

Overview of Some Gaps Regarding the Regulation of Construction Insurance in Ethiopia: A Note

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Abstract

Construction is a risky business. However, such risk can be managed, minimized, shared, or transferred through insurance. In the developed world, it is difficult to practice construction business in the absence of sufficient cover of insurance. Adequate insurance policy could satisfy the interest of the general public, client, construction workers, and other concerned parties. In Ethiopia, though construction insurance is evolving, it is not given proper attention by concerned stakeholders such as law makers and legal professionals. Accordingly, this note explores the legal lacunas observed in the regulation of different types of insurance policies that are apt to manage risks on construction projects in Ethiopia. To discover the gaps and scrutinize the contesting legal issues, the writer employed a doctrinal research method. In the investigation, it is found out that variables such as rigid standard insurance policies, complex insurance policy language, absence of mandatory insurance for license renewal — mainly for contractors and consultants, excessively expensive premium, and lack of coordination between parties of the insurance policies are major sources of legal gap in this regime of law. As a result, the writer suggests areas of improvement to rectify these gaps. Particularly, it is imperative for the legislature synchronize the insurance policy laws in the country, eliminating conflicts, make insurance mandatory for license renewal, set fair insurance policy premium, and use concise language in drafting the policies.

Keywords: Client, Contractor, Consultant, FIDIC, Insurer, MoWUED, Sub-contractor.

Introduction

Risk is an inherent part of any construction project.¹ Usually, the inherent risk is exacerbated by the interdependence among the project participants; if one participant runs into financial difficulty, it is likely to impact the entire project.²

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¹ Gail S. Kelley, Construction Law, An Introduction for Engineers, Architects, and Contractors, John Wiley & Sons, Inc., (2013), p.197. [here in after Gail S. Kelley].

² Ibid.

Further, construction industry is highly risk prone with complex and dynamic project environments which create an atmosphere of high uncertainty. The industry is vulnerable to various technical, socio-political and business risks. It is sensitive to an extremely large matrix of hazards and thus to risks.³ This sensitivity is, in turn, due to some of the inherent characteristics of construction projects such as long period, complicated processes, hostile environment, financial intensity, dynamic organizational structures, and diverse interests of project stakeholders.⁴

It is, therefore, extremely relevant for the construction industry and those involved in it to understand the concept of risk and to equip themselves with knowledge and skills to manage the risk matrix generated when a construction project is initiated.⁵ Managing risks in construction projects has been recognized as an important process to achieve project objectives in terms of time, cost, quality, safety, and environmental sustainability.⁶ Moreover, the need for suitable insurance policy is unquestionable to satisfy the interest of the client, to achieve the required quality and standard, to safeguard the safety of workers and the general public during and after construction, and for proper utilization of public resources.⁷

Yet, in Ethiopia, despite the boom in the construction industry, construction firms, their clients, law makers, legal professionals, and the society in general fail to appreciate such roles of insurance policies.⁸ These problems, the author supposes, can be traced to failure in institutional accountability and deficiency in professional training. For example, concerning legal professionals, the main reason for their lack of proper understanding may be the failures of the existing scholarship on teaching construction law in general and construction insurance in particular. The law schools in Ethiopia offer construction law as an eclectic course rather than a mandatory one in their LLB programs. While the current educational law school programs overlook this discipline, no sign of attempt has been made to comprehensively map the offering of the course in the future. In

³ Nael G.Buni, *Risk and Insurance in Construction*, Second Edition, Spon Press, Taylor and Francis Group, (2003), pp. 30-32 [here in after Bunn].

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Patrick, Guomin, and Jiayuan, *Understanding the Key Risks in Construction Projects in China*, *International Journal of Project Management*, Vol. 25, No.6, (2007), p.612.

⁷ Abebe Dinku, *Insurance Requirements and Practices of Ethiopia's Construction Sector*, *Journal of EAEA*, Vol.17, (2000), p. 35 [hereinafter Abebe Dinku]. Though this article is published 20 years ago, its finding on the benefit of insurance for construction industry and the then problems in the Ethiopian construction industry are intact today.

