩን ለማየት የሚያበቃ ብሄራዊ የዳኝነት ስልጣን ስለሌለው ክርክሩ በፍ/ቤ/ስ/ህ/ቁ 244/2/ሀ መሰረት ውድቅ እንዲደረግ፣ የCOMESA ቢ.ጫ ካርድ ተጠቃሚ የሆነ ተሽከርካሪ የሚያደርሰውን አደጋ በተመለከተ በአደጋው ምክንያት ለሚቀርብ ክስ ክሱን ተቀብሎ መልስ ለመስጠት ፍቃድ የተሰጠው ብቸኛ አካል ጉዳት የደረሰበት ሀገር ብሄራዊ ቢሮ በመሆኑ በዚህ ጉዳይ ላይ ቀርቦ መከራከር ያለበት የጅቡቲ ብሄራዊ ቢሮ እንጂ የኢትዮጵያ ብሄራዊ ቢሮ ባለመሆኑ 2ኛ ጣልቃ ገብ ሊከሰስበት የሚችል በቂ ምክንያት የለም ተብሎ ፍ/ቤቱ በፍ/ቤ/ስ/ህ/ቁ 33/3 እና 244/2/መ መሰረት ክክሱ በነፃ እንዲሰናበት፣ በከሳሽ እና በደንበኛው መካከል የተደረገው የመድን ውል በኢትዮጵያ ውስጥ ብቻ ለሚደርስ አደጋ የተደረገ ሲሆን ከሳሽ ክስ ያቀረበበት አደጋ ደግሞ የተከሰተው ጅቡቲ ስለሆነ ይህንን አደጋ በተመለከተ በከሳሽና በደንበኛው መካከል ውል በሌለበት ሁኔታ ከሳሽ በደንበኛው መብት ላይ ተዳርጎ ክስ ለማቅረብ ስለማይችል በፍ/ቤ/ስ/ህ/ቁ 33/2 እና 244/2/መ መሰረት ክሱ ውድቅ ነው እንዲባል የሚሉ ናቸው።

በመቀጠልም በተነሱት መቃወሚያዎች ላይ ግራ ቀኙ የቃል ክርክር ያደረጉ ሲሆን የፅሁፍ ክርክራቸውን በማጠናከር እና ተያያዥነት ያላቸውን ጉዳዮች በማንሳት ተከራክረዋል።

ፍ/ቤቱም የተነሱትን መቃወሚያዎች የመረመረ ሲሆን 1ኛ ጣልቃ ገብ ያነሳውን መቃወሚያ በተመለከተ የቢ.ጫ ካርድ እቅድን ለመተግበር የወጡ የብሄራዊ ቢሮዎችና የአባላት መድን ኩባንያዎች መመሪያዎች (ከዚህ በኋላ “የCOMESA መመሪያዎች” ተብሎ የሚገለፅ) (The Guidelines For The National Bureaux And Member Insurance Companies On The Implementation Of The Yellow Card Scheme) በመግቢያው ላይ እንዲሁም ስለተዋዋይ ወገኖች ግዴታዎች በሚዘረዘረው ክፍል 3(b)(i) ስር አባል የሆኑ ኢንሹራንስ ኩባንያዎች የእቅዱ ተዋዋይ ወገኖች እንደሆኑ እና በእቅዱ አፈፃፀም ላይ ተሳታፊ እንደሆኑ በግልፅ ይደነግጋል።

ከዚህም በተጨማሪ በCOMESA መመሪያዎች መሰረት ስለኢንሹራንስ ኩባንያዎች ተግባራት በሚዘረዘረው ክፍል 9 እንዲሁም በሰነድ ወገን የሞተር ተሽከርካሪ መድን እቅድ ማቋቋሚያ ፕሮቶኮል (ከዚህ በኋላ “የCOMESA ፕሮቶኮል” ተብሎ የሚገለፅ) (Protocol On The



