

## ***KJI NEWSLETTER*** ***March 2006***

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles relating to issues of interest to judges and prosecutors working in Kosovo.

### **INSURANCE FOR MOTOR VEHICLE LIABILITY AND INDEMNITY**

#### **An instrument of social intervention for indemnity in the motor vehicle traffic**

The danger using the motor vehicles, respectively the damages that are caused from their possession and use exceed the possibility of the users (owners) to confront with their obligations in case of an accident. Even if eventually these obligations are met, this represents a huge burden for the drivers, and it causes serious financial consequences – especially when the damage caused is of considerable damage in property or in persons. This was evident immediately after the first production and use of motor vehicles. As the number of motor vehicles and damages was increased considerably in the society, the issue for establishing insurance system for indemnity for the victims became an imperative, this was at the same time an economical protection of the motor vehicle drivers – through the mandatory insurance one would socialize the danger through a dispersion of driver's obligations. Almost one century has passed every since the first MANDATORY INSURANCE FOR THE MOTOR VEHICLE LIABILITY was established (hereinafter Insurance for MVL) up to now this way of indemnity and liability remains the most preferred system, and is continuously advancing and being harmonized with the new age requirements.

The introduction of such system was a logical consequence of appearance of motor vehicle and at the same time of the affirmation of the liability (objective liability) based on the danger instead of the responsibility based on the guiltiness. What remains postulate and guiding principle during the whole period of interventions and efforts to improve the effectiveness, appeared to be a double mission or function which is:

- a) The adequate indemnity of the biggest number of the victims of traffic accidents
- b) Legal and economical defense of the owner and any authorized user of the motor vehicle in case of an accident and damage to a third party.

This double function, although with the co-existing and complementary possibility, results with giving priority to the first function – in such a case the offering of protection to the category of “third persons” exceeds the frames of insurance contract. Nonetheless, through regulation of this system the lawmaker clearly defines two legal relationships: 1) relationship between

the insurer and injured party and 2) between insurer or other institution charged with obligation and injured party, these relationships are regulated by the imperative norms and, the insurer is not allowed to make any objection based on the insurance agreement against the injured party.

In order for this system to perform its mission, it needed to frequently be under evident and indirect impact of the legal norms of liability of the damage. The first efforts for unification of the “indemnity law” in Europe are done through the approval of the International Conventions and some Directives of EU with the purpose of establishment of a common insurance

system, which enables territorial extension out of state boundaries, of insurance and indemnity. The issues that were briefly mentioned above regarding the insurance system of MVL, should be taken into consideration in any event when reviewing any subject matter which is referring to the respective field one should have into consideration also that, the legal provisions are interpreted correctly, the disputes are discussed, the role of the institutions and participants in this system are analyzed, negative phenomena in implementing the insurance system are mentioned and the revision or efforts are made in order to change the advancement of the negative phenomena.

### **The system of mandatory insurance for motor vehicle liability in Kosovo**

The mandatory insurance is applicable in Kosovo for half a century. Up to 1991 the content of this insurance system in Kosovo was not the same, it varied slightly in quality from the recognized and more advanced European systems. During the period of 1991 up to 1999 this system diverges in its implementation, as a result of the economical and political situation in Kosovo. Immediately after the war in 2000, UNMIK made efforts and established an “*inoperative*” mandatory traffic insurance system. Fortunately this system was applied only until October 2001. Such system had nothing to do with insurance for motor vehicle liability, because, it did not met the fundamental functions such as: offering a protection for motor vehicle drivers or injured parties. This system benefited only the insurers and the persons who did this job “in transit”. Such system did not benefit the people of Kosovo especially when heaving in mind the post-war situation. This system

will be remembered for the fact that many victims of traffic accidents remained without indemnity from the insurance companies in Kosovo. Many insurance companies gained profits with the “loss ratio” huge amounts, which were never gained or will be gained anywhere else in the world. It is not worthwhile to discuss or present this system, but it is good to specify the fact regarding the negative reflection which is still present in Kosovo and is still very profitable business, argument for this is the actual structure of the deep insurance pockets of Kosovan insurance companies, with participation from MVL with over 90%. Furthermore in the post-war Kosovo, after the adoption of UNMIK Regulation on licensing, supervision and regulation of Insurance Companies and Insurance Intermediaries no. 2001/25 promulgated on 05.10. 2001, the supervision of activities of mandatory insurance for motor vehicle liability falls under the competencies of

BPK. One could immediately see the approach for radical changes and efforts regarding the establishment of the modern system of the mandatory insurance for the motor vehicles. The struggle to find solution

for original institutionalization of the respective filed will become an imperative in the very near future as a requirement for a territory aiming to become a state.