⁸ *Ibid.*

addition, an improvement is mandatory on those laws regulating the establishment and operation of the construction insurance policy, and on those laws determining the rights and duties of the stakeholders such as clients, contractors, and consultants. This note explores these loopholes and their sources at greater depth in the regulation of construction insurance in Ethiopia. Further, it suggests remedies to redress the gaps identified. The note employed doctrinal research method which is based on the identification, synthesis and analysis of the law regulating construction and construction insurances.

The themes in the note are organized in six sections. Following this introductory section, in the first section, terminology of risk, construction, insurance, and construction insurance are explained. In section two, the writer evaluates the major rationale behind construction insurance. Section four identifies the major types of insurance policy in construction industry. In section five, the note shows some loopholes in the regulation of construction insurance in Ethiopia. Finally, it concludes by suggesting areas of improvement in the formulation of laws, enforcement, professional training, and public education pertaining to construction insurance policy.

1. The Definition and Forms of Construction Insurance

Different scholars define construction insurance with a slightly different phrasing, but closely similar essence. For example, Bunni, defines it as "... contracts of indemnity within the activities of the Construction industry where insurance is chosen as the medium through which liabilities are shifted."⁹ Akbiyikli defines this concept as "... a practice of exchanging a contingent claim for a fixed payment to protect the interests of parties involved in a construction project and it is a major method of managing risks in the construction industry."¹⁰

From the definitions given by the two scholars, one could see that construction insurance is a contract whereby the insurance company seeks to provide coverage and indemnify the construction contractor or the client against a potential peril, loss, damage, or liability that arises from the performance of the construction work. In the practical operation of the contract, insurance allocates the risks to which the project is exposed, between the parties while risk forms the basis of insurability and premium calculation.¹¹ As such, construction

⁹ Bunni, *supra* Note 3, p. 181.

¹⁰ Akbiyikli, Dikmen, and Eaton, Insurance Issues and Design and Build Construction Contracts, *Journal of New World Sciences Academy*, Vol. 7, No. 1, (2012), pp. 203-214.

¹¹ Bunni, *supra* Note 3, p. 181.

insurance is expressed in the form of bond or guarantee. It is to note that the main forms of bond and guarantee transacted within the construction industry take different forms such as performance bond, bid bond, advance payment bond, retention money bond, maintenance bond or defects liability bond. The next sections take each of these forms bond for further explanations.

1.1. Tender Bond or Bid Bond

The tender bond is an amount of money deposited in the form of a bank guarantee bond to compensate the damage the public body may sustain as a result of the successful bidder refusing to sign the contract. Bid bonds are intended to assure the beneficiary that the bid or tender is a serious one and that, if it is accepted, the tenderer will proceed and effect the form of contract including whatever subsequent bonding arrangements he is required to provide.¹²

The bid bonds deposit could be made either in cash, letter of credit, insurance bond or a bank guarantee.¹³ The amount of bid security shall be sufficient to discourage irresponsible bidders.¹⁴ In fixing the amount of bid security, the public body shall take into account the following points:(1) the volatility of the price of the required object of procurement, (2) the availability of adequate number of candidates to participate in the bid, (3) that the bid security required of candidates doesn't discourage them from participating in the bid, (4) that the bid security urges the successful bidder to sign the contract, (5) that the bid security is sufficient to compensate the damage the public body may sustain as a result of the successful bidder refusing to sign the contract.¹⁵ Any tenderer who fails to fulfill the conditions of tender bond will be disqualified or rejected.¹⁶

¹² Bunni, *supra* note 3, p. 199.

¹³ Federal Public Procurement Directive, MOFEC, June 2010, Articles 16.16.4 & 16.16.5. [here in after Public Procurement Directive].

¹³ Bunni, *supra* note 3, p. 200.

¹⁴ Federal Government Procurement and Property Administration Proclamation, Proc. No. 649/2009, 15th Year, No. 60, Art. 40(1). [here in after Federal Procurement Proclamation]. The Public Procurement Directive as per Article 16.16.2 provided that the amount of bid security shall be between 0.5-2 % of the total estimated contract price and the maximum amount of bid security shall not be exceed 500, 000.00 (Five Hundred Thousand) Birr. See Public Procurement Directive, *supra* note 13, Article 16.16.2.

¹⁵ See Public Procurement Directive, *supra* note 13, Article 16.16.3.

