Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia

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Introduction

The problems addressed in this article are related to the functions, purposes, and effects of non observance of legal formalities in contracts of insurance in Ethiopia. Failure to meet the formality requirements provided in the law entails nullity of a contract. However, this paper attempts to explore and examine the various perspectives of this proposition with regard to insurance contracts. To this end, the writer has reviewed literature, conducted extensive interviews and analyzed cases.

The first section deals with formalities in Ethiopian contract law in general, and makes a general overview in respect of all types of formal contracts. It attempts to show the broad social and institutional purposes and justifications of formalities beyond narrower immediate effects viewed in the context of individual cases and present needs. The last two sections are devoted to analysis of insurance formalities both in the law and in the practice.

1. Formalities in Ethiopian Contract Law

The term '*form*' generally refers to the *model or skeleton* of an instrument *to be employed* in a judicial transaction. It contains the necessary elements, appropriate technical terms or phrases and whatever else is required to make it formally correct, properly and methodically arranged, and capable of being adapted to the circumstances of a specific case or transaction.[1] *Formalities,*

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on the other hand, are the *conditions* with regard to method, order or arrangement, use of technical expressions, performance of specific acts, etc; which are *required by the law* in the making of legal transactions, to ensure their validity and/or enforceability.[2]

1.1. The Types of Formalities

In the sense discussed above, one can find different types of formalities. In traditional legal systems each type of contract was said to have its own formalities. In Roman law for instance, according to M.Planiol, 'every juridical act had to be carried out in a form special to it. There was a ritual for all acts … hallowed words such as *sacramentum*, *manicipatio* and *stipulatio* of the old Roman law. If these formalities were not observed or the prescribed terms were not used, nothing acquired juridical existence'.[3]

No legal system could have survived to this date with each juridical act having its own formalities. The explanations for the decline in importance of formalities are two. These are 'the needs of commerce and the progress of intellectual culture.'[4] Formalities, needless to say, impede the easy flow of goods and services. If a person has to get an instrument drawn up to accomplish the purchase of a slice of bread or a pencil, then one can imagine how the wheels of commerce could run. To this end, Planiol asserts that the need for expedience of commercial operations coupled with the development of chirography (instrument in writing) rendered most of the formality requirements irrelevant.[5] Modern legal systems, thus, reserve formalities for limited types of transactions, and only when so required by stronger considerations of public policy than the needs of commerce.

a) Formalities of the Olden Days

Before the introduction of writing, formalities were usually constituted by speech. One typical formality requirement of this category was the *stipulatio*

Yalalet Teshome, Ato Solomon Belete, Major Birhanu Tadesse, Ato Yonas Melaku, Aquar Alem,Ato Fasil Asnake for their assistance in the original of this work.

[1] Henry C. Black, et al, *Black's Law Dictionary* (Minnesota: West Group, 6th ed, 1990) 450

[2] *Id*, 451

[3] Marcel Planiol and J Ripert, *Treatise on the Civil Law.*, (Translation, Louisiana State L. Inst., ,11th ed 1959, Vol. 1, Part 1,) 197

[4] *Ibid*

[5] *Ibid*

in Roman law.[6] The entire process of contract formation was verbal and it was thus always mandatory for a ceremonious speech to be made by the parties. The promisee thus, had to state the terms of the promise: '*Do you promise so-and –so*?' to which the promisor has to reply '*I promise*' for the formalities of the *stipulatio* to be successfully complied with. The formalities of the *stipulatio* were these verbal expressions without the utterance of which no contract was deemed to have been made regardless of whether or not there was an implicit understanding between the parties to the contrary.[7]

b) Formalities of Publicity, Registration and Authentication

At present, registration and publicity are some of the most important types of formalities. Authentication by a notary or court is also an important formality requirement particularly in the Civil law traditions of Germany and France. It is ordinarily taken as the alternative for a signed document in France.[8] In German law, judicial or notarial authentication may, also be taken as a substitute for writing.

In Ethiopia too, as can be seen under Articles 1723 and 2878 of the Civil Code and Articles 160, 164, 219 and 222 of the Commercial Code, contracts relating to immovable properties, business and business organizations are among the transactions which require stricter formalities.

c) The Formalities of Writing

The formality requirement of writing can be viewed in two ways. In one paradigmatic instance, contracts are required *to be made* in writing.[9] In Ethiopia such contracts as a bill of exchange, a contract of insurance and contracts of guarantee are required to be made in this form.[10] Again in another typical paradigm, the formality requirement of writing may be cast in such a way that certain contracts are required to be *evidenced* in writing. An example here is contract of loan under Article 2472 of the Civil Code which provides that loan of money above Birr 500 can be proved only in writing (or confession or oath made in court). In this case, 'the contract itself need not be

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[6] A.M.Pichard, *Leage's Roman Private Law: Founded on the Institute of Gaius and Justinian* (London: MacMillan and Co.Ltd., 3rd. ed., 1961) 333

[7] *Id*, 334

[8] Barry Nicholas., *The French Law of Contract* (Oxford: Clarendon Press, 2nd ed 1992) 61

[9] Raymond Youngs, *English, French and German Comparative Law* (London: Cavendish Publishing Ltd., 1998) pp.366-368

[10] Com. C. Art.735, Civ. C. Art. 1723

made in writing. And the written evidence may take the form of multiple writings that suggest they can and should be read together, and may have been created contemporaneously with the negotiation and formation of the alleged contract, or subsequent to it.'[11]

Formalities of writing may comprise different elements. The Ethiopian Civil Code is more elaborate in this regard. Indeed, the principal formality requirement under the Ethiopian Law Contract is writing. To this effect Article 1727 of the Civil Code provides that any contract required to be in writing shall be: (1) supported by a special document; (2) signed by all the parties bound by the contract; and (3) attested by two witnesses.

1.2. The Functions of Formalities

In codified legal systems like that of ours, it is very difficult to know the exact function a particular formality requirement is intended to serve. Though it can sometimes be discerned from the special contracts provisions, this is not always helpful as we shall see below. This is in a remarkable contrast to non codified systems like that of the Common Law that use piecemeal legislation on every particular subject. The functions of the formalities of writing in the *Statute of Frauds***,** for example, were explicitly shown to be the prevention of perjury and fraud by proving '(a) that there was a contract, and (b) the nature, scope and extent of its terms'.[12] The problem of codified systems in this respect is the attempt to place formalities in the general part wherein it is difficult to show in detail the particular functions they were meant to serve in various types of contracts.

On the other hand, the explanations as to why formalities exist happen to be rather derivative. Formalities are justified on the ground that they protect or advance values that are related rather indirectly to the particular actions that the formalities provide.[13] These functions are 'the evidentiary function, the channeling function and the cautionary function'.[14] While these are services mainly in relation to the parties to the contract; formalities do also have other functions in relation only to the interest of the public and third parties.

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[11] See for instance the English Statute of Frauds, G. E. Brendt, et al, *Contract Law and Practice*, (Ohio: Anderson Publishing Co, 1998) 575

[12] G.H. L Friedman, 'The Necessity of Writing in Contracts Within The Statute of Frauds', (1985) 35 *The University Of Toronto Law Journal* 48

[13] S.A Smith., *Contract Theory* (New York: Oxford University Press, 2004) 210

[14] Lon L. Fuller, 'Consideration and Form' (1941) 41*Colombia Law Review* 800

1.2.1. The Evidentiary Function

The most obvious function of formalities is, to use Austin's words, that of providing evidence of the existence and purport of the contract in case of controversy'[15] The formalities of writing, authentication by court or notary typically perform these functions. The presence of witness serves a similar purpose, but retaining the details of a transaction in the minds of individuals is not only a less reliable and less certain way of preserving it, but it is also unhelpful in retaining the exact words of the transaction compared to writing.[16] Furthermore, the transaction will be more durably preserved when its proof depends on a written or notarial authentication.[17]

1.2.2. The Cautionary Function

While the evidentiary function of formalities in a way facilitates the administration of justice by making proof of the existence and content of the contract easier, the cautionary function in reality serves only the interest of the parties themselves. Here formalities are justified by their cautionary or deterrent function; by acting as a check against thoughtless action.[18] They serve 'to give a party a pause; to oblige him to stop and think more seriously about the nature of the transaction into which he is entering or by which he is engaging himself in some burdensome or potentially burdensome way.'[19] On this point, Savigny argued that 'in the interest of commerce it is desirable that contracts should not be entered hastily, but rather with a deliberate consideration of the ensuing consequences'.[20] Such an argument cannot, however, satisfactorily explain formalities the non observance of which results in nullity against the interest of the parties. This compulsion towards prudent reflection and the related protection of the parties from undue haste is said to be in the interest of economically weak and commercially inexperienced persons. Yet, the requirement is double edged. The observance of formalities requires both parties to have the precise knowledge and the skill to be able to follow them. Even when the former is present, the latter is

[15] *Ibid*
[16] Arthur Taylor V. Mehren, *The Civil Law System: Cases and Materials for The Comparative Study of Law* (Boston : Little Brown and Company, 1957) 606
[17] *Ibid*
[18] *Supra* n 14
[19] Supra n 12, 49
[20] *Supra* n 16, 604

usually missing.[21] In these circumstances, therefore, the cautionary function may not necessarily serve the interest of the parties.