### **BPK insurance system for motor vehicle liability**

It was 18.10. 2001 when BPK dealt with the first case of the insurance for motor vehicle liability through applying the Rule no.3 In the meantime until June 2004 through continuous and intensive activity several amendments and supplementations were done (1st on 28.03.02 / 2nd 27.06.02 / 3rd 27.02.03 and 4th 25.06.04). What makes in the system of BPK characteristic is the fact that finally we are dealing with a complete mandatory system of insurance for MVL, unlike the previous one established by UNMIK which was an improvised one. Although it was under the influence and coordination of the experts from USA the system of BPK was successful in designing itself in accordance with EU requirements, and as such during the stage of forming the statehood, it may very easily lead towards the incorporation of Kosovo in the European systems of Insurance from vehicle liability, and in the system of International Insurance Charter. Having in mind such an objective in the system of BPK one could assume that there should be incorporation of a huge number of requirements from the Directives of EU in the field of Insurance for Motor Vehicle Liability. An assessment done on 2000, until 2003, ranked Kosovo Insurance System as the most advanced in the region. As such the system gained respective sympathy from some of the National Insurance Bureaus and the integration of Kosovo in the respective international Insurance systems was supported.

Unfortunately, such enthusiasm and continuous promotion of the respective insurance system is not adequate and in the meantime this produced a lot of negative phenomena in realizing the respective function, at the same time it caused a delay in meeting the objective of affiliation in the international systems. The truth and the small success achieved by the project *Kosovo TPL Plus*, may fail. Not only that no agreement is expected in the near future with other MOU-s in the region but, a notice was given for revocation of the existing agreements with Macedonia and Albania. This is a news that will not be welcomed by the insurants-drivers, this might be of interest for the insurers because, this may provide double premium for the border insurance of MVL, by providing most favorable positive financial results.

It appears that this system lately is more under the factual competency of the insurers and treated within the IAK (Insurance Association of Kosovo) and BPK. This may be a good message and reason for actualization of new approach and engagement in this field. The impression up to now, is that BPK fulfils even exceeds its possibilities and competencies of engagement in this insurance system. This refers to the issue of legislative matters on approving the Law on Mandatory Insurance in Kosovo what in reality should now be under the competencies of Kosovo Assembly. This, what we prefer is not

unusual but it is a rule that we want the insurance system to be regulated through the Law. In case of an eventual law BPK would

continue to exercise the activities under its jurisdiction given by the UNMIK Regulation no.2001/25.

### **Presentation on the applicable content of the BPK Insurance System**

Taking into the consideration the destination - objective of this presentation, it appears that there is a need for more concrete presentation on the actual insurance system

of MVL, in relation to this we will especially elaborate on the following:

#### **1 – The bearers of the risk of Motor Vehicle Liability Insurance**

The function of this system is consisted of certain organization of the respective material funds for meeting the bigger obligations. This system means the main bearers-drivers of the motor vehicle for legal-civil liability are insured for the damages caused to the third persons as a result of vehicle possession. Although Article 174 of Law on Obligations besides the owner holds responsible the person who was using the car namely the person to whom the vehicle was entrusted for care and supervision, holds responsible the owner of Motor vehicle.