¹⁶ Article 16.21 of the Public Procurement Directive puts the condition of rejection of Bid Bond such as committing corruption, violation of the procurement proclamation and directive, breach of obligation in previous contract and the like. See Public Procurement Directive, *supra* note 13, Article 16.21.

The forms to be used for submission of tender bond shall be included in the tender documents.¹⁷

1.2. Performance Security or Bond

Performance bond is issued for the completion of the contract or given as a guarantee for the performance of the contractual obligation.¹⁸ According to Bunni, unless it is specifically provided, the bond is issued for the completion of the contract and not for its proper implementation.¹⁹ Bunni argued that keeping the bond beyond the contract period is of no value to the owner unless the usual format of the bond is changed to include the word ‘proper’ or similar terminology to incorporate the standard of performance into the bond.²⁰

In Ethiopia, for every contract, a public body shall receive performance security, an amount equal to 10% of contract price, within 15 days from the conclusion of the contract.²¹ It will be used to compensate damages suffered by the public body due to failure by contractors to perform the contract.²²

1.3. Advance Payment Bond

Advance payment bond is issued to assure the beneficiary that any sums of money advanced will not be lost through default or poor performance by the party in receipt of the advance.²³ It is submitted in cheque /unconditional bank guarantee from a bank, equal in amount to the advance payment.²⁴ However, under the Ethiopian laws, domestic contractors may submit unconditional, irrevocable and payable on demand advance payment security and conditional advance payment security issued by a bank.²⁵ The client and contractors may conclude an agreement on the use of the advance payment. Finally, advance

¹⁷ Federal Procurement Proclamation, *supra* note 14, Article 40; Public Procurement Directive, *supra* note 19, Article 16.16.

¹⁸ The FIDIC: Federation Internals des Ingenieurs Conseils: International Federation of Consulting Engineers, Clause 10. [here in after FIDIC]; Federal Procurement Proclamation, *supra* note 14, Article 47; Public Procurement Directive, *supra* note 13, Article 16.25.

¹⁹ See Bunni, *supra* note 3, p. 200.

²⁰ *Ibid.*

²¹ Public Procurement Directive, *supra* note 13, Article. 16.25.2. The tender should include the period of validity of the bond, the procedures to be followed if the bond is said to be forfeited and arrangements for its release.

²² Public Procurement Directive, *supra* note 13, Article. 16.25; see also Federal Procurement Proclamation, *supra* note 14, Article 47.

²³ See Bunni, *supra* note 3, p.200.

²⁴ Federal Procurement Proclamation, *supra* note 14, Article 48; Public Procurement Directive, *supra* note 13, Article 16.26. 2.

²⁵ Public Procurement Directive, *supra* note 13, Article 16.26 (3 -9).

payment shall not exceed 30% of the contract price and to be stated in the contract price.²⁶

1.4. Retention Money Bond

According to Bunni, retention money bond is “issued to allow the release of retention money usually held by the beneficiary”.²⁷ The employer may retain certain amount of money from each payment due to the contractor until the completion of the whole of the works. In Ethiopia, Five percent of the certificate amount shall be retained from payment indicated in each payment certificate (PC).²⁸ Half of the total retained is released upon completion of works and issuance of provisional acceptance certificate while the remaining 50% shall continue to be retained for one-year period of warranty. However, such sum may be released on condition that the contractor submits unconditional guarantee valid for 12 months.²⁹

2. Types of Insurance Policy in Construction Industry

Construction insurance policies must be specially designed to respond to the circumstances.³⁰ It means an insurance policy needs to be specially designed according to the nature of the project, the types of procurement, and construction contract.³¹ Under the Construction Works Contract, a contractor is expected to produce five different insurance policies. Contractor’s all risk policy, contractor’s comprehensive commercial vehicles policy, third party’s liability policy, workmen’s compensation policy, and decennial or inherent defect policy. These insurance policies cover distinct forms of risks. The following sections elaborate their contents and differences.

2.1. Contractor’s All Risk Policy

In principle, the meaning of *Contractor’s All Risks* is all the risks attributed to construction Works. It covers loss or damage from whatever cause to the contract works or materials on the contract site(s) and in use in connection with the contract during the performance of the contract and the period of

²⁶ Id, Article 16.26(1).