1.2.3. The Channeling Function

Lon Fuller asserts that formalities serve to mark out or signal the enforceable promise from the non enforceable one.[22] Here formalities serve as a 'stamp of the finally resolved legal will'[23] Thus, juridical acts that are not made in accordance with the prescribed formalities are not meant to be binding. This function of formalities as a dividing line between enforceable and non enforceable undertakings is noted through the eloquent expression of Fuller as follows:

> There is a real need for a field of human intercourse freed from legal restraints, for fields where men may without liability withdraw assurances they have once given. Every time a new type of promise is made enforceable, we reduce the area of this field. The need for *a domain of free remaining relations* is not merely spiritual. [24] (*Emphasis added*)

In a system where formalities prevail, the expression of mere intention as to the future is wholly without danger; there will never be the risk that it will be confused for a present intention to create legal relations. Where formalities are not prescribed, however, there is always a danger that one will be confused for the other.[25]

If we are convinced with Fuller's 'domain of free remaining relations' we would rather argue for minimum formalities, than for their complete abandonment. Of course, it is the declared will, not the real will which is generally the basis of contract liability nowadays.[26]

1.2.4. Other Functions of Formalities

There are other functions that formalities serve, such as protection of the interest of third parties, and protection of the weaker party in a transaction. In the first case publicity may be required. 'Most contracts relating to

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[21] *Id*, 607
[22] *Supra* n 14, 801
[23] *Supra* n 16, 605
[24] *Supra* n 1, 4813, See also Kennedy, 'Form and Substance in Private Law Adjudication**'(**1976) 89HLR 1728 *(Emphasis added)*
[25] *Supra* n 16, 605
[26] K.W. Ryan, *An Introduction to Civil Law* (Brisbane: The Law Book Series of Australia Pt. Ltd, 1962) 40

immovable are therefore required to be registered, but the absence of this publicity requirement does not affect the validity of the contract between the parties; it merely makes the contract ineffective against third parties. In other words, no rights in *rem* are created. [27]

Under the Ethiopian Civil Code, contracts relating to immovable property are required to be written and registered. The effect of registration and publicity have sometimes been misleadingly interpreted as though these requirements were intended for the protection of the third parties' interest alone, as is often implied from Article 3089 (1) and 2878 of the Civil Code. The debate in this regard has recently been settled by the Cassation Panel of the Supreme Court in its decision of May 10, 2007. The Court has thus laid down a binding precedent to the effect that there are two registrations involved in the contracts for the transfer of immovable properties. The first type of registration (Article 1723) involves authentication of the contact at court or notary for the purpose of validity, while the second phase involves registration (Article 2878) in the registers of immovable properties for publicity and transfer of ownership. Non observance of the second does not render the contract ineffective as between the parties, while non observance of the first results in nullity of the contract for all intents and purposes.

The other use of formalities in modern contract laws tends to be protection. These types of formalities are employed quite often in other legal systems; such as the ones requiring the size and color or types of clauses in contracts, which may work to the disadvantage of the weaker party.[28] Such formalities are more pervasive in insurance contracts[29]

In Ethiopia an example of such a formality requirement can be seen in the Labor Proclamation of 2003, (Proclamation No. 377/2003). Article 11(3) of the Proclamation provides that 'when the parties agree to have a probation period, the agreement shall be made in writing.' This could be taken as an example of a formality requirement put in place to protect the weaker party. In principle, a contract of employment can be entered into in any form (Article 5). When it contains a term of probation period, however, the law requires it to be in writing, importing the full effect of the formalities of writing in Article 1719-1730. If any of the elements of the writing formalities is missing, the probation term of the contract will be null/void with the eventual effect of rendering the contract of employment a contract for an

[27] *Supra* n 8, 60
[28] *Supra* n 8, 60
[29] *Ibid*, See also 43 *American Jurisprudence*,(2nd. ed., 1965) 255

indefinite period *ab initio*. The purpose of this law is protecting the weaker party, i.e. the employee. Formalities prescribing stamp duties are also examples of the protective function because they protect the financial interest of the state, thereby falling under the miscellaneous function of formalities.

1.3. The Sources of Formalities

The sources of formality requirement are either legal provisions or agreements of parties to a contract. We are already familiar with legal provisions requiring formalities. Thus, in this particular section, the discussion will focus on formalities emanating from "form agreements"[30]

'Form agreements' may be made in two ways. In the normal course of events form agreement may be made as a preliminary to the main contract in which case, the formalities would be expressly stated or stipulated. In the second instance, the parties may impliedly agree at the time of formation of their contract to subject their contract to one or more formalities; such as writing and witness attestation. More often, the parties may just conclude their contract in one or another form, without any prior agreement and the contract will still have the same effect. It would in such cases be very controversial whether or not in such cases it can be said that there is a form agreement.

In Ethiopia, there is a debate among authorities particularly among the judiciary on this matter. On the one hand, it is said that the very act of concluding their contract by the parties in writing shows their agreement to subject their contract to the formalities of writing in the Civil Code. Thus, the contract will be subject to the formalities in the Civil Code at the peril of nullity.'[31] The opponents of the above position hold that 'unless the parties expressly commit themselves to make their contract subject to the written form in the Civil Code, the formalities in the Civil Code cannot apply'[32]

The latent fallacy in the first argument can be seen in the act of giving the freedom of form with one hand and taking it with the other. If the parties can prescribe formalities for their own contract then, we have to take whatever they prescribe. Once the law has given the parties the freedom, we cannot impose the formalities provided by law, unless they expressly undertake to

[30] This term is used in the *Comparison of Legal Systems*, by Pierre Bonassies et al, Infra note 33, pp.1623-1699

[31] Belay Nemaga, **የውል አደራረግ ፎርም እና አለመሟላቱ የሚያስከትለው ውጤት /የውይይት መነሻ ሀሳብ**/ 1 (Unpublished, Presented at the Monthly Panel of the Federal First Instance Court, Jan. 2006)

[32] *Ibid*

accede to these formalities. In other words, the parties may for example, agree to conclude their contract in writing, but not get it attested by witnesses if they so agree. There should not be a difference in treatment when the parties just happen to be concluding their contract in writing and do not get it attested by witnesses. If they are presumed to have agreed to make their contract in writing, they shall also be equally presumed to have agreed to exclude the formalities of attestation by witnesses.

Unlike legal formalities, agreed formalities may be either constitutive or non-constitutive of the main contract. A formality requirement in the form agreement is said to be constitutive if the main contract would not exist without the observance of the agreed formalities. In the case of non-constitutive formalities, the parties are free to disregard the form agreement and conclude their contract in a different manner. More often, however, the parties will not indicate whether their form agreement is constitutive or otherwise. In certain cases, it is even difficult to know whether the parties have agreed to make their contract in the form they have actually concluded their contract at a particular moment. In the absence of explicit or implied indications as to the constitutive or non constitutive nature of the contemplated formalities, legal systems have differing approaches as to how to fill the gap. Some presume the contemplated formalities to be constitutive, others consider them to be non-constitutive and still others look into the particular circumstances of the case.[33]

As per Article 1726, form agreements are deemed or presumed to be constitutive of the main contract. The Civil Code's approach can easily avoid disputes between parties as to the constitutive non-constitutive nature of the form agreement. But this can bring a problem or danger of disregarding the intentions of the parties. It can also be manipulated by a fraudulent party to take advantage against an innocent party by first casually prescribing formalities, and tactically evading them later on.

1.4. The Effect of Non-Observance of Formalities

Although most formalities can have the purpose of serving as validity requirements, it is not logical to assume evidence as a purpose to be served by formalities. It is also true that, there are formalities which are neither requirements of validity in their purpose nor evidentiary in their functions. Formalities with *evidentiary function* may be placed for the purpose of

[33] Pierre Bonassies, et al, 2 *Formation of Contracts: A Study of the Common Core Legal Systems* **(**New York: Oceana Publications Inc., 1968) pp. 1624 -1650

determining validity or otherwise, depending on the approach chosen by the law maker. Formalities intended to give channeling and cautionary services, however, seem to be likely to have been designed to serve as validity requirements in all cases. The idea is that both the cautionary and channeling functions are related with the quality of consent, particularly with the existence of a free and full consent. .

But formalities serving other functions such as publicity, public financial interests, protective functions and the like are not 'fully' *ad validitatum*. Thus, the assumption that formalities are either for validity or for proof (evidentiary) is a false dichotomy. Formalities might be provided either for validity purposes or not. There is no evidentiary purpose, rather evidentiary function. Therefore, formalities with evidentiary function may be provided with a validity purpose so that their non observance may give rise to invalidity or nullity of the contract in question.

1.4.1. The Void-Voidable Dichotomy

A 'void act is an empty act. It does not achieve what it set out to do. It does not achieve its intended legal consequences.' [34] A voidable act is an act which, although defective, would bring about its intended legal effect. The defect in the voidable act is not serious enough in itself to prevent the act form coming into effect.[35] On the other hand, a voidable act is essentially different from a void act as it is an act which 'may take effect but is liable to be deprived of effect at the option of some, or one of the parties…'[36] '*Voidability*' is in a way the juridical effect attached to defects in consent, or lack of capacity. In that case, since defect in consent affects the party that gave such consent, the validity of the contract is subject to such party's option, but not on the other's. Voidable contracts give option to one party against the other. In the case of failure to observe formalities, the question would be who should be given the option to render the contract void, since both parties are equally responsible for the failure; or since neither party is specifically and personally affected? The difficulty lies in the fact that both parties are presumed to have given 'unchannelled', or 'rush' consent, or consent difficult to prove.

[34] *Supra* n 9, 266
[35] Kathrine O'Donovan, 'Void and Voidable Marriages in Ethiopian Law' (1972) 8 JEL, 440
[36] *Ibid*

1.4.2. Void- Non- Enforceable Dichotomy

The consequence of failure to observe formalities provided for reasons of evidence is usually either voidness or non- enforceability. Unenforceability is not equivalent to voidness. A contract which is unenforceable, can anyway be invalidated, or cancelled. It can also be the subject of novation, set-off, or anything short of enforcement. A void contract is nonexistent, but an unenforceable contract is somehow legally recognized for its mere existence. In French law, for instance, failure to comply with a form requirement provided for evidentiary functions leads to the unenforceability of the contract.[37]

In the Ethiopian Civil and Commercial Codes there are formalities merely with an evidentiary function without validity purpose. The writing required in respect of 'proof of loan' in Article 2472 of the Civil Code is a typical case here. Obviously this article does not require the contract of loan to be made in writing. Thus, in accordance with such articles, the effect of failure to follow the formalities of 'proving the contract' is non enforcement of the contract in question.