*The owners of motor vehicles are the main subject in which this system relies, The Insurance companies are organized with the means which are realized by the premium of motor vehicle insurance, and the funds located for indemnity of damages caused in the traffic accidents.* The system of motor vehicle liability seems to be confusing and unacceptable especially when we see that the primary role is represented by the insurance companies themselves, which in reality are nothing else but a body hired to offer the service and to implement this system in interest of the society. When this

is viewed better by all participants of this system and in particular by BPK as main supervisory body, the questions that come up are many for example: how can the contribution of the motor vehicle drivers be given arguments by these special Insurance Companies, respectively how can they argument the payment of this premium when we know that participation in compensation of damages is less than 20%? How can the motor vehicles drivers accept the activity of the insurance companies when the contracted (mediation) expenses of the mandatory insurance are higher than the compensated damages? Why isn't Kosovo implementing the principle of functional premium, such system would be determined based on the indemnity and would serve mainly for this destination, whereas the other part of this premium would be gained by the insurers depending on how successful and how conveniently they organize their insurance and compensate the issues of damages? It may seem like paradox but it the actual system in Kosovo the structure of premium is 4:1 in detriment of the function of this system?! The other question that arises may be – is

the system of mandatory MVL insurance established with the purpose of paying the indemnity for the damages caused in the traffic or is it established for filling the pockets of the insurance companies? The actual problem in Kosovo in delays of the insurance companies in meeting their obligations for contributing to the GUARANTEE FUND adds to the problem, it seems that the insurers instead of taking their role of service providers in this system they are taking the role of the bearers.

Otherwise, according to the Rule no.3 of BPK, this mandatory insurance refers to the owners of all motor vehicles designated for transportation of people and goods, trailers,

tractors, working vehicles, and which should possess a Vehicle Registration Document. The obligation for vehicle insurance refers also to all types of motor vehicles that are used in territory of Kosovo and are registered out of Kosovo. In such cases, the contract is concluded with the so-called “border insurance”, except for the vehicles registered in Macedonia and Albania, if equipped with insurance certificates according to the Doctrine of Appreciation.

This kind of insurance is not mandatory for the motor vehicles of KFOR, UN, EU, OSCE, and CD, which are acceptable with the contracted insurance companies licensed outside of Kosovo.

## **2 - The content and capacity of the insurance coverage**

The insurance system is an essential issue which determines the criteria and content of an insured case and making at the same time the framework and the quality of the insurance protection understandable and desirable for the society. The system of BPK in its Articles, 1.4, 1.5, 1.8, 1.9, clearly defines that the Rule no.3 determines the category of the vehicles which refer to the MVL, the insured case, the amount for covering the insurance, and the category of “third parties”.

The categories of motor vehicles covered by this insurance system were mentioned above. Whereas the **insured case** is determined when the case of mandatory insurance of MVL is defined, “the liability on the third parties for damages caused from the use of vehicles, damages with consequences of death, bodily injury, health damage, and damage of goods”. These

damages are covered with the amount paid in the insurance of the legal-civil liability of the owner according to the provisions of Art, 173 - 178 of the Law on Obligations and the indemnity for material and immaterial damage pursuant to the Art, 185-205 of the LO, Rule no.3 of BPK. The provision of Art, 176 of the LO, extend the financial coverage and every authorized user of the vehicle will gain the status of the insured person.

The effect of the MVL insurance in relation to granting the indemnity refers to the definition of the “**third party**”. The wider is the cycle of persons who enjoy this kind of status, the more all-inclusive and qualitative this system will be considered. It is a main institution, without which the system can not function, which determines the extent of the socialization of the danger through this insurance system. Kosovo has incorporated the EU recommendations and

directives, excluding the right to indemnity of only a small number of persons. The definition of this category with negative method results with the principle of the right to indemnity of all injured parties, besides the responsible driver, the driver and user who is in illegal possession of the motor vehicle, and the damage of goods which belongs to the owner, co-owner, and the user of the vehicle. This system now provides for the insurance coverage, respectively indemnity is provided for the category of persons who are bearers of the risk, the contactors the owners, co-owners and their family members, who were not included in the category of “third persons” in the previous system.

The quality of the insurance coverage, although it meets all other standards, it still depends on the adequate limitation of the insurance coverage. This is best shown by **minimal amount for contracting the insurance for MVL** which are foreseen by the Law. An educational case of inadequate limitation of the insurance coverage was the UNMIK system of 2000, where the minimal amount for an insured case was **20.000 DM.** The actual insurance system of BPK

foresees the minimal amount of insurance in case of damage in persons to be **100.000 Euro and for damage in property 50.000 Euro, respectively 100.000 Euro** for damage of property, the amount for the immaterial damage in persons caused by the use of bus of transportation vehicles during the transport of dangerous materials the amount of **1.000.000 Euro**, respectively the amount of **3.000.000 Euro** in case of damages caused to other motor vehicles. With a small intervention in the legal provision of Art, 2 of the BPK, Rule no.3, the Kosovar MVL insurance system in few years could be considered as the most advanced one in the region. The EU Directive no.5 /2005 requires the harmonization of the legislation related to the limits of the insurance coverage until 11 June 2012.