²⁷ See Bunni, *supra* note 3, p.200.

²⁸ Public Procurement Directive, *supra* note 13, Art. 28.5(b).; see also General Condition of Contract- Public Procurement Agency, 2006, Clause 48 & 49.

²⁹ Public Procurement Directive, *supra* note 19, Article 28(5) (c).

³⁰ Bunni, *supra* note 3.

³¹ Junying, Bingguang, and Jiong, Insurance and construction project risks: a review and research agenda, InProc 12th Annu PBFEA Conf, (2004), p13.

maintenance.³² Yet it is important to note that not all risks affecting the construction works are insurable. Particularly, the exception to the principle, stipulates that risk must be unforeseeable or unintended by a prudent contractor. Even if the risk is unforeseeable, the damage that may entail may be extremely high which is beyond the capacity of insurers hence is uninsurable.³³ For example, risks arising from war, ionizing radiation, or contamination; pressure waves caused by aircraft or aerial devices, act of foreign enemies etc. Such types of risks are generally excluded by the insurance market, hence are uninsurable risks.³⁴ Apart from these risks, insurers also restrict certain risks or limit their coverage. Sometimes the contractors also may accept certain deductions just to minimize the premiums. The FIDIC conditions of contract require the contractor to take out such a policy in the joint name of the client and the contractor.³⁵

2.2. Contractor's Comprehensive Commercial Vehicles Policy

The Contractor is responsible to insure the works, plants, materials and equipment for incorporation into the works. However, damages to third parties caused by commercial vehicles of the Contractor are not usually covered by the third-party insurance policy. They are excluded risks since self-propelled vehicles licensed for road use are not covered under plant and equipment insurance of the Contractor's All Risk Policy.³⁶ As a principle under insurance laws, insurable risks are departmentalized and vehicle insurance is a separate department from construction insurance and requires a separate policy. Accordingly, a construction Contractor is required to produce a comprehensive commercial vehicle and private vehicle policy for these vehicles utilized in the construction.³⁷ Moreover, if the contract states that the Contractor is responsible to provide vehicle to the Consultant, that vehicle should have commercial vehicle insurance policy coverage. Thus, this insurance policy alerts contractors and third-party clients to the separate cover given to vehicles in construction businesses.³⁸

³² Abebe Dinku, *supra* note 7, p.30.

³³ Debebe Moges, Check Lists for construction Insurance Policies, Legal Service Department, Ethiopian Road Authority, p.5. Unpublished, this is available on the writer library. [here in after called Debe Moges].

³⁴ FIDIC, *supra* note 18, Clause 20.

³⁵ Id. Clause 20 and 21.

³⁶ Debebe Moges, *supra* note 33, p.5.

³⁷ Ibid.

³⁸ Id, p.4.

2.3. Third Party's Liability Policy

A third-party liability insurance policy covers loss or damage to third party persons or property arising out of the construction or maintenance of the works. To put it in other words, it means anyone who is not directly a party to the insurance contract may sustain damage due to accidents connected to the operation of the construction business. The FIDIC conditions of contract require the contractor to buy this policy covering the such damages.³⁹ At this point it is important to note that third party liability policy does not cover the contractor's employees or that of the employer's employees in the project as these risks are to be insured under separate insurance policy. The policy is mainly against liabilities for death or injury to any person or loss by or damage to any property arising out of the execution of the contract other than the exceptions stated in the contract. The contractor shall produce this policy in the joint name of the Contractor and the Employer.⁴⁰

2.4. Workers' Compensation Policy

Worker's compensation insurance is designed to cover workers who are injured in the course of employment.⁴¹ The contractor is contractually responsible to insure his employees working in the construction project.⁴² The Contractor's workers are excluded from the third party liability insurance policy coverage since damage resulting from the process of construction works in the case of employees fall under separate sector of insurance. Therefore, workers compensation policy covers damages in respect of injuries to employees in their employment, or employment of any sub-contractor.⁴³

2.5. Inherent Defect Policy

The inherent defect policy is usually required for constructions of buildings or structures. It is transacted to cover the liability of those involved in construction for latent defects in the stability of the structure and for major defects in the weather shield for ten years.⁴⁴ In most jurisdictions including Ethiopia the period of limitation for inherent defect insurance policy is ten years from the

³⁹ FIDIC, *supra* note 18, Clause 22 & 23.