2. Formalities in the Formation of Insurance Contract in Ethiopia: Analysis of the law

The discussion in this section will focus on the critical analysis of the formality requirements provided both in the Civil Code and the Commercial Code with regard to the formation of insurance contract. It will mainly revolve on the nature and concept of insurance contract and the policy, the main formalities in the contract formation process, and the effect of failure to observe them.

2.1. Insurance Policy vs. Insurance Contract

The term 'policy' is sometimes used interchangeably with 'insurance contract.' While a policy is always a written document, its interchangeability with 'contract' is true even in such legal systems that do not require writing for the validity or proof of the contract. In this respect, some authorities hold that though the term 'policy' 'is generally used to describe such a formal

[37] *Supra* n 8, 61

document, it may also be used to describe any contract of insurance however informal'[38]

In England, the country from which insurance practice has been transplanted into Ethiopia, insurance contracts are treated differently from the policy.[39] A distinction is made in England between policy and contract even in marine insurance in which the formality of writing is a prerequisite. According to Howard Bennet, 'A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer', regardless of the issuance of the policy at the time; and '… [t]herefore, the formation of a marine insurance contract does not require embodiment of the contract in a policy, but occurs upon the acceptance by the underwriter of the assured's offer.' [40]

Because the policy and the contract are different, the contract can come into existence without the policy. This, of course, clearly shows that the form requirement in the above English Marine Insurance Law is evidential in its purpose. In the absence of the policy, Marine insurance law does not make the contract void, but unenforceable. In non-marine insurance on the contrary, failure to issue a policy does not affect the validity and/or the enforceability of the contract.[41] The situation would however be different if the particular form is required for validity as well.

In Ethiopia, the difference or sameness of policy and contract is not apparent, though not that much difficult to discern. While the requirement that insurance contracts should be in writing is not disputable, the issue whether the issuance of insurance policy satisfies this requirement is far from being clear. Article 1725(b) of the Civil Code states that insurance contracts shall be in writing. And Article 657(1) of the Commercial Code states 'a contract of insurance shall be supported by a document called an insurance policy.' It is to be noted that the heading of Article 657 of the Commercial Code reads '*proof of insurance contract*' leading to a plausible inference that the policy is required merely for reasons of evidence and not for validity. In other words, the whole language of this provision implies the separateness of the policy and the contract, contrary to Article 1725 which requires that the contract be inseparably fused into the written document.

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[38] Raul Colinvaux, *Colinvaux's Law of Insurance* (London: Sweet and Maxwell, 6th. ed 1992)14

[39] *Ibid*

[40] Howard N.Bennet, *The Law of Marine Insurance* (Oxford: Clarendon Press, 1996)31

[41] *Supra* n 38, 15

One line of interpretation may be that the writing required under Article 1725 is different from the policy. But, the consequence of this line of thinking is that the formation of insurance contracts would be accompanied by a proliferation of documents which does not, of course, seem to be the intention of the legislature. According to Zekarias Keneaa such a multiplicity of the contract documents is repugnant both to the law and the practice in the insurance industry.[42]

The Commercial Code (almost consistently) uses the term '*insurance policy*' in the sense of 'insurance contract.' Article 654(1) defines insurance policy as a contract. Indeed, it is only under Articles 657(1) and 662(1) that the Code uses the term 'insurance contract.' In all the remaining provisions, the term used is 'policy' or 'insurance policy' even in situations where one would aptly imply the contract, and not the document. To make the use of language even more confusing, the Code refers to the terms 'policy', 'insurance policy', and as well 'insurance contract' without making any distinction. Such interchangeability of 'policy' and 'contract' seems to at least imply sameness of the two terms. Moreover, there is a high degree of similarity in wording between Article 657(1) the Commercial Code and 1727(1) of the Civil Code. In both provisions, we find the phrase *'…shall be supported by […] a document.'* No doubt, what Article 1727(1) of the Civil Code means by the phrase is that the contract be reduced into writing. There is no reason why the same interpretation cannot be imported to Article 657(1).

By and large, from the general language of the Commercial Code, one can conclude that the terms policy and contract are generally interchangeable.

2.2. The Formalities in Respect of Insurance Contracts

Insurance contracts are required to be in writing under Article 1725(b) of the Civil Code. The formality of writing in Ethiopia includes making the contract in writing (Article 1727(1) of the Civil Code), affixing the signatures of the parties on the document bearing the contract (Articles 1727/1 cum 1728/1 of the Civil Code), and getting it attested by at least two witnesses (Article 1727/2 *cum* 1729 of the Civil Code). An insurance contract should thus be in writing (cannot be oral), be signed by the parties, and be attested by witnesses if it is to become formally valid.

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[42] Zakarias Keneaa, « **በኢትዮጵያ የመድን ሕግና ውሎች ዙሪያ ስለሚስተዋሉት ጥቂት አሳሳቢ ችግሮች**» (2006) 1 *Ethiopian Bar Review* 3, (Writer's Translation)

The manner of complying with these formalities in the case of insurance contracts is however open to two different interpretations, although only one line of interpretation is, and has to be, the correct one. For the sake of convenience, these two interpretations can be analyzed under the headings 'unity' and 'dismemberment' of the writing.

What this writer calls the '*dismemberment theory*' roughly runs as follows: the requirement of writing in respect of insurance contracts does not necessarily require the contract formation to be made on a unified document. Thus, the formation of insurance contracts in two separate writings (the proposal form and the policy) in the practice is in line with the requirement of writing in the Civil Code. On the other hand, the opposing thesis asserts that the requirement of writing demands the contract formation to be made on a unified document.

2.2.1 The 'Dismemberment' theory

This theory proposes the dismemberment of the written document in the formation of insurance contract. The idea is that, as in any other contract, the formation of an insurance contract is made through offer and acceptance. An offer in insurance contracts is usually made by the would-be insured, who fills out a document called the proposal form; which he then submits to the insurer(s).[43] The proposal form is a document of application for insurance to be filled by the person who seeks to be insured. As the proposal form is prepared by the insurer (in printed format), it contains questions whose answers give the particulars of the risk against which the applicant wishes to be covered.[44] In other words, the proposer puts down in the proposal form, the terms of the contract according to which he wants to be bound. Thus, the proposal is an offer in its own right made by the applicant.

Upon receiving the proposal form thus filled out by the applicant, the insurer in response issues a policy, a written document which is taken as an acceptance. If the insurer rejects the proposal the contract is not formed. The proposal form is a written document bearing the signature of the proposer once it has been filled out by her/him. The proposal form alone, however, is not a contract; it is merely an offer by one party subject to acceptance by the other party, if it is to create a contractual relation.

[43] M. Parkington, et al, *MacGillivray and Parkington on Insurance Law* (London: Sweet and Maxwell, 8th ed.,1988)87

[44] *Supra* n 38, 15

Article 1725(2) of the Civil Code provides that an insurance contract shall be made in writing, and the proposal form alone does not fulfill such writing. Despite the apparent clarity of this provision, it is not clear as to what the phrase 'formation of a contract' means. Does it mean that the entire negotiation be in writing? Or does it simply require the final terms of agreement to be reduced into writing? Indeed, the process of contract formation may involve many stages. At each stage in the negotiation, facts, figures, opinions, etc. may be raised with a series of agreements and disagreement until the final and 'refined' terms are clearly set out. In this sense, it seems absurd to require observance of a formality or writing for the non-binding intermediate negotiations.

Yet in another sense, a form requirement for the process of contract formation may not sound as absurd as it does in the above scenario. It is a truism that a contract is formed through an offer and acceptance. When the offer made by one party is accepted by the other, the contract is said to be formed. Here, the process of a contract formation is reduced into two main component stages- offer and acceptance. Thus, when a contract is required to be made in writing, it makes sense to conceive the requirement as implying that both the offer and acceptance be in writing.

In the formation of an insurance contract, the proposal form constitutes the offer when it is filled out by the insured. And the policy issued by the insurer stands as the acceptance of the offer made via the proposal form.[45] Thus the requirement of formation in writing is satisfied since both the offer and the acceptance are made in writing.

While this is the practice in the formation of insurance contracts in Ethiopia,[46] it is difficult to correlate this statement with the law. The main problem here is of course the Commercial Code's use of the term 'policy' to mean contract. Because, the policy is not only a declaration of acceptance, but it is also a contract in the Commercial Code's parlance. The policy of course, incorporates and makes reference to the terms of the proposal form. Any one who takes a look at any policy specimen can find expressions like '… the insured by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein….'

These statements on the face of all policies in Ethiopian insurance market indicate the fact that policies, at least by reference incorporate the terms of

[45] *Id*, 12
[46] See section 3 *infra*

the proposal form. An acceptance can indeed be made by using the language or words used in the offer or by referring to the terms of the offer. But this does not necessarily elevate the acceptance to the level of a contract, although acceptance generally marks the conclusion of the contract. But Article 654(1) of the Commercial Code defines the policy as a contract, and other subsequent provisions use the term policy instead of contract thereby showing that the policy represents the contract, not just a mere acceptance. Thus, it has to embody all the terms of the contract- the offer and acceptance. If the policy is an acceptance, then it is only an acceptance. The thorny parts in the above argument pertain, however, to the writing and witness attestation. Let us now turn our attention to these.

How are The Signature and Witness Attestation Requirements Satisfied?