It is foreseen respectively required to contract MVL insurance in the minimal amount of **1.000.000 Euro** per person in case of bodily injuries or death, and **the aggregate amount of insurance of 5.000.000 Euro** respectively **1.000.000 Euro for damages to the property.**

### **3 – The extension of the system out of frames of the contract on mandatory MV insurance**

The interest of the society does is not consisted of or limited on partial solution of the problems of damages in traffic accidents. A partial solution would be if the respective issue would only be realized based on the contract on mandatory insurance. In such a case the indemnity will exist only when the accidents are caused by the drivers who are properly insured. What will happen with the victims- damaged parties in an accident in which the damages were caused by a vehicle which has no valid

insurance policy, or in case of bankruptcy of the insurance company who contracted the insurance? Is there a reason for the victims of vehicle traffic to remain without indemnity for the damages caused by the unknown vehicles? In order to reach this aim in general, it would be reasonable to organize the system where the MVL insurance society would provide material assets for indemnity in cases when the damage was not cause by the insurants – its members. This is why special institutions

and funds need to be established for this purpose, so that the injured parties in such cases would have the possibility to realize the indemnity from the Base of the insurance system. “Guarantee funds” is usually the institution in this system to conduct such a function, otherwise such fund is collected through the contribution of insurance companies which exercise the activity of MVL – the premium of the insurance will also include the expenses for the functioning of such a fund. Again the activity of Guaranty Fund is a burden for the insurants, it is not the burden of insurance companies which are nothing else but intermediaries who offer services to the insurants (endangered society) and collect the insurance premium and treat the claims for indemnity of traffic accidents in accordance with applicable laws.

The system of BPK (Art, 4 of the BPK Rule no.3) provides for a modern solution and

foresees the indemnity right for the injured parties in all of these cases; it foresees the establishment of the Kosovo Guarantee Fund the organizational and functional rules. There is no essential distinction in the quality of the indemnity on bases of the MVL insurance and Guarantee Fund, This fund enjoys the status of legal entity and it may be subject to a law suit. The Guarantee Fund may grant realizations of the rights for the foreign nationals, of course with the condition of reciprocity. The claims for property insurance or medical and invalidity insurance are not covered by this Fund. Taking into consideration the position of Kosovo, because of inability to establish National Insurance Bureau, this fund has other obligations which refer to the payment of damages caused by the motor vehicles with foreign number-plates, pursuant to the obligations set forth by MoU.

#### **4- The review of indemnity claims**

The purpose for establishing the mandatory insurance system is to guarantee adequate indemnity within the due time. Predisposition for realizing this objective is the fact that the insurers initially provided the financial means for this destination and the insolvency should not be seen as a problem. If adequate compensation is awarded, but due to complicated proceedings, takes several years for it, such performance will be interpreted as failure of the system. Taking into consideration the fact that some insurance companies fail to perform these requirements in the right order, by often forgetting that in fact they are only intermediaries engaged for offering services in the field of insurance, the

lawmaker has foreseen the legal terms within which the indemnity claims shall be reviewed. In the international level many efforts are being made in harmonization of legislation - EU Directive no. V of /11/5/2005. Because the prolongation of the indemnity procedures is often caused by the attorneys who often forget that they are there to represent the interest of the injured party not their own, the lawmaker in some cases foresees the obligation to submit the claim before the initiation of the litigation – otherwise the claim suit will be considered as premature.

The current system of BPK has a modern and original approach in relation to this issue (see Art, 5 of the BPK Rule no.3). It

foresees a very short term of 10 days, which is more favorable to the injured party, within which the claim should be reviewed/decided. In case of a delay, respectively if the insurer does not review the claim within the above mentioned term, this rule foresees the payment of the punitive of 20% calculating from the date of the submission of the claim. The claim of the third party may be submitted directly to the insurer although the injured party is not in a legal relationship with the insurance company.