⁴⁰ Debebe Moges, *supra* note 33, p.6.

⁴¹ Gail S. Kelley, *supra* note 1, p.201. According to Gail's workers are entitled to compensation without regard to fault and without having resort to litigation. In exchange for guaranteed compensation, workers give up their right to sue their employer for employment-related injuries.

⁴² Abebe Dinku, *supra* note 7, p. 31.

⁴³ *Id.*, p. 31.

⁴⁴ See Bunni, *supra* note 3, p.200.

final taking over certificate of the project.⁴⁵ Article 3282 of the Civil Code of Ethiopia adopted this ten years guarantee or warranty in respect of defects of construction.⁴⁶ Where there is a problem in structures, there will be difficulty in identifying the causes of problems as to whether it is due to design, defects in materials or due to problems in workmanship. So, this policy is intended to cover such inherent defects that may arise from design, workmanship or defect in materials in buildings or structures within ten years from its completion.

3. Gaps in the Regulation of Construction Insurance in Ethiopia

While an attempt has been made by legislators to distinctively departmentalize insurance policies and explicitly stipulate the rules of the respective purposes, there are still gaps in the regulation and working environment of construction insurance in Ethiopia. In this section, the writer tries to examine these gaps in the real operation of the construction business and the interaction of parties in the processes thereof. These gaps take on different forms. Some of them are related to professional indemnity insurance and lack of coordination between concerned parties while others are concerned with rigid and complex insurance policy language use and formality requirement of construction insurance. Still others are about lack of professional measurement of premium and compensations and deficiency on the coverage of construction insurance. Each of these gaps are elaborated at greater depth in the next sub sections.

3.1. Gaps Related to Professional Indemnity Insurance

Professional indemnity insurance insures against liability arising from professional negligence. Reasonable care and diligence is required from architects, engineers, quantity surveyors, professional consultants and a building contractor.⁴⁷ Each will have their own insurance policy to indemnify them

⁴⁵ Ibid, Bunni cited the French Civil code, Articles 2270 & 2820; Italian Civil code, Law No.1086 of Nov 1971, the Spanish Civil Code, art. 1591, Belgian civil code, art.1792, the Dutch Civil Code, art 1645). Art 1792 of the French civil code of 1979 provided that “any architect, contractor, technician, or other person bound to the owner of the structures by a work contract is legally responsible to the owner or those deriving title from him for any damage which jeopardize the integrity of the structure or which by affecting one of its component element or one of the equipment elements renders the structure unfit for its intended purposes.

⁴⁶ Civil Code of Ethiopia, the Federal Negarit Gazeta, Year No.2, Proc. No. 165/1960, Article 3282. [here in after Civil Code).

⁴⁷ Standard professional indemnity policies cover the insured against liability for professional negligence, but there are considerable doubts as to whether they extend to other forms of liability. Thus, if the architect is held to have guaranteed the suitability of a design, rather than merely undertaking that reasonable skill and care has been used, any resulting liability might well not be covered. Policies could specifically exclude liabilities that the professional voluntarily assumes by way of such guarantees. See

against liability for professional negligence.⁴⁸ The policy is taken as a cover against their liability for acting negligently. For example, in case where a structure collapses during construction because of faulty design, the client would be compensated for the loss arising out of designer's negligence and all resulting cost of damage thereof.

In Ethiopia, professional indemnity insurance policy is one of the rare elements in the operation of construction businesses. According to Abebe, there are different reasons for the rarity. First, the government and/or clients in Ethiopia do not demand for it and the policy has never been exercised by insurance companies; or if they exercise it at all, it is too expensive.⁴⁹ The other problem of this policy is that it may be valid and adequate within construction period, yet it may be discontinued after the construction is completed.⁵⁰ This means that a latent design fault discovered after completion of the construction is not covered by professional insurance.