Establishment Of A Third Party Motor Vehicle Insurance Scheme) አንቀፅ 5(2)(b) መሰረት ኢንሹራንስ ኩባንያዎች ብሄራዊ ቢሮ የሚከፍለውን የጉዳት ካሳ እና ሌሎች ተያያዥ ወጪዎችን የመተካት ሀላፊነት እንዳለባቸው ይገልጻሉ።

በመሆኑም በተያዘው ጉዳይ ላይ 1ኛ ጣልቃ ገብ የቢ.ጫ ካርድ እቅዱ ተዋዋይ ወገን እና አባል መሆኑ ለደንበኛው ክሰጠው ቢ.ጫ ካርድ ያለምንም ጥርጥር መረዳት ስለሚቻል እንደተዋዋይ ወገን ከላይ የተጠቀሱት የCOMESA መመሪያዎችና ፕሮቶኮል አንቀጾች በ1ኛ ጣልቃ ገብ ላይ ተፈጻሚነት ስለሚኖራቸው እንዲሁም በፍ/ሰ/ሀ/ቁ 1731/1 መሰረት በተዋዋይ ወገኖች መካከል የተቋቋሙ ውሎች ባቋቋሟቸው ሰዎች ላይ ህግ እንደሆነ ስለሚደነግግ 1ኛ ጣልቃ ገብ በክርክሩ ውስጥ እንዲገባ የሚያስገድደው የህግም ሆነ የውል መሰረት የለም በማለት ያነሳውን መከራከሪያ ፍ/ቤቱ ውድቅ አድርጎታል።

2ኛ ጣልቃ ገብ ያቀረበውን የመጀመሪያ መቃወሚያ በተመለከተ 2ኛ ጣልቃ ገብ በፍ/ሰ/ሰ/ሀ/ቁ 27 መሰረት ለክሱ መነሻ የሆነው ጉዳይ ከኢትዮጵያ ውጪ በመከሰቱ ምክንያት ፍ/ቤቱ ጉዳዩን የማየት ብሄራዊ ስልጣን እንደሌለው ቢቃል ክርክሩ የገለፀ ሲሆን በእርግጥም አንቀፅ ካሳ የመጠየቅ ክርክር ጉዳቱ በደረሰበት ቦታ ለሚገኘው ፍ/ቤት ሊቀርብ ይችላል የሚል ቢሆንም ይህ ማለት ተከራካሪ ወገኖች ጉዳያቸውን የሚያቀርቡበትን ቦታ በተመለከተ አማራጭ እንዳላቸው ከማላየት ወጪ ሌላ ፍ/ቤት ጉዳዩን ማየት አይችልም የሚል ክልከላ አያስቀምጥም።

ከዚህ በተጨማሪ በፌደራል ፍርድ ቤቶች አዋጅ ቁጥር 25/88 አንቀፅ 11/2/ሀ መሰረት የፌደራል ክፍተኛ ፍ/ቤቶች የግለሰብ አለም አቀፍ ህግ የተመለከቱ ጉዳዮችን የማየት ስልጣን እንዳላቸው በግልፅ ተደንግጓል።

2ኛ ጣልቃ ገብ ጉዳዩ መታየት ያለበት በጅቡቲ ሀገር ነው የሚል መከራከሪያ ያቀረበ ሲሆን በዚህ ዙሪያ ትክክለኛ ድምዳሜ ላይ ለመድረስ መከራከሪያውን ከግለሰብ አለም አቀፍ ህግ ጋር የተያያዙ ፅንሰ ሀሳቦችን በመመልከት መመርመር አስፈላጊ ነው። ስለሆነም የግለሰብ አለም አቀፍ ህግን ለመጠቀም ፍ/ቤቱ የሚያየው ጉዳይ በውስጡ ጉዳዩ በሌሎች ሀገራት ፍ/ቤቶች ወይም ህጎች እንዲታይ የሚያደርገው ባህሪ (foreign element) አሟልቶ ሲገኝ ነው። ይህንንም ቅድመ ሁኔታ አሟልቷል ከሚያስብለው መመዘኛዎች መካከል አንዱ ጉዳዩ ወይም ድርጊቱ የተፈፀመበት ቦታ ክስ ከቀረበበት ሀገር ውጪ ሆኖ ሲገኝ ነው። ስለሆነም በተያዘው ጉዳይ ላይ