This is enabled through installment of "*actio directa*" which is granted by the law for the injured party. This is one of fundamental institutions in this insurance system, which enables the realization of absolute separation and independence of the two legal relationships in this system (the injured party – insurer – insured). Cases when in which the indemnity is awarded in this system – not based on the insurance agreement, *actio directa* it is normal in the system for this indemnity to be foreseen in the Guarantee Fund. With respect to the damages caused by the motor vehicles with foreign registration-plates, the submission of the claim for indemnity should be submitted to the Claims Servicing Office (an office established according to the CoB Directions for Kosovo) but, at the same time this office does not enjoy the passive legitimacy because of the special

circumstances in Kosovo as a result of not heaving the National Insurance Bureau. Otherwise, the passive legitimacy of the insurance companies in the disputes based on the MVL insurance and against the Guarantee Fund is not disputable.

Besides a solid regulation of the indemnity procedure, it could be considered that there are still many practical problems in practice. Not that the injured parties are not satisfied with the awarded indemnity, but, also the procedures for reviewing the claims encounter many unnecessary prolongations, and the procedure for treating the claims does not correspond with the foreseen standards. It seems that the reason of heaving such situations is the inefficiency of the courts which fact has emboldened some irresponsible insurers to continuing with the old way of treating the indemnity, taking advantage of the delay of Court decisions with aforementioned consequences. Under the pressure of the fact that the injured party should wait for the decision of the court for at least 2 to 3 years the injured party is obliged to accept a deal for indemnity even if inadequate. The highest liability for this falls with the BPK for failing to undertake the necessary measures for elimination of such negative phenomena which result in heaving such a dysfunctional system, although the system is properly regulated.

## **RESUME**

The purpose of the above text was to refresh our memory in relation to the role and function of the Mandatory insurance of motor-vehicle Liability. It seems it is

necessary, especially now, when we are faced with many difficulties and negative phenomena in Kosovo in applying this special insurance system. Besides a

successful activity by BPK, the impression is that it is time to regulate the respective field with special law by the Assembly of Kosovo. Nevertheless BPK remains dedicated in this field as the main supervisory body in order to realize the role of this mandatory insurance of the motor vehicle liability and finally through some adequate solutions to eliminate the negative phenomena present in the insurance companies in the field of contracting insurance and handling of damages. Without further delay it is necessary to re-actualize activities in the international field of this Insurance System. Any activity which would be initiated in the meantime by Kosovo Assembly, BPK or other institutions should take into consideration the fact that indemnity for vehicle traffic may at the first site look like an individual problem but, in reality it is a problem which has penetrated in the society and it requires proper intervention. The mandatory motor vehicle liability insurance is only one instrument chosen by the society for solving the traffic problems which would enable the socialization of risk and consequences of vehicle traffic. The policyholders of this insurance system are the drivers themselves – the ones that create the risk for the community and together with the adequate material funds dedicated for compensation of the victims of traffic accidents. The insurance companies can never be policyholders but, this phenomenon is appearing very often in Kosovo as a result in misapplication of this system. The Insurance companies can only be simple mediators, of course specialized entity to offer qualitative insurance services (contracting of insurance policies and treatment of damages) with the purpose to perform the functions of this system. In

Kosovo same as everywhere else in the world the insurance system as a system with social character should not create conditions for becoming a basis for enormous profits. In most of this system does business within the limits of the *even breaking*, without excluding losses. Several states (Japan for example) prohibit by law the realization of profits in the field of insurance system. It is confusing when we think that in Kosovo for five years in a row it is still allowed to apply the tariff system which results in participation of payment of damages with the insurance premium which is under 20%. There are other types of voluntary insurance activities where the insurance companies can prove themselves and where it is normal to realize profits and for which insurances there is no state support in binding the citizens to contract insurance.

In the process of implementation of the insurance system in post war Kosovo, many negative phenomena were present in the realization of the indemnity right before the courts.

9. The inefficiency on proper treatment of the disputes from this field had indirectly influenced in appearance of negative phenomena in the field of treatment and allocation of indemnity. The inefficiency of the courts seemed to be additional support for insurance companies exercise the activity of mandatory insurance contrary to its purpose and function of this system. Through educating and specializing magistrates and through better organization of the courts would provide huge support for adequate application of this system. The efficiency of the court activity would help the decrease in the number of disputes in the near future and it would indirectly influence

in the elimination or decreasing the negative phenomena in this field, which mainly reflect as damage for the injured parties who usually are the traffic accidents victims.