From the above observation, insurance contracts are never oral in Ethiopia. The contract has to be in writing[47] and the requirement of writing in turn includes affixing of signatures by the parties[48] and attestation by witnesses[49]

Since insurance contract, as indicated above means a contract in writing made in two dismembered documents- the proposal form and the policy, the signature requirement is easily met; as the proposal form is signed by the would be insured, whereas the policy is signed by the insurer. Upon filling the proposal form, the insurance seeker signs on it. When such proposal form, so signed to certify the correctness of the answers thus given, is delivered to the insurer, it is considered by law as an offer. And when the insurer in turn, having considered the proposal form delivers a policy bearing its signature, to the insurance seeker, this is an acceptance signifying the conclusion of the contract.[50]

The basis of the argument for dismemberment seems to be a liberal, and non-purposive interpretation of Article 1728(1) of the Civil Code that reads '[a]ny party bound by a contract shall affix his hand written signature thereto.' The law here does not lay any stringent requirement of signing on the same document. It only requires each party to affix signature onto the contract; and seemingly that can very well be complied with by the offeror signing on the offer and by the offeree signing on the acceptance.

[47] Article 1727(1) of the Civil Code
[48] (Articles 1727(1) *cum* 1728(1) of the Civil Code
[49] Article 1727(2) *cum* 1729 of the Civil Code
[50] *Supra* n 42, 11

Although their source is mainly the practice, proponents of this argument can gather some premises from the Commercial Code, as well. Article 667 deals with filling in the proposal form by the insured. Furthermore, Articles 657(3) and 659 require that the policy be signed, without giving any idea as to who is supposed to sign on the policy. Since the policy, in practice, emanates from the insurer it is easy for the advocates of the above argument to aptly hold that the signature required per the above provisions is imposed on the insurer.

As far as witness attestation is concerned, it can arguably be satisfied in this theory. What makes it awkward, however, is the premise that the contract formation is made in two parts -the proposal form and the policy- and, the question of which part of the contract ought to be attested by witnesses. Logically, there are only two ways out for the proponents of the dismemberment thesis. The first and more logical line of thinking would be to hold that witnesses attest the entire processes from filling of the proposal form up till issuance of the policy. Clearly enough, such interpretation will be completely out of the law maker's intentions. The second way out is to require witness attestation at the signing of the policy, since the latter is relatively more representative of the contract formation than the filling out of the proposal form.

2.2.2 The 'Unity' Theory

The above argument based on the assumption of dismemberment of the written document, though conceptually coherent and supported by practical experience in insurance, is not compatible with the law's plain meaning. To this effect, the law unequivocally requires a unified document in these words. 'Any contract required to be in writing shall be supported by *a special document* signed by all the parties bound by the contract.'[51] It is hardly possible to justify the assumption of dismemberment of the written document on the face of this provision.

Therefore, neither the offer (the proposal form) nor the acceptance (the policy) can meet the demands of Article 1727(1) of the Civil Code. It is doubtful whether the proposal form and the policy can be said to form two parts of a unified document. However, the phrase 'a special document' renders such an attempt futile. The requirement of unity is well in accord with the overwhelming practice in written contracts except for that of insurance which has its distinct features different from the formalities observed upon the conclusion of various written contracts. .

[51] Civ. C., Art. 1720(1) (*Emphasis added*).

On the basis of this argument it is easier to harmonize the formalities in both codes. The provisions of the Commercial Code are much more in conformity with the formalities in the Civil Code. The Commercial Code provides only very loose formalities under Articles 657(3), 659(1), 658, and 667. Yet, these are not opposed to the formalities in the Civil Code. The Commercial Code provides that an insurance contract is the policy under Article 654(1). Though the term 'policy' is used equivocally in the Commercial Code, it means a contract of insurance in the above provision.

Thus, the unified written document under Article 1727(1) of the Civil Code is not opposed, rather reinforced by the provisions requiring a policy under the Commercial Code. The contents of the policy provided under Article 658 of the Commercial Code do not necessarily contradict the Civil Code formalities. The formality requirement of affixing signatures found in both codes can also be reconciled. The Civil Code provisions are adequately explicit as to who signs, but the Commercial Code under Articles 657(3) and 659(1) does not expressly state who is required to sign although the provisions state signature as a requirement. This is a good indication that the Commercial Code makes an implied reference to Articles 1727(1) and 1728 of the Civil Code for details. Apparently, repetition is not a good draftsmanship. Hence, one cannot read a contradiction between the two Codes unless one wants to.

Witness attestation

The Ethiopian Civil Code resorts to witness attestation, as opposed to notarial or judicial authorization which are the principal elements of the formality of writing in its parent Codes of France and Germany. The exact meaning of witness attestation is, however, not precise under Civil Code. First what is meant by attestation? And secondly how is it to be made?

Attestation may be defined as the act of 'affirming something to be true or genuine; the act of witnessing and authenticating by signing as a witness.'[52] The requirement of witness attestation in Ethiopia has customarily taken the form of witness signature. But nowhere in the Civil Code, from Articles 1718-1729, do we find a requirement that witness attestation takes the form of signature only, although this would be the easiest way to accomplish it. Of course, it is arguable that though the law maker did not expressly require it, nothing other than signature can be envisaged. We can, however see that the same legislature unequivocally requires the parties to sign on the document,

[52] *Webster's Third New International Dictionary* (Unabridged)

whereas the same provision only requires the witnesses to attest. Some authorities hold that the requirement of attestation is much stronger than that of signing in its tone. Thus, the law is not demanding something lesser than merely signing which the parties are required to but rather is requiring an act of more caution in addition to signing, from the witnesses.[53]

This writer would have automatically endorsed such an ingenious interpretation of a vague provision, had it not been for Article 881(3) of the Civil Code that triggers doubt on the validity of such interpretation. In that particular provision the same legislature is again found requiring witness to sign (not attest generally) in respect to other written juridical acts such as contracts for the donation of an immovable (Article 2443) and public wills (Article 881(3)). No doubt the law maker must have been liberal as to how to attest under Articles 1727 (2), 1729 and 1730 of the Civil Code. It is not stubbornly requiring the affixing of signatures of witnesses as it does in case of public wills and donation of immovables.

In conclusion, the requirement that insurance contracts be attested by witnesses does not necessarily give rise to an obligation on the parities to secure the signature of witnesses. In addition to its being preferable, it is also doubtful whether there can be any practical way of attestation other than by signing, although theoretically there may be other means such as oral attestation.

On the other hand, the Commercial Code does not provide for witness attestation. Perhaps, this silence can be interpreted as an indirect reference to what is provided in the Civil Code, since the Commercial Code is generally subject to the mandatory provisions of the general rules of contract law in the Civil Code.[54] The silence of the Commercial Code can, thus be taken as , a deliberate omission made in order not to repeat what is already there in the mandatory provisions of the Civil Code.

The other formality requirement is the proposal form. Filling in the proposal form is a formality requirement stipulated in the Commercial Code and not in the Civil Code. This procedure is generally universal in that it is applicable to all insurance contracts. Thus, it is placed in the Commercial Code because it is inherently related to the special nature of insurance contracts. All the same,

[53] Interview with Ato Yoseph Aimero, Judge in the Insurance Division of the Fed. High Ct (2 June, 2006)

[54] This argument can be further strengthened if one looked at the *expose des motiefs* on Article 1 of the Commercial Code by the drafter

it does not derogate from the formalities in the Civil Code and is rather a mere addition to those formality requirements. So it can be taken cumulatively as a part of the formalities constituting the requirements for the conclusion of insurance contracts. In general, the argument of unity of the written document is not merely a literal way of interpreting Article 1727(1) of the Civil Code. It is rather the plain meaning of the provision.

It is clear that Article 1727(1) of the Civil Code cannot go along with the argument supporting the possibility of dismemberment of the written document into proposal form and policy. The theory of unity of the document also achieves the underlying functions of written form more satisfactorily than the dismemberment thesis. The unified written document can be a more reliable evidence than a dismembered one that is executed at different times (the proposal form is filled out often days earlier from the date on which the policy is executed.) The channeling function will also be more easily achieved if the written document is a unified one, since the parties will be less likely to be mistaken as to each other's promises if they execute the same document at the same time, than where they each execute different documents at different times.

Based on these considerations, one can conclude that an insurance policy that does not bear the signature of the parties and attestation of witnesses is void.

2.3 The Purpose and Functions of Formalities of Writing in the Formation of Insurance Contracts

The term 'purpose' in this article refers to the relationship between the formalities and the validity or otherwise of the contract in question. On the other hand, the word 'function' is meant to refer to the specific and immediate services or the utilities intended to be served by these requirements in relation to the parties or third parties.

2.3.1 Functions of Insurance Formalities

Articles 1719-1729 of the Civil Code embody general rules on formalities, and logically, particular types of contracts i.e., insurance, guarantee, contracts relating to immovable property and administrative contracts should not have been provided in there. Whether or not these contracts are subject to the formalities of writing (as stipulated under Articles 1719-1729 of the Civil Code) should have been stated in the special provisions of these areas as has been done in the case of the sale of business and the formation of business organization under Articles 152 and 214, respectively, of the Commercial

Code. Even in relation to those contracts that are incorporated into these general rules, the law does not follow a consistent approach. With most of these, the particular form required is repeated in the special section governing them; with the exception of contracts of guarantee, with respect to which no mention of the writing form is repeated in Articles 1920-1951 of the Civil Code.