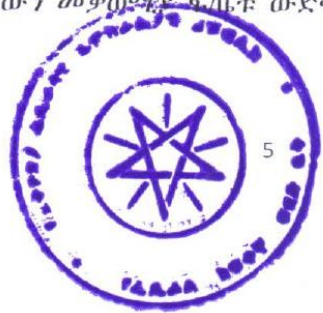


የከላሽ ደንቦች ተሽከርካሪ አደጋ የደረሰበት ጅቡቲ ውስጥ በመሆኑ ጉዳዩን በግለሰብ አለም አቀፍ ህግ መሰረት ለማየት እንደሚቻል አጠራጣሪ አይደለም።

ከዚህ በፊት እንደተጠቀሰው ከላሽ ክስ ያቀረበበትን ጉዳይ በተመለከተ በግለሰብ አለም አቀፍ ህግ መሰረት ጉዳዩን ለማየት ይህ ፍ/ቤት ብሄራዊ ስልጣን አለው ከሚያስብሉት ምክንያቶች መካከል ጉዳዩ በጅቡቲ ከሚታይ ይልቅ ከኢትዮጵያ ጋር የሚያያይዙት ጉዳዮች (connecting factors) ብዙ በመሆናቸው ለዚህም መገልጫው ከላሽ፣ ተከላሾች እንዲሁም ጣልቃ ገቦች የኢትዮጵያ ዜጎች አልያም አድራሻቸው በኢትዮጵያ የሚገኝ በመሆናቸው ጉዳዩን ለመከታተል ለሁሉም ወገኖች አመቺ ከመሆኑ አንጻር ጉዳዩ በጅቡቲ ሀገር እንዲታይ ማድረግ ለተከራካሪ ወገኖች አመቺ ካለመሆኑም በተጨማሪ ፍትሀዊ ባለመሆኑ ጉዳዩን ይህ ፍ/ቤት የማየት ብሄራዊ ስልጣን አለው።

ከዚህ ቀጥሎ 2ኛ ጣልቃ ገብ ጉዳዩ መታየት ያለበት በጅቡቲ ህግ ነው የሚል መከራከሪያ ያቀረበ ቢሆንም ለክሱ መነሻ የሆነው አደጋ የደረሰው ጅቡቲ ከመፈጸሙ ውጪ ጉዳዩን በተመለከተ የኢትዮጵያ ህግ ጥቅም ላይ ሊውል ይገባል ወይስ የጅቡቲ ህግ? የሚል ጥያቄ የሚያስነሳ ምክንያት ስለመኖሩ 2ኛ ጣልቃ ገብ በክርክሩ ላይ ጠቅሶ አልተከራከረም። በሀገሮች መካከል ተፈጻሚ የሚሆነውን ህግ የመምረጥ ጉዳይ (choice of law) መርህ የሚመጣው ፍ/ቤቱ የየትኛውን ሀገር ህግ ቢጠቀም አግባብነት አለው የሚለውን መዝና የተሻለውን ለመጠቀም የሚያስችለው ነው እንጂ ጉዳዩን ከማየት የሚያግደው አይሆንም።