Research evidence on such problems uncover the gap in the regulation of construction insurance policy in this country. For example, Getachew revealed that though consultants of construction firms are required to provide the professional indemnity insurance equivalent to the contract amount and valid for the period of the service contract, a majority of the design and supervision consultants involved in the road projects do not have effective professional indemnity insurance for the service they deliver.⁵¹ One could guess the damage the employer (the government or the public in this case) would sustain upon the occurrence of professional negligence in the design or supervision of road constructions which consumes huge public budget. Given the magnitude of public interest visible in such situations, this author argues, it is imperative to include professional indemnity insurance as a mandatory element of contractual obligations.

3.2. Lack of Coordination Between Concerned Parties

In the operation of a construction work, it is presumed that the client, consultant, insurance companies and the contractor cooperate to the effect of identifying

Will Hughes, et.al., *Construction Contracts, Law and management*, Routledge, Taylor & Francis Group, 5th eds., 2015, p. 271.

⁴⁸ Id, p. 270.

⁴⁹ Abebe Dinku, *Supra* note 7, pp.1-35. Abebe mentioned an instance as this policy is not a criterion for license renewal for contractor and consultant.

⁵⁰ Id, p. 30.

⁵¹ Getachew Yilma, *The Practice of Construction Risks Management through Insurance in the Ethiopian Federal Road Projects*, Msc Study, *Addis Ababa University, 2014*, p.97.[here in after Getachew Yilma].

and allocating risks to the party who is supposed to better control and manage it. As such, the reasoned risk allocation strategy in construction industry is a *win-win* proposition for all project participants. Such a strategy tries to allocate specific risks based on an analysis of which party is best able to evaluate, control, manage, and assume the risk.⁵²

However, the problem is that the contracting parties mainly provide insurance coverage to meet the demand of the client rather than to avoid possible risks. The client mainly uses the opinion of external consultants (design and supervision consultants) as a primary means of risk identification. Contractors, on the other hand, conduct risk analysis at the time of tendering. Due to complex characteristics of construction projects, a construction project insurer's opportunity lies in the drafting, negotiating, and concluding of a bearable long-term insurance agreement, it is therefore, necessary for construction insurers to get involved in the risk identification, allocation, drafting and negotiation of insurance policies before and during construction. Nevertheless, in practice most of the insurance companies provide insurance coverage without normally visiting sites such as road construction projects.⁵³

According to the evidences reported by Getachew, most of the contractor groups just add a percentage to budget/cost to cope with uncertainties rather than implementing mathematical risk analysis tools to quantify risks.⁵⁴ He discovered that the insurance premium is fixed mainly based on the location of the project and the contract amount of the project.⁵⁵ He further added that most of the contractual agreements between client and consultant, client and contractor, contractor and sub-contractor do not require adequate insurance cover.⁵⁶ Moreover, the research evidences showed that the cooperation and coordination among the contracting groups in the identification and management of risks with insurance companies is insignificant.⁵⁷

Therefore, this author takes the view that drafting a common contract involving all concerned parties would be one means of increasing cooperation and proper risk allocation among interested parties. Though it is not common in Ethiopia and abroad in content, it is commendable to reconsider of the existing contractual relations and to develop a single and comprehensive construction

⁵² Bunni, *Supra* note 3, p.43.

⁵³ Getachew Yilma, *supra* note 51, pp.96-99

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

insurance contract that involves all concerned parties namely the client, the contractor, and insurance companies.

3.3. Rigid and Complex Insurance Policy Language Use

One of major source of problems in the operation insurance policy in the Ethiopian construction industry is the adhesion nature of construction contract. That is, insurance companies follow a universal standard in drafting insurance policies. As such, policy clauses provided under the general and special conditions of contract are copied verbatim from FIDIC and it is difficult to understand due to its technical and complex language use. So, it is this writer's view that drafting the insurance policy in plain language and updating it from time to time. Besides, as stated earlier it would be proper to design an insurance policy according to the nature of projects, the types of procurement and construction contract as well as its limitation and coverage than adopting standard policy words that are forwarded by the insurance companies.