## **KJI Training Activities March 2006**

Practical Skills Training/Simulation of Trial  
*On 03.03.06 KJI held a practical skills training in a form of simulation for judges hearing Criminal cases and public prosecutors from Gjilani region*

In 2006 KJI continues with the field practical skills training program. The training session was organized in Gjilan/Gnjilane as a simulation of a main trial. Judges and prosecutors who actively participated in the simulation rendered a decision at the end of the session.

Practical Skills Training/Simulation of Trial  
*Target group were: Civil Law Judges*

On 09.03.2006 KJI held a practical skills training session – simulation of a trial, for civil law judges from Prizreni/Prizren region. The simulated case treated the issue of compensation of damages in the cases of motor vehicle responsibility including material and non-material damage.

Training for Minor Offences Court Judges

In 2006 KJI continues with the organization of specialized training sessions for Minor Offence Court Judges. The first training event held on 14.03.2006 at KJI focused on the minor offence court procedure with a special emphasis on the minor offence

liability, the co-liability of natural and legal persons and the collection of evidences during the procedure.

Seminar: Combating trafficking in human beings.

*Target group: prosecutors and judges hearing criminal cases.*

The Seminar aimed to examine some of the practical aspects of the combat against the trafficking in human beings in Kosovo. The programme of the Seminar was focused on the development and specific characteristics of Trafficking in Human Beings as a phenomenon, as well as on the practical aspects of the investigation, international cooperation, and protection of witnesses in such cases. The implementation of Kosovo Anti-Trafficking Action Plan was one of the matters that were discussed during this session.

Seminar on Execution of Civil Judgements

*Target group: Civil Law Judges*

Based on the Judicial Training Needs Assessment, on 23.03.06 KJI organised a seminar on execution of civil judgements which treated many dilemmas and practical problems related to the execution procedure, its implementation and difficulties judges face during their daily work.

## Forthcoming events

### Workshop – evidence procedure- Admissible and Inadmissible evidence in the Criminal Procedure

Target group of this seminar will be judges, prosecutors and judicial police. This workshop which is to be held at the premises of KJI will focus on the evidence procedure and the rules for the administration of evidences provided for in the second part of the Criminal Procedure Code.

*Planned date: 4 April 2006*

### Seminar for lay judges in the Mitrovica region

Based on its mandate KJI is involved in training of lay judges in all the regions of Kosovo. For the month of April a practical training for lay judges from Mitrovica region is foreseen. The training will focus on the criminal and civil procedures as well as on some aspect from the Code of Ethics.

*Planned date: 10 April 2006.*

### Workshop on Code of Ethics

In 2006 KJI continued with the organisation of workshops on the Code of Ethics in all regions of Kosovo.

This time the beneficiaries of the training will be judges and prosecutors from Prizren region. The training aims to give a more detailed overview on the experience and practice, in which the independence of judges may be worrying. The workshop will focus on the position of the judge as a single decision-maker and as a decision-maker in a panel.

*Planned date: 18 April 2006.*

### Seminar: Practical Problems related to - property issues pursuant to the applicable law in Kosovo

This seminar will treat the practical aspects of this topic respectively the issues that are related to gaining of ownership pursuant to the applicable law in Kosovo, such as registration of real estates and other relevant problems that are encountered in the practice when dealing with co-ownership. The newly promulgated Regulation 2006/10 and the establishment of the Kosovo Property Agency will be also a matter of discussion.

*Planned date: 20 April 2006.*

### Seminar – Measures for ensuring the presence of the defendant

Target group of this seminar are criminal law judges and prosecutors, who impose measures for ensuring the presence of the defendant in accordance with the Criminal Procedure Code. This seminar will focus on the measures that are foreseen by the Criminal Procedure Code for ensuring the presence of the defendant in the criminal procedure. The precise implementation of the respective provisions as a guarantee for a prevention of criminal offences and for heaving a successful flow of the procedure will be also discussed.

*Planned date: 26 April 2006.*