በአጠቃላይ ፍ/ቤቱ ይህንን መቃወሚያ ሲመረምር አደጋው ጅቡቲ ውስጥ ከመከሰቱ ውጪ የጅቡቲ ህግ ጥቅም ላይ ሊውል ይገባል የሚለውን የ2ኛ ጣልቃ ገብ መከራከሪያ ተገቢ ሆኖ አላገኘውም። ይልቁንስ 2ኛ ጣልቃ ገብ በመከላከያ መልሱም እንደጠቀሰው ለጉዳዩ በይበልጥ አግባብነት ያለው ህግ የCOMESA ስምምነቶች ናቸው። በዚህ ረገድ ፍ/ቤቱ ይህንን ክስ ተቀብሎ በነዚህ ስምምነቶች መሰረት ውሳኔ ከመስጠት የሚያግደው ህግ የለም። እንዲያውም ፍ/ቤቶች የሚያዩት ጉዳይ በሀገር ውስጥ ህግ የማይሸፈን በሚሆንበት ጊዜ አለም አቀፍ ስምምነቶችን መሰረት አድርገው ውሳኔ መስጠት እንደሚችሉ በኢ.ፌ.ዲ.ሪ ህገ-መንግስት አንቀፅ 9(4) ከተጠቀሰው መገንዘብ ይቻላል። በመሆኑም 2ኛ ጣልቃ ገብ ጉዳዩ በጅቡቲ ህግ መሰረት መታየት አለበት በማለት ያቀረበውን መቃወሚያ ፍ/ቤቱ ውድቅ አድርጎታል።



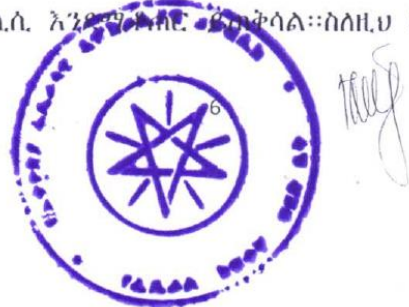
Handwritten signature or initials in blue ink.

የ2ኛ ጣልቃ ገብ 2ኛ መቃወሚያን በተመለከተ የቀረበውን መከራከሪያ ፍ/ቤቱ የመረመረ ሲሆን 2ኛ ጣልቃ ገብ ይህን መቃወሚያ ለማቅረብ መሰረት ያደረገው የሶስተኛ ወገን የሞተር ተሽከርካሪ መድን እቅድ ለመተግበር በብሄራዊ ቢሮዎች መካከል የተደረገውን የውስጥ ስምምነት (ከዚህ በኋላ “የCOMESA ስምምነት” ተብሎ የሚገለፅ) (Inter-Bureaux Agreement For The Implementation Of The Third Party Motor Vehicle Insurance Scheme) አንቀፅ 14 ነው። ነገር ግን ይህ አንቀፅ የሚለው አደጋው የደረሰበት ሀገር ብሄራዊ ቢሮ በመድን ዋስትና ገቢ ላይ የፍ/ቤት ጉዳይ የማቅረብ ስልጣን ወይም የመክሰስ ስልጣን እንዳለው ነው እንጂ 2ኛ ጣልቃ ገብ እንዳለው ክስ በሚመሰረትበት ጊዜ መልስ መስጠት ወይም መከራከር እንዳለበት የሚገልፅ አይደለም።

ከዚህም በተጨማሪ በCOMESA መመሪያዎች መሰረት በክፍል 9 ስር የብሄራዊ ቢሮ ተግባራት ተብለው ከተዘረዘሩት መካከል ቢጫ ካርድ የተሰጣቸው ተሽከርካሪዎች ከሀገር ውጪ ሆነው ሲያሸነገኑ ለደረሰባቸው ጉዳት ካላ በሚጠይቁበት ጊዜ በሀገራቸው የሚገኘው ብሄራዊ ቢሮ ሽፋን የሰጠውን ኢንሹራንስ ከባንያ ወክሎ ይህንን ካላ የማስተናገድና እዳውንም የመክፈል ሀላፊነት እንዳለበት በግልፅ ይደነግጋል።