Secondly, there are tendencies of using warranties⁵⁸ and conditions⁵⁹ interchangeably while the two have different legal effects. In his examination of the meanings carried by these terms, Zekarias indicates that conditions and pre-conditions are in many respects similar to what are known as warranties and it is invariably difficult to distinguish between the two in the way they are expressed in insurance policies currently in use.⁶⁰ Zekarias further argues that the non-observance of warranty clauses always exonerates the insurer from liability while this is not always true in the case of conditions precedent.⁶¹ This lack of clarity in the wordings and the meanings construed therein may cause uncertainties in the interpretation and enforcement of the law. Thus, it should be considered as a point of improvement through subordinate laws such as directives or amendment of the existing legislation.

⁵⁸ Warranties are essentially promises made by the insured relating to facts or things which he undertakes to do, or not to do, as the case may be. They will invariably affect the risks to which the insurer is subject. See John Birds and Norma J. Hird; *Modern Insurance Law*, Sweet and Maxwell Limited, London, (2001), p.138.

⁵⁹ Usually a notification and cooperation and supply supporting information concerning the claim are a condition precedent to the insurer's liability under the policy. For instance, if a notification clause provides that notice of a claim is to be given within a particular period of time, but in the event notice of the claim is given late, the insurer's liability will not have been triggered, and the insurer will be entitled to reject the claim. See Julian Bailey, *Construction Law*, Routledge, Taylor and Francis Group, Vol. I, II & III, 2nd eds., 2011, p.1208.

⁶⁰ Zekarias Kenea, *Issues of Controversy around Some of the Provisions of Ethiopian Insurance Laws and Contracts*, *Ethiopian Bar Review*, p.20. [here in after Zekarias Kenea].

⁶¹ *Ibid*.

3.4. Issues on the Formality Requirement of Construction Insurance

Form is the outward appearance of contract, and so the way the will of the parties becomes apparent. It is mainly about whether a contract must be written, or it suffices to be agreed orally. Article 1719 of the Civil Code provides that no special form is required of parties when they conclude a contract. Yet there are specific cases where the law imposes a formality requirement. Thus, failure to comply with the exceptionally imposed formality requirements would render a contract null and void. Concerning the formality of an insurance contract it is required to be made in written form⁶²; signed by the parties⁶³; and attested by the witness⁶⁴. The non-observance of any one of the requirements makes an insurance contract a mere draft⁶⁵ and to be invalidated.⁶⁶

In Ethiopia construction insurance contract is concluded in the form of an insurance policy and an insurance policy is defined under Art 654 of the Commercial Code of Ethiopia as “a contract whereby a person, called the insurer, undertakes, against payment of one or more premiums, to pay to a person, called the beneficiary, a sum of money where a specified risk materializes”.⁶⁷ Here, the terms and conditions of an insurance policy is drafted and signed only by an insurer ,i.e., there is no signature of an insured (contractor) and there is no mechanism of attestation by witnesses. The FIDIC, MoWUD, and the Insurance Proclamation⁶⁸ are consistent with the commercial code. Now, the issues of controversy are that how can we resolve the inconsistency between the civil code provisions with other laws including the commercial code. For example, in Ethiopian *Insurance Corporation Vs. Fetan Construction Contractors*, the Federal First Instance Court ruled that the insurance contract is invalidated by the mere fact that it is not signed by the contractors and attested by witnesses.⁶⁹ Yet the writer would dissent in the ruling of the court following the rules of interpretation based on hierarchy of special and general laws. As such the insurance proclamation, the special law in the present context, which is also in line with the commercial code, MoWUD and FIDIC, shall prevail over the general law, the provisions of the civil code.

⁶² Civil Code, *supra* note 46, Art. 1725 (2).

⁶³ Id, Art.1727(1)

⁶⁴ Id, Art. 1727 (2)

⁶⁵ Id, Art. 1720.

⁶⁶ Id, Art. 1808

⁶⁷ The Commercial Code of Ethiopia, Proclamation No. 166/1996, *Federal Negarit Gazzeta*, (1960), Art. 654. [here in after the Commercial Code].

⁶⁸ For example, see FDRE Insurance Business Proclamation, Proc No. 746/2012, *Federal Negarit Gazette*, 18th year No. 17, 22nd August 2012.

⁶⁹ *Ethiopian Insurance Corporation vs. Fetan Construction Contractors*, Federal First Instance Court, F. No. 39988, Cited by Zekarias Kenea, *supra* note 60, pp. 1-35.