With regard to contracts relating to immovables, the writing requirement is repeated in the special parts on contracts relating to immovables, manifestly with different functions intended for it. While the provisions of Article 1723 do not show the function of the written form, Article 2898 of the Civil Code provides that lease of an immovable shall be proved by writing.[55] The special section on lease of an immovable thus, does not state the form required for the formation of the contract, although the contract is one relating to an immovable and thus according the language used under Article 1723 subject to the general writing requirement of Article 1723. Sale of immovables and donation of immovables are made subject to strict formality requirements with no discernible functions.[56] But these provisions are at least in form different from those requiring the writing for reasons of proof. As can be seen from the two Codes, form provisions are often express when their intended function is of evidentiary nature. This is perhaps, the only discernible pattern in the Civil Code.[57]

The provision that requires writing for insurance contracts (i.e., Article 1725) does not indicate for what services such writing is required. And it does not need to, since it is not the special part on the subject. As for the Commercial Code, it seems to be explicit under Article 657(1) that the evidentiary function is envisaged. This conclusion can be gathered from the very heading of the provision.[58]

The Civil Code does not clearly relate to any of the channeling, cautionary, or the evidentiary functions. Perhaps one may argue that all these functions can co-exist side by side without mention being made to that effect. 'It is obvious that there is an intimate connection between them, and generally speaking, whatever tends to accomplish one of these services will tend to accomplish

[55] Civ.C. Art. 2443,2877,2898; See generally *Supra* n 31
[56] Civ. C. Arts.2443and 2877
[57] Civ.C. Art. 2472 and 2828; Com. C. Art. 152
[58] While the heading of Article 657 reads : "proof of contract of insurance" , sub article 1 provides that the contract of insurance shall be supported by a document called an insurance policy

the other two.'[59] But such does not seem to be the case since an explicit reference has been made in Article 657(1) of the Commercial Code (the special part where it can appropriately be placed) to the evidentiary function. Therefore the only reasonable conclusion one could arrive at is that the function of formalities in respect to insurance contracts is evidentiary.

2.3.2 Validity Requirement Formalities *vs.* Other Formalities

The main debate on the purpose and legal effect of the form requirements in respect of an insurance contract centers on the question whether the purpose of these requirements is validity and hence leading to a conclusion that non compliance will result in nullity; or whether their purpose is not for validity, and non compliance would have the effect of unenforceability only i.e. relative ineffectiveness towards third parties, and so on.

In the case of an insurance contract, the formalities required are both evidentiary as well as validity, i.e., evidentiary in their function, and validity in their purpose. But where the formalities have the consequence of nullifying the contract when not complied with, it may seem superfluous to talk about their evidentiary value, since something which does not exist cannot be required to be proved in a formal way, nor can it make sense to talk of the evidentiary value of a formality, where the same formalities serve as a basis to determine the legal authoritativeness of a contract.

Here some people feel a sense of contradiction between the two Codes. But it is not easy to show the existence of a contradiction. In the first place the Civil Code does not in some of its general provisions state the functions of the formalities of writing. It simply provides the formalities to be observed, and the consequences of non-observance. And the functions the formalities are supposed to serve will not necessarily be the same across the board for all contracts. Thus, it is neither necessary nor possible to provide the functions in the general part.

Therefore, the service of these formalities when it comes to insurance contracts is evidentiary. One thing we can be certain about relating to the function of formalities in insurance contract is, thus, the fact that the Commercial Code is concerned with their evidentiary importance. Since the functions of formalities with respect to a given special contract are more discernible in the special sections or parts dealing with that particular subject, Article 657(1) of the Commercial Code does a good job in this respect. Had

[59] *Supra* n 14, 803

Article 657(1) of the Commercial Code not been there, there could have been a controversy as to what their intended function is. But in the presence of Article 657(1), it is logical to conclude that the function of the writing formalities is rather evidentiary as far as insurance contract is concerned.

However, two clarifications need to be made with regard to the above remark. First, Article 657(1) of the Commercial Code does not provide formalities, whatsoever, in connection to the formation of insurance contracts. It rather states the functions of formalities provided elsewhere (both in the Civil Code and the Commercial Code).[60] The second point to be clarified is that, Article 657(1) is different form apparently analogous provisions such as Article 2472 (proof of loan), a provision that requires a contract of loan to be proved in writing.

Whereas Article 657(1) of the Commercial Code is premised on the presence of a contract made in writing, Article 2472 of the Civil Code does not presuppose such a formal contract. Nor is the writing to serve as an instrument of evidence alike in these two provisions. Under Article 2472 of the Civil Code, the writing is not required to be in the form prescribed under Articles 1719, 1720,1727, and 1728, because these formalities are mandatory for the formation of a contract, not for proving a contract which is already made. On the other hand, according to Article 657(1), not only is the writing required to be made at the time the contract is concluded, but it is also a policy which is the contract in itself.[61] On the other hand, the writing in Article 2472 of the Civil Code is not necessarily required to be made simultaneously with the formation of the contract. It can very well be made some time after the oral contract is made. In other words, under Article 2472, the contract required to be proved in writing is not itself subject to formalities. It can be made orally.

The correlation between the evidentiary function of insurance formalities and the '*validity versus evidentiary*' dichotomy of their purpose is another area of confusion. Formalities meant to give evidentiary services can also determine the validity of a contract. This is rather a matter of public policy. Thus, the assumption that formalities that do not determine the validity of a contract are evidentiary, and vise versa is misleading. Although it is generally assumed that the non-observance of evidentiary formalities does not affect the validity

[60] But see a letter from Attorneys of Insurers to the Ethiopian Insurers' Association (5 July, 2005,Unpublished) 1

[61] Civ. C. 47 Art. 1725(b); See also Com. C. Art. 654(1)

of a contract, except its proof, this does not seem to be the case in relation to insurance formalities in Ethiopian law.

Though the functions insurance formalities are supposed to serve are shown in Article 657(1) of the Commercial Code, the effect of non- fulfillment of the formalities is provided in the Civil Code. Thus, According to Article 1720(1) and 1727(2) where the formalities are not observed, the contract will be *void ab initio.* Both the '… *of no effect*' and '…*a mere draf*t*'* phrases carry the notion *void ab initio.* Article 1720 (1) of the Civil Code does not make a difference on the basis of the functions the formalities are meant to serve. In all cases where formalities prescribed by law are not observed, the legal consequence seems to be nullity, regardless of whatever the underlying function the formalities are intended to serve.

This is not to say that the meaning of Article 2472 is free from controversies. Even the Federal Supreme Court does not have a consistent position on the interpretation of Article 2472 of the Civil Code. In one case, the Federal High Court's holding that a 'contract of loan that was not attested by witnesses is valid' was reversed on appeal by the Supreme Court on the assumption that the requirements of written form are applicable to a contract of loan.[62] On the same issue in a subsequent case the Federal Supreme Court's Cassation Division held that '…a contract of loan is not required to be made in writing. Thus, Article 1727(1) of the Civil Code cannot be invoked to nullify a contract of loan that lacks witness attestation'[63]

It may be argued that Article 2472 of the Civil Code and Article 657(1) of the Commercial Code are identical, and it is just by oversight that the legislature failed to mention in the general contract section that the contract of loan provided in Article 2472. But the legislature did not exhaustively mention all special types of contracts subject to the written form in the general contract section. There are particular types of contracts subject to the strict formalities of writing without being mentioned in the general contract part that talks about form. Hence, if the legislature had the intention of subjecting contracts of loan to the formalities of writing it could have drafted it in the same manner as it had done in respect of contracts for the formation of business organization and the like.

[62] Getachew Temesgen v Yibasu Bayileyegn (Federal Supreme Court., Federal Supreme Court Case Report Volume 1, Federal Supreme Court, 155, 1995) (writer's translation)
[63] Ketema Tulu v Assefa Balcha (Federal Sup. Ct., Sebber, Volume, 2,46-47, 2001)

2.4 The Effect of Failure to Observe Formalities

Contracts of insurance not in conformity with the formalities prescribed by law are of no effect. This conclusion is derived from Article 1727 cum Article 1720(1) of the Civil Code. One should not look at the Commercial Code Articles 657(3), 658, 667 to reach at this conclusion. The effect of this conclusion in practice may, however, be devastating.[64]

There are different theories proposed to avoid the dire consequences of this interpretation. One line of argument attempts to achieve this end is by making an emphasis on the wording difference in the Amharic version on the one hand, and the English and French versions on the other, of Article 1720(1) of the Civil Code.[65] Literally translated Article 1720(1) of the Amharic version would read as follows: 'when particular formalities are prescribed by law for the making of a contract, and are not observed, the contract shall remain *a mere draft until the formalities required are observed*.' The English version, on the other hand reads: 'where a special form is prescribed by law and not observed *there shall be no contract but a mere draft of a contract*.' (Emphasis added.)

This discrepancy between these two versions of the Code is not simple. The consequence of the discrepancy, to put it simply, is that while non-observance of the formalities makes the contract void in the English and French versions, this does not seem to be the case in the Amharic version. Accordingly, this line of interpretation may render the Amharic version as allowing subsequent rectification of the formal deficiency (e.g. by getting the contract signed by the parties, or by getting it attested by witnesses, if any, of these is missing.)[66] Thus, the contract, according to this line of thinking, will not be *void ab initio*; it would rather be an incomplete one waiting for the fulfillment of that missing formality. This assertion can be further reinforced by the rule that the Amharic version is the controlling one in case of discrepancy with the English version.

However, given the fact that the Code was originally drafted in French and then translated into English and Amharic simultaneously, the conceptual conformity between the French and English versions can imply that the real intention of the law maker is to be gathered from the latter versions.

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[64] See generally Section 3, *infra*

[65] Alemayehu Haile, « **የመድን ውል አተረጓጎም በኢትዮጵያ ሕግ** » (Unpublished, Addis Ababa,1990) 4

[66] *Ibid*

On the contrary, a more purposive (than merely literal) interpretation can even reveal a contrary intention than what is conveyed in Article 1720(2) and (3) of the Amharic version itself. It provides that the non observance of formalities of stamp duty, registration fee, and other fiscal matters shall not make the contract void. Here it should be noted that an '*á contrario'* reading of these sub articles implies that the effect of non compliance with the provision of Sub-article (1) is nullity.