በአጠቃላይ በCOMESA ስምምነት መሰረት የተቋቋሙት ብሄራዊ ቢሮዎች ከቢጫ ካርድ እቅድ (Yellow Card Scheme) የሚመነጩ በየሀገራቱ ያለውን ብሄራዊ ቢሮ የጋራ ጥቅም ከማስከበር አንፃር የተቋቋሙ እና ከተደራሽነት አንፃር በእያንዳንዱ የCOMESA አባል ሀገራት ውስጥ ቅርንጫፍ ሆነው የእቅዱን ጠቅላላ ስራ ከማቀላጠፍ አንፃር የተቋቋሙ በመሆናቸው 2ኛ ጣልቃ ገብ በጉዳዩ ውስጥ ገብቺ ልከራከር አይገባም ሲል ያቀረበውን መቃወሚያ ፍ/ቤቱ ውድቅ አድርጎታል።

በመጨረሻም 2ኛ ጣልቃ ገብ ያነሳውን መቃወሚያ በተመለከተ ፍ/ቤቱ ጉዳዩን የመረመረ ሲሆን 2ኛ ጣልቃ ገብ ለዚህ ክርክር መነሻ ያደረገው በፖሊሲው ላይ ሽፋን የተሰጠበት ቦታ ኢትዮጵያ ብቻ ተብሎ የተቀመጠ በመሆኑ ነው። ከላሽ በማስረጃነት ካያያዛቸው ሰነዶች መካከል ለደንበኛው የሰጠውን ቢጫ ካርድ ሲሆን በCOMESA ስምምነት አንቀፅ 1(Q) መሰረት ቢጫ ካርድ መኖሩ አደጋው በደረሰበት ሀገር ህግ እና ደንብ መሰረት የ3ኛ ወገን ሽፋን ለመኖሩ ማስረጃ ሆኖ እንደሚያገለግል ከመግለፁም በተጨማሪ በCOMESA መመሪያዎች መሰረት ደግሞ ቢጫ ካርድ በራሱ እንደኢንሹራንስ ፖሊሲ እንደሚሰጠው ይጠቅሳል። ስለዚህ ከላሽ ለደንበኛው ቢጫ ካርድ



መስጠቱ በCOMESA አባል ሀገራት ውስጥ ለሚደርሱ ጉዳዮች ሽፋን መስጠቱን በተዘዋዋሪ የሚያመላክት መሆኑን ለመረዳት ይቻላል።

ከዚህም በተጨማሪ ከላሽ ለደንበኛው ከሰጠው የ3ኛ ወገን መድን ፖሊሲ ጋር ተያይዞ በሰጠው የጭነት ኢንሹራንስ ፖሊሲ ላይ ከኢትዮጵያ በተጨማሪ በጅቡቲ እና በሱዳን ለሚደርስ ጉዳት ሽፋን የሰጠ መሆኑን ፍ/ቤቱ ከክሱ ጋር የተያያዙ ማስረጃዎችን በማየት ተገንዝቧል። በመሆኑም ከላሽ የመድን ሽፋን የሰጠበትን ቦታ በተመለከተ ኢትዮጵያን ብቻ መጥቀስ የአፃፍ ስህተት ነው እንጂ ከላይ የተጠቀሱት ሁኔታዎች ከላሽ ለደንበኛው በCOMESA አባል ሀገራት ውስጥ ለሚደርስ አደጋ ሽፋን የሰጠ መሆኑን በግልፅ መረዳት ስለሚቻል ከላሽ በደንበኛው ላይ ተዳርጎ ክስ የማቅረብ መብት የለውም የሚለውን የ2ኛ ጣልቃ ገብ መቃወሚያ ፍ/ቤቱ ውድቅ አድርጎታል።

በመሆኑም 1ኛ እና 2ኛ ጣልቃ ገቦች ያቀረቧቸው የመጀመሪያ ደረጃ መቃወሚያዎች ውድቅ በመሆናቸው ምክንያት በክሱ ላይ የፍሬ ነገር ክርክር ሊቀጥል ይገባል የሚል ብይን ተሰጥቷል።

ገጽ 4
በቀጠላ ገጽ 4 ላይ ይገኛል ለመገምገም ለ17/07/2012
9/20 8:30 ተጠቅሞ



[Handwritten signature]