So, in the present context attestation by witness, this writer holds, is not a mandatory requirement for the conclusion of insurance contract and the civil code provisions shall be amended accordingly.

3.5. Lack of Professional Measurement of Premium and Compensations

In Ethiopia, there is lack of professional experts to weight risks and insurance largely resulting in significantly expensive premium.⁷⁰ The main problem here is that the insurance premium is fixed mainly based on the location and the contract amount of the project. Concerning the cost of premium, Article 678 of the commercial code states that compensation shall not exceed the value of the object insured.⁷¹ This rule can only apply if the real value of the object insured is equivalent to the sum insured. Thus, if the sum insured is less or more than the real value of the object, its application would be at odds either with the rules expressed in Article 665(2) — which provides that the insurer's liability shall not exceed the sum insured or — with the principle that compensation shall not exceed actual damages.⁷² Another point worth noting in this respect is that construction insurance policy does not cover loss of use or consequential loss resulting from damage to the object insured. This stipulation in insurance policies has been the subject of frequent and intense disputes and some argued that the insurer must, at least, be made liable for consequential loss resulting from his failure to exercise his obligation within a reasonable period.⁷³ Thus, these hosts of contesting meanings and the absence of professionally crafted standards of premium in the policies can be potential sources of threat to the ends of insurance law in the construction industry.

3.6. Deficiency on the Coverage of Construction Insurance

In Ethiopia, there is lack of capacity of the insurance companies and absence of re-insurance scheme. Mostly, insurance companies are not efficient in responding to clients' claim and they do not give immediate attention and assistance to contractors.⁷⁴ The arrangement of insurance by contractors and consultants might be revisited to implement effective insurance policies by shifting the responsibility of purchasing of insurance to the client.⁷⁵ However, in Ethiopia, there is no insurance scheme for employers' risk. The law simply

⁷⁰ Abebe Dinku, *Supra* note 7, p.35.

⁷¹ Commercial Code, *supra* note 67, Article 678.

⁷² *Id.*, Art. 665 (2).

⁷³ See for example, Zekarias Kenea, *supra* note 69, pp.1-35.

⁷⁴ Abebe Dinku, *Supra* note 7, p.35.

⁷⁵ Getachew Yilma, *supra* note 51, p.98.

requires the ,the contractor to provide (in joint names of the employer and the contractor) insurance cover from the start date to the end of the defects liability period, in the amounts and deductibles stated in the special conditions of contract (SCC) for the contractor's risks such as loss of or damage to the works, plant, and materials; loss of or damage to equipment; loss of or damage to property, and personal injury or death.⁷⁶

A closer look into this stipulation shows exclusion of the employer's risks. Yet, who insures for such risks? While there is a possibility for such risks to occur, it is less common for contractors to require security from an owner. Further, it is believed that contractors know the need to require an owner to provide evidence of finance or capacity to pay the entire contract sum. Yet they expediently restrain themselves from doing so. Moreover, there is no sufficient insurance coverage which is limited to buildings and to some extent to road projects. There is no as such insurance coverage for other construction projects such as dams, water related structures, water storage reservoirs.

4. Concluding Remarks

The hosts of analysis and investigations presented across the different sections of this note lead us to the conclusion that there are several legal lacunas clearly visible in the regulation and working environment of construction insurance in Ethiopia. Specific instances of the gap include: rigid standard of the insurance policies; complex insurance policy language; failure to make insurance as a criterion for license renewal mainly for contractor and consultant; very expensive premium; and lack of coordination between parties of the insurance policies.

Therefore, this writer holds, the relationship between clients and consultants; clients and contractors; consultants and contractors; contractors and sub-contractors should be clearly stipulated in the pertinent insurance laws. Also, the insurance policy should be crafted in simple and plain language. Further, insurance should be made a mandatory requirement for license renewal for those get involved in risky construction projects. Finally, insurance premium and compensation should be assessed by professional experts and the assessment should take into consideration the relevant risk factors of the construction projects. Particularly, as part of risk identification, insurance companies are recommended to visit project sites at the early stage of the construction

⁷⁶ FIDIC, *supra* note 18, Clause 22 & 23.

processes and throughout the construction period rather than only when problems arise.