The other line of argument advocates that the formalities in respect of insurance are only evidentiary, and their non observance will not make the contract void. The premise of this argument is of course correct. The function of the formalities in insurance contract is evidentiary. But the conclusion does not seem to be tenable since we do not have any legal source to support the conclusion that when the function of a formality requirement is evidential, its non observance shall not result in nullity. On the contrary, the law states (particularly in relation to insurance contracts) that where formalities are not observed, the contract shall be void (Article 657/1 of the Commercial Code *cum* Articles 1720-1729 of the Civil Code).

2.5 The issues of equity and economic effects

The proper interpretation of the law would not save insurance policies that do not bear the signatures of parties and attestations of witnesses from nullity. Economic, moral and political arguments are also advanced against the nullity of insurance contracts on the grounds of formalities. The moral and economic effects of nullifying insurance contracts can easily be felt. The potential or actual danger of nullity or legal unenforceability of insurance contracts is a blow not only to the insurers, but for the national economy at large. At the moral level, nullifying existing insurance contracts would leave policy holders uncompensated despite payment of premiums for many years. Yet such consequences are obvious only when the issue is seen from altruistic perspective and equity.

More focus seems to be given to the economic argument against nullification of insurance contracts. For instance, Ato Yonas Melaku, Head of the Legal Department in Africa Insurance Co. reckons that 'if courts had continued [67] to nullify insurance contracts for reasons of formalities, the whole insurance industry would have been in a complete wreck by now or would be so in the

[67] The Fed. First Inst. Court is no more deciding insurance cases which involve formalities of contract in the manner it used to.

very near future.'[68] This opinion is shared by many professionals both in the industry and in the judiciary.

At the abstract level however, the economic vindication or refutation of formalistic nullification of contracts is not as easy as that of the moral argument. Generally, however, formal rules (those specially providing formalities) are non- interventionist in their substantive policy. Thus, the argument for formalities and their proper enforcement 'is inherently non-interventionist, and it is for that reason inherently individualistic.'[69] That means, the state (through its courts) should not interfere in the economic relationship between the parties as established by them. This is readily contrasted with economic altruism which takes standard as its form, and result orientation in its substance.[70]

3. Problems in Relation to the Formalities in the Formation of Insurance Contracts: The Practice

The problem of formalities in insurance was felt long ago, especially among scholars.[71] But it was only since 2003/2004 (1996-97 E.C) that the problem was felt by the courts.[72] In the year 1997 E.C more than 50 insurance cases were dismissed by the Federal First Instance Court that considered the "contracts" as void.[73] The astonishing fact is that almost all these cases were dismissed by the same judge. The only similar judgement rendered by another judge of the Federal First Instance Court, as far as this writer could find is the case *EIC vs. Ato Dawit Gebreab and Ministry of Education*.[74] Initially, it was the judges who raised the inquiry regarding the fulfillment of the formalities although, on subsequent cases policy holder defendants began to invoke this defense.

[68] An Interview with Ato Yonas Melaku, Head of the Claims Department of Africa Insurance Co. (22 may, 2006). See also a letter from Attorneys of Insurers, Supra n 57, 1; *Supra* n 42,12
[69] *Supra* n 24,1742
[70] Ibid
[71] *Supra* n 62; *Supra* n 42, 12
[72] *Supra* n 42, 12
[73] The writer couldnot find exact figures; but reportedly, in EIC 30-40, in Nile Insurance S. Co. more than 10, in United Insurance S. Co. around 6, and in Africa Insurance S. Co. 1 cases were dismissed on account of formality defects.
[74] EIC v Dawit Gebreab, (Fed. First Instance Court , File Number 04649)

Insurers do not raise the defense because of its adverse effect on their business. 'The reason,' says Ato Fasil Asake, head in the Legal Department of United Insurance S. Co., 'is that the defense will backfire.' Admission of the nullity of the policy by the company when it is a defendant in the dispute means ruining the very foundation of the business it runs. 'The message we give to our customers by so doing', he adds, 'will be that all the policies we have issued to them are void. It is like cutting off the branch on which one has stepped.'

Major Birhanu Tadesse, Legal Service Manager of Africa Insurance Company, states on the other hand that 'it is unethical on the part of insurers to issue a policy and then deny its validity.' Of course, there are attorneys, even in some insurance companies (particularly in EIC) who admit the discrepancy between the policy as in the law, and the policy in practice. Of course, they also admit that the legal effect of the discrepancy would be nullity. Indeed, in one case a freelance lawyer representing one of the private insurance companies was said to have raised the defense on defect of formalities.[75]

3.1 The Reasoning of the First Instance Court on the issue

Several cases brought to the Federal First Instance Court in the Year 2004/2005 were rejected due to the discrepancy between the formality requirements in the law and the manner in which the contracts were made. In all these cases,[76] the argument of the court was that an insurance contract which is not made in a unified document, and which does not bear the signatures of both parties, and that is not attested by witnesses is void.

[75] Interview with Ato Fasil Asnake, Head of the Legal Department of United Insurance, (31 June 2006)

[76] EIC v Melka Share Co. (Federal First Instance Court, File Number 49788); EIC v Oromiya Water, Mines and Energy Bureau (Federal First Instance Court, File Number 24051); EIC v Satcon PLC. (Federal First Instance Court, File Number 30269); EIC v Tiruwork Mekonnen (Federal First Instance Court, File Number 04649); EIC v Fetan Construction Enterprise (Federal First Instance Court, File Number 39988); Tiruneh Assefa v EIC(Federal First Instance Court, File Number 31876); National Ethiopian Insurance Co. v Alemayehu(Federal First Instance Court, File Number 45444); Nile Insurance Co. v Shemsu Awol, (Federal First Instance Court, File Number 43456); Zed P. L C. v United Insurance Co(Federal First Instance Court, File Number 31271);Fasil Araya vs.Africa Insurance Co., (Federal First Instance Court, File Number 25446); and several others

In all these cases, the decisions of the Federal First Instance Court were entirely based on the Civil Code's provisions, as the reasoning did not accept that insurance formalities are provided in the Commercial Code. In one of these cases the judgement reads '…in the case at hand, the contract is neither signed by the parties nor attested by witnesses. Hence, according to Articles 1720, 1725, and 1727 of the Civil Code it is of no effect. It is void *ab initio*.'[77] These decisions went against a deep rooted practice and they evoked criticism from various stakeholders and academics. These critiques can be divided as procedural and substantive.

a) Procedural criticism

The procedural criticism contends that the court cannot raise the question of formalities which the parties themselves have not raised.[78]The reason for this is that it was the judge in the first couple of cases that raised the issue of formalities. The main source of this argument is Article 1808(2) of the Civil Code that reads: 'a contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or any interested third party.' The proponents of this procedural criticism state that the court is neither a contracting party nor a third party in the sense of Article 1808(2). This argument is reinforced by the provisions in the Civil Procedure Code that prohibit the court from formulating issues on points the parties are not in disagreement. Articles 246 and 247(1) of the Civil Procedure Code in particular are the relevant provisions here. Article 247(1) state that the court shall formulate issues to be resolved only on points the parties are in disagreement.[79] Moreover, Article 182/2 of the Civil Procedure Code does not allow First Instance Courts to give judgments "on any matter not specifically raised by the parties."

However, it may be argued that a contract not made in accordance with formalities is void *ab initio*, and cannot be enforced whether or not the parties want it to be enforced. In one of the subsequent cases the court opined that since the contract is neither signed by the parties nor attested by witnesses, it

[77]EIC v Melka Share Co. (Federal First Instance Court, File Number 49788) (Writer's translation)

[78]Zakarias, cited above at note 42, 13; See also Achame Gabure v EIC (Federal High Court, File Number 36431); Awash Insurance Company v Salini Nex Joint Venture(Federal High Court, File Number 23204); EIC v Oromiya Bureau Education(Federal High Court, File Number 21665): all these three decisions are appellate opinions)

[79]Achame Gabure v EIC (Federal High Court, File Number 36431)

is of no effect, i.e. void *ab initio* according to Articles 1720, 1725, and 1727 of the Civil Code. Since non-observance of formalities renders the contract void *ab initio*, the desire of the parties to the contrary cannot create the contract.[80]

The 'function of the court' the judgement added, is to interpret the law 'with the view to identifying legally recognized rights and duties and enforce the same.' In this sense, is the court not an 'interested third party' per Article 1808(2) of the Civil Code? Ato Solomon Belete, who was a judge in the Insurance Bench of the Federal First Instance Court, believes that 'the court has both the power and responsibility to inquire in to the observance of formalities upon its own initiative.'[81]

This interpretation can be substantiated by the query whether proponents of the procedural critique would maintain the same view (of judicial restraint), if the issues were unlawfulness or immorality of object of the contract. Assuming that the object of a contract is unlawful or immoral, it is unlikely that a court having known the fact, would abstain from nullifying the contract on the ground that the parties have not raised the issue.

b) Substantive criticism

The substantive critique is based on the controversial assumption that the Civil Code and the Commercial Code are in contradiction, and thus the latter (as a special regime of law) should prevail over the former (the general law).[82] As a matter of fact, there exists an apparent difference between the two Codes. But the postulation that the difference can be elevated to the level of irreconcilable contradiction does not seem to be valid.

The contradiction, if any, on formalities relating to the formation of insurance contracts is to be gathered from the provisions on the same subject. The Civil Code provisions stipulating formalities for the formation of insurance contracts are Articles 1719, 1720, 1725, 1727, 1728 and 1729. On the other hand, the Commercial Code provisions prescribing formalities for the formation of insurance contract are Articles 657(3), 658, 659(1) and 667. Though not in a vivid way, these provisions provide the formalities during the

[80] EIC v Oromiya Bureau of Education (Federal High Court, File Number 21665) (Writer's translation)

[81] Interview With Ato Solomon Belete, Judge at the Insurance Division of the F.F.I Court (1st June , 2006)

[82] *Supra* n 76; *Supra* n.77; Awash Insurance Co. vs. Saleni Joint Venture (Federal High Court File number 23204)

formation of insurance contracts. Article 667 of the Commercial Code provides the formality requirement of filling the proposal form; Article 658 lays down the formality requirement that the contract be made on a policy and that the particulars listed therein be shown in the policy; and finally, Articles 657(3) and 659(1) talk about the formality requirement of signature.

In short, the formalities for the formation of insurance contract under the Civil Code are:(1) reduction of the terms of the contract into writing in a unified document, (2) affixation of signatures of the parties on the same document; and (3) attestation by witnesses of the formation of the contract. And, the formalities in the Commercial Code are filling out the proposal form, reducing the contract into a document known as a policy and signature of the policy.

Obviously, there is a difference in these sets of formalities provided in the two Codes. But the difference does not seem to be irreconcilable. First and foremost, the term 'policy' being equivocally used in the Commercial Code, it means both the insurance contract;[83] and the document into which the contract of insurance is finally put in a written form. Thus, the unified written document required under Article 1727(1) of the Civil Code is not contradicted by the provisions requiring a policy in the Commercial Code. Rather the two Codes seem to reinforce each other in this regard. Thus, the perceived contradiction between the two codes on insurance formalities can be reconciled.

Even if we perceive an inconsistency, can the rule 'special prevails over the general' be a remedy to the problems of insurance formalities? No doubt, the Commercial Code is special compared to the Civil Code, and the provisions on insurance formalities in the Commercial Code are likewise special, compared to their counterparts in the Civil Code. But the relationship between the two Codes cannot be accurately described by depicting them as special and general.

One would obviously be in doubt as to which legal regime has the overriding importance in matters of commerce, by a simple reading of Article 1 of the Commercial Code. It reads: 'unless otherwise provided in this Code, the provisions of the Civil Code shall apply to the status and activities of persons and business organizations carrying on a trade.' To grasp what is meant under

[83] Com. C.Art.657, See the definition under Art. 654 and the way the term is employed elsewhere in Title III, such as in Arts. 659, 661,666,671, 672,673….

the above cited provision, let us look at the very words of the drafter. Thus, as to the place of Commercial Code in relation to the Civil Code, he stated that:

> …a recent theory which is still widespread maintains that the commercial law is autonomous. I thought it preferable, however, and more in conformity with the preeminent place of the civil law in the future law of Ethiopia, in the theory of obligations, and in the regulation of contracts, to maintain the classic principle of the priority of civil law. Commercial law is thus, only a law supplementing the Civil Code. This is the principle I have incorporated in Article 1 of the Commercial Code….[84]

If the Commercial Code is meant only to supplement the Civil Code, can it override the Civil Code in cases of conflict? From the above statements of the drafter, it is discernible that despite the specialty of the Commercial Code, it is not meant to override the Civil Code in case of conflict.

From the foregoing considerations it is safe, therefore, to conclude that neither the perceived inconsistency between the two codes, nor the resulting application of the interpretive doctrine of the 'special prevails over the general' is warranted by the true state of facts. In reality, the contradiction is not between the two legal regimes. The battle of formalities is rather between the Civil Code and the deep rooted practice in the insurance industry in Ethiopia, and may be in the whole world.

3.2 Disparity between the Law and the Practice

The formalities involved in the formation of insurance contract in practice are: 'First, the applicant for insurance fills out a proposal form with a set of questions, which he then submits to the insurer. The insurer either accepts, or rejects the proposal all together. If the proposal is accepted, the insurer issues a policy bearing its signature to the insured'.[85]

Only the insurer signs on the policy. The contract will not be signed by the insured (a party bound by the contract- Art. 1728 of the Civil Code) nor is it attested by witnesses.[86] Thus, the formalities involved in practice are squarely in contradiction with the Civil Code formalities. The source of the formality requirements, in the practice is the long established and universally pervasive English practice dating back to the Lloyd's.[87] One can simply look at the

[84] Faculty of Law, HSIU, *Background Documents of the Ethiopian Commercial Code of 1960*, (Peter Winship, edr.,trans.,1974) 36
[85] Interview with Ato Tibebe Sirak, Head of the Legal Department of EIC (25 May 2006)
[86] *Ibid*
[87] *Supra* n 42, 9; *Supra* n 62

policy wordings and languages to understand the extent to which this foreign practice is rooted in the industry in this country. Indeed, though insurance as a system originated in Italy, much of its development took place in England, and thus the English practice has pervaded in most parts of the world.

Generally, therefore, the disparity is between the law and the practice and not between the two codes. It is pretty obvious in any sense that when the law and the practice are in conflict, the judge has nothing to do except apply the law. Applying custom for matters clearly provided for in the law is not only going against the intention of the law maker, (look Article 3347 (1) of Civil Code), it is also shaking the very foundations of an established legal order.

If the law and the practice are at variance, it would be the responsibility of the legislature to provide a solution to this problem. It would be appropriate to adapt the law in the direction of the practice than bend the practice to the law, particularly as far as commercial laws are concerned. There are two reasons for this. First, both in experience (history) and reason, commercial law has followed the practice by recognizing those practices in commerce; and the insurance industry is no exception. The law should not thus superimpose rigid formalities which go against the dynamism and tempo of the insurance sector, but rather be amended in tune with the existing practice which it ought to facilitate and regulate. The second reason which justifies amending the law is the fact that the existing insurance practice is in conformity with the international practice particularly concerning re-insurance.

3.3 Reasons for non-compliance with Legal Formalities

In the first place, there is always the attempt to interpret the practice in line with the law. Thus insurers claim that the policy they issue in practice is in accord with the legal formalities. 'The policy incorporates by reference the terms of the contract as incorporated in the proposal form, cover note, endorsements and representations, and it is signed by the insurer' says Major Birhanu Tadesse of Africa Insurance Company. Many attorneys in other companies concur with this opinion.

The problem pertains to the absence of signature of both parties and attestation by witnesses in addition to the failure of the policy to incorporate all the terms of the contract. There seems to be a big difference between making part by reference, and making part by incorporation. The reason for requiring written formalities is to make sure that the parties by following the particular formalities prescribed by the law will get to know what they are doing. So, in this case the writing and signing will allow them to know only what appears on the document, and not necessarily those terms made part of

the document only by reference. So the message of Article 1727 (1) of the Civil Code is that the terms of the contract be put in the document.

Secondly, insurers assert that the nature of insurance business is not compatible with the formalities in the law. Major Birhanu Tadesse contends that, 'Because the business is so swift, it does not give time for the parties to deliberate on a round table, sign and get two witnesses to attest the contract.' The fast pace of the insurance sector makes it imperative that it should not be subject to the requirements of written contract (in a unified document) and witness attestation as stipulated under the Civil Code. 'Individuals want immediate cover upon filling out the proposal form; they do not want to wait for a minute thereafter; leave alone come with witnesses and get it attested,' says Ato Tibebe Sirak, Head of the Legal Department in Ethiopia Insurance Corporation. Major Birhanu Tadesse also adds: 'We issue coverage by telephone, fax, or even e-mails. They simply give us the information we want, and we issue them coverage.' Most of the insured policy holders do not come to insurers even for paying premiums; it is all done through e-mails, fax, phone and so on.[88]

Another reason why insurance companies fail to comply with the formalities required by law is that Insurance is more of an international business. The forms which are in use in this country are also in use in most parts of the world. These globally standardized formalities in insurance make any attempt of modification difficult. This contention is strongly forwarded especially in relation to re-insurance, because modified formalities are not known by re-insurers.

Nevertheless, there is no instance in which a policy with signature of parties and attestation of witnesses is sent to the re-insurers and rejected. Thus, the contention that inserting on the face of the policy the signature of parties and attestation of witnesses will endanger re-insurance is merely an assumption. In this regard, there is divergence of opinion among lawyers in the industry. For instance, Ato Tibebe Sirak of the EIC legal department does not accept the above contention. He believes that 'getting the policy signed by the parties and attested by witnesses does not affect the terms and conditions of the policy, in which case the re-insurers will not be concerned.' Both Major Birhanu Tadesse and Ato Fasil Asnake share this opinion.

[88] *Supra* n 57, 2

Ato Yonas Melaku[89] has a different point in this respect. According to him, risks like constructor's all risk insurance, performance insurance, advance payment insurance, etc., are extremely big risks which domestic insurances cannot insure. He tries to illustrate this by a practical case. Tekeze Hydroelectric project's risk is 26 Billion Birr. Its insurer is Africa Insurance Company with a capital of 30 Million Birr. Africa Insurance Company's retention capacity (the amount of the risk it insures by itself) is much less than 0.01 per cent of the total risk. The rest is thus, distributed among the foreign re-insurers. So if the risk materializes, it is the re-insurers that pay more than 99.9 per cent of the compensation. Because of this, they are the ones who send all documents (including the insurance policy and others) which are not even easily comprehensible. Since the re-insurers' interest in the risk is so high the domestic insurers need not meddle with the policy. The domestic insurer is more like an agent in reinsurance cases. This is true, not only because the re-insured risk involves mainly the interest of the re-insurer, but also due to the nature of the relationship with re-insures. The domestic insurer in here like an agent who facilitates the conclusion of the contract, collects the premium and cedes it to the re-insurer *en toto*; out of which around 40 per cent is returned to it as a commission. Even as an agent, it is a very weak agent that cannot negotiate its commissions, let alone to negotiate the terms and form of the policy.

3.4 Actions taken to alleviate the problem

The problem was so unexpected that insurers panicked and took some measures to handle the matter. First, an effort was made by the Association of Insurers to lobby for an amendment of the law to accord with the practice.[90] There has also been an effort to put pressure on the court to change its attitude on the matter. Hence, the Monthly Panel of the Federal First Instance Court had attempted to reach at a consensus on issues of formality in general, and on the problem of insurance formality in particular. But all the efforts thus made were not fruitful as the Panel finally ended up by introducing new and even more divergent views.[91] These being long term measures other provisional measures were also taken.

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[89] *Supra* n 68

[90] A letter form EIC to Ethiopian Insurers Association (7 Feb, 2005, Unpublished) 2

[91] Interviews with Ato Desalegn Berhe, President of the Federal First Instance Court,19 May, 2006

3.4.1 Changing the Practice

Some insurance companies have gone to the extent of changing the form of the policy; or accompanying with it a document signed by both parties. On the one hand we find the half hearted effort to comply with the legal requirement by inserting the signature of parties at the bottom of the policy,[92] although this does not satisfy the requirement. What lacks in this particular case is the attestation of witnesses which is so indispensable under the law. The other effort to comply with the formalities provided in the Civil Code is affixing the signatures of parties on a separate document attached to the policy.[93]

This is open to controversy because the separate document bearing these signatures may be challenged especially by the defendant policy holders. The law requires the policy itself to bear the signatures of parties, and not another different document, and it is thus doubtful whether formal validity can be achieved through such measures. Such an undertaking also seems to be opposed to the sprit of the law, since it leads to the unnecessary proliferation of documents bearing the content of the contract. Indeed, the separate written document in such cases does only bear reference to the policy and signature of the parties. On the other hand, this very document itself does not show attestation of witnesses.

3.4.2 Getting written acknowledgement of debt or written promise of payment

In this case, some insurance companies, (specifically Africa Insurance Company, and Nile Insurance Company) get a written acknowledgement of debt by the insured, for the payment of premiums. This is well in accordance with Article 2019 of the Civil Code that states 'where a person promised to make a payment or acknowledged a debt, the person in whose favor the promise was made or the debt acknowledged need not prove a cause justifying them. The existence of a valid agreement shall be presumed subject to proof to the contrary.' At the Nile Insurance Company in particular policyholders are made to sign a Check or a Promissory Note in favor of the company for any outstanding premiums. 'We institute action for the payment of premiums on the basis of these documents; seldom on the basis of the policy' says Ato Tewodros, an attorney in the legal department of the company.

[92] *Supra* n 78
[93] *Ibid*

However, this does not seem to be a satisfactory remedy. On top of the fact that validity of the underlying contract can be challenged, the solution seems to fall short of solving the main problem. First of all, if at all it works, it is a remedy only for the insurer. The insured practically does not get an equivalent document which bears the acknowledgement of debt by the insurer. Thus, it is only an inadequate remedy. Secondly, even for the insurer it is of no use in case of claims against the third party tortfeasors based on the insurers right of subrogation.

3.4.3 Appeal

Appeal to the High Court has been taken as the most effective solution to the problem. Almost all decisions in which insurers were plaintiffs in the lower court had been appealed to the Federal High Court; and all of these have been reversed and remanded to the lower court to be considered on their merits. These decisions are inspired by premises constituted mainly by extralegal considerations such as economic analysis; somewhat like 'if we void all such insurance contracts, the insurance industry will crumble.' But to the extent that the high court's reasoning for reversing the lower courts' decision lacks strong legal premises, the problem will remain unresolved. This is a legal system where precedent does not fully work save the recent Proclamation No. 454/2005 which stipulates that decisions passed by the Supreme Court Cassation Panel of five or more judges shall be binding on all courts regarding interpretation of similar legal issues.

3.4.4 Precedent of the Federal Supreme Court's Cassation Panel

Ato Desalegn Berhe, President of the Federal First Instance Court, believes that the ultimate solution would be the decision of the Federal Supreme Court's Cassation Panel [94] because its decision will be binding for subsequent matters. But such dispositions by the Panel have to be on questions of law. The Cassation Panel can only make interpretations of disputable legal texts. With respect to the problem of insurance formalities, the Cassation Division of the Federal Supreme Court might hold that there is no dispute on the legal text. The problem emanates from the conflict between the law and the practice, and in effect, the solution would be to either change the law or the practice. Apparently, the Supreme Court's Cassation Panel cannot change the law; nor can it practically change the practice since judicial decisions are incapable, in practice to alter social conduct.

[94] *Supra* n 88

Thus, the ultimate solution to the problem of insurance formalities seems to be purely legislative. The legislature can either change the law to accord to the practice; or leave the law where it is. The reason why the legislature should change the law is clear enough. In commercial relations the law shall always follow the foot steps of the practice. Legislating commercial law form above may be possible, but at the end it may not be as effective as it ought to.

Historically as well, commercial legislations have never been creations of the sovereign legislature. The broader commercial legal fabric of *lex mercantoria* evolved out of custom, and only after it attained its full development did it acquire legislative recognition. This is especially true regarding insurance law which traces its origin from the custom of Venetian traders and the practice at the Lloyds of England which is indeed the pioneer in insurance. Legislation was only a subsequent development; and it did not contradict the practice. It was achieved simply by systematically writing down what existed there in the practice. A typical instance for this would be The Marine Insurance Act of 1906 of England.

Accordingly, insurance contracts were not required to be in writing under the English legal system since in practice traders did not want it to be in writing, except those of marine insurance. This practice at Lloyd's was disseminated to almost all legal systems thereby attaining the level of international practice. In most legal systems insurance contracts are not thus required to be in writing. Given all these indications, therefore, the choice the legislature must make would be to change the law so as to make it conform to the practice. The fact that the formalities in respect of insurance are more international, makes it imperative to adapt the law to the practice. In this regard there seems to be unanimity of opinion both among the judges and insurance attorneys.

Concluding Remarks

The formalities towards the formation of insurance contracts are mainly provided in Civil Code. Moreover, there are Commercial Code provisions which deal with the same subject of formalities. These two sets of formalities are therefore to be read together, and they don't seem to be irreconcilably contradictory with each other. It is indeed possible to interpret them harmoniously by subordinating the Commercial Code provisions to those of the formalities stipulated in the Civil Code because this seems to be the intention of the law maker in light of Article 1 of the Commercial Code.

However, this causes the problem of contradiction between the law (particularly the Civil Code) and the practice. In practice, insurance contracts

are not made in accordance with the formalities provided in the Civil Code. And the solution will have to be reconciling these two institutions by changing either of the two. It would, however, be more practical to change the law than the practice.

Thus, the first thing to do in order to solve the problem of insurance formalities will be to set insurance contracts in particular, and possibly the Commercial Code in general, free from being subjected to the Civil Code. The subjection of commercial relations to the Civil Code (in accordance with Article 1 of the Commercial Code) appears to lack legislative wisdom. Professor Jauffret didn't seem to forecast the dynamism of unfolding commercial relations in Ethiopia when he opted not to make commercial law autonomous. Civil law by its very nature is relatively more stable as opposed to the more dynamic commercial relations. The reason civil law is more stable is because it is much more shaped by sociological and historical factors, than by the commercial reality. Furthermore, the justifications for formalities hold much less true in the background of commercial relations.

Formalities may be prescribed for their cautionary functions. But this does not seem to be relevant for a trader who does not need to be cautioned when he professionally concludes a particular contract, like insurance. Being a professional he need not be forced to deliberate before cutting the deal. The same reasoning holds true for the channeling function of formalities; the utility of which lies in drawing a line between situations of a present promise with intent to be bound, and with no such intent. Here as well, a trader is a professional and does whatever he does with a full intent to be bound. Such cautionary and channeling functions make a lot more sense in the context of civil relations. There, the non-trader who happens to enter into particular type of contract only once or a couple of times in his lifetime may need the cautionary and channeling services of formalities.

The importance of the evidentiary function of formalities can as well be dismissed in commercial law settings. Commercial relations are informal in the majority of cases. What matters in most cases is good faith, which implies that possibilities of subsequent controversies about the existence of a contractual relation are rare. And this renders the evidentiary value of formalities superfluous in the background of commercial relations. It is to be noted that 'good will' constitutes the core incorporeal element of business undertakings as it has been clearly stated under Article 127 of the Commercial Code.

Moreover, the question of evidence in commercial law is much more flexible, compared to that in the Civil Code. A trader who *prima facie* is expected to

keep audited books of accounts under Article 63-70 of the Commercial Code is entitled to produce these as evidence in his favor. This is in a remarkable contrast to Article 2016 of the Civil Code which does not allow the non-trader to prove a claim in his favor by producing books and documents he has personally written.

Given the swift nature of commerce, a trader who is supposed to make several transactions (say per day) would find it difficult, if not impossible to comply with formalities. Here again the formalities may be workable in the non commercial setting. A person who happens to transact only occasionally can afford to follow formalities whatever they are.

The contract of insurance should thus be set free from the formalities in the Civil Code. The easiest way to do this will be to strike out Article 1725(b) from the Civil Code so that the rigid and cumbersome formalities therein do not hinder the dynamic and swift transactions of the insurance sector. Upon such repeal, however, the form required in respect of insurance contract will be like the one under Article 2472 of the Civil Code in respect of the proof of contract of loan. But the strong practice that has put in place a standard form for insurance policies will preempt the possibility of any controversy arising under Article 2472.

The same would also be recommendable with respect to the special contracts listed under Articles 1723-1725. However, the scope of this article does not allow a discussion on these special contracts. With regard to the subjection of the Commercial Code in general to the Civil Code, the solution will have to start from amending Article 1 of the Commercial Code, in such a way that the Commercial Code becomes autonomous. It is indeed high time that this issue be addressed in the course of the revision of the Commercial Code which is at present in progress.

Repealing Article 1725(b) will have to be *via* a particular proclamation. To this effect, the judiciary can initiate a bill. With respect to the autonomy of the Commercial Code, however, given that it is a serious undertaking that needs much care, it would be better to incorporate the amendment of Article 1 in the revision of the Commercial Code which is currently underway. ◘