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The International Comparative Legal Guide to:

Insurance & Reinsurance 2015

4th Edition

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

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Chapter 30

Turkey


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The insurance regulatory agency in Turkey is the Insurance Undersecretariat of the Treasury (the "Undersecretariat"). As it is positioned under the Prime Ministry, it is not an independent body.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An insurance company in Turkey can only operate in the form of a joint-stock company or, in the case of mutual insurance funds, a cooperative company, however, in practice joint-stock companies are preferred. The incorporation process is subject to the general establishment procedure set out in the Turkish Commercial Code ("TCC") dated 14.02.2011 and numbered 6102. In addition to the Ministry of Customs and Trade approval, it is required that founders of insurance companies have a strong financial condition and a clear criminal record.

Other than the above, the minimum paid share capital of an insurance company must be TRY 5 million (around EUR 1,809,297 as of November 29, 2014), paid in cash. However, the Undersecretariat is entitled to request an increase in such amount.

To operate as an insurance company, the company must apply to the Undersecretariat after incorporation to obtain a licence for operation in each insurance class.

Companies failing to apply for an insurance licence within one year following the incorporation, at the latest, will lose their right to use "insurance" in their commercial names as well as being subjected to criminal and administrative penalties.

It should be noted that an insurance company is not allowed to be active in both life and non-life insurance divisions or in any sector not related to insurance.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Insurable interests of Turkey residents must be insured by insurance companies established in Turkey. The exceptions to this rule are freight exporting and importing, ship chartering and life insurances. Non-compliance with the above is subject to criminal sanctions including imprisonment and monetary fines. However, it is possible for the local reinsurer to transfer 100 per cent of the risk to a foreign insurer. Foreign insurers which are not licensed in Turkey usually make fronting arrangements with local insurance companies in order to insure interests in the jurisdiction of Turkey.

Foreign insurance companies can only operate in Turkey by opening a branch, by incorporating a company in Turkey or by acquiring the shares of a local insurance company.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In principle, freedom of contract is valid in insurance contracts, but subject to certain restrictions. The insurance policy must be prepared in compliance with the general conditions predetermined by the Undersecreteriat. Moreover, the insurance contract cannot be against the mandatory and semi-mandatory rules of the TCC.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under Turkish law, there is not any specific legislation requiring companies to indemnify their directors and officers. However, there is not any regulation preventing such an indemnification mechanism from being implemented for the directors and officers in relation to liabilities arising while conducting companies' business and transactions.

1.6 Are there any forms of compulsory insurance?

There are a considerably high number of compulsory insurance classes in Turkey, particularly in relation to dangerous activities such as gas boilers, transportation, medical injuries, clinical trials and hazardous materials, etc. The most frequent type of compulsory insurance in Turkey is cover for motor vehicles. Insurance companies cannot refrain from providing compulsory insurance services which fall under the scope of the insurance branches that they cover in their business.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The general approach of the Turkish legislation is towards protecting the relatively weak party in a legal transaction.

Likewise, the substantive law relating to insurance is more favourable to the insured, as insurer companies are perceived to be stronger than the insured. When there is ambiguity or contradiction in the wording of the policy, interpretation in favour of the insured prevails since the primary duty of providing proper wording is on the insurer. The Turkish courts adopt the same approach in court proceedings as well.

2.2 Can a third party bring a direct action against an insurer?

Third parties to the insurance policy can only bring a direct action against an insurer in liability insurances. The insurer's obligation to the injured third party will continue within the monetary and term limits set by the insurance policy.

2.3 Can an insured bring a direct action against a reinsurer?

As per Article 1403 of the TCC, reinsurance of the risk shall not entitle the insured to bring a direct action against the reinsurer because the parties to the reinsurance policy are the reinsurer and the insurer. The whole idea of reinsurance is to separate the risk of the insurable interest between the reinsurer and insurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The remedies of the insurer in cases of misrepresentation or non-disclosure are stipulated in three different stages. These are: a) before the conclusion of the contract; b) at the occurrence of the risk; and c) during the term of the policy (which is also evaluated as the subsequent increase in the occurrence of the risk).

a) Before the conclusion of the contract:

In case of non-compliance with the duty of disclosure or misrepresentation before policy inception, the TCC provides alternative rights of either withdrawing the policy or asking for premium difference (both to be used within 15 days of becoming aware of the non-disclosure of important facts). When the request for premium difference has not been accepted within 10 days, the insurance will terminate automatically.

After the occurrence of the risk, if the negligence of the policy holder is determined and the insured is in breach of its disclosure duty, the compensation is reduced in accordance with the degree of negligence, provided that the non-disclosure has the potential to affect the risk or the compensation amount. Where the insured has acted with wilful misconduct, the insurer shall be discharged of its obligation to indemnify or to pay a fixed sum if there was a connection between the non-disclosure and the risk that materialised. If there is no such connection, the insurer shall pay the indemnity or the fixed sum proportionally, by taking into consideration the ratio between the premium paid and the premium that should be paid.

As provided above, the TCC gives utmost importance to the presence of a causal link.

b) At the occurrence of the risk:

The TCC introduces a duty for immediate notification upon learning.

If the policy holder fails to notify the underwriter without delay or fails to notify at all, the underwriter is entitled to request a reduction from the compensation depending on the degree of the negligence, provided that this failure has led to the increase in the damage arising from the occurrence of the risk.

c) During the term of the contract:

The insured is under the duty to immediately notify the insurer of facts that subsequently increase the risk within 10 days as of learning such facts. If the policy holder has deliberately done anything that increases the risk, it has to notify the underwriter immediately.

If the underwriter learns about these facts during the course of the policy, the underwriter is entitled to terminate the policy or ask for the premium difference within one month of learning. If the premium difference is not accepted by the insured within 10 days, the policy shall be deemed terminated.

After the occurrence of the risk, if the negligence of the policy holder is determined and the insured is in breach of its disclosure duty, the compensation is reduced in accordance with the degree of negligence, provided that the non-disclosure has the potential to affect the risk or the compensation amount. Where the insured has acted with wilful misconduct, the insurer is entitled to terminate the contract and thus shall be discharged of its obligation to indemnify or to pay a fixed sum if there is a connection between the non-disclosure and the risk that materialised. If there is no such connection, the insurer shall pay the indemnity or the fixed sum proportionally, by taking into consideration the ratio between the premium paid and the premium that should be paid.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured is under a positive duty to disclose important facts that are, or should be, known to him. The TCC provides that questions asked orally or in writing by the insurer are presumed important unless proven otherwise. Also, all facts which can affect the judgment of a prudent merchant when executing the policy, or those facts that require the policy to be executed on other terms had they been known, shall be deemed as material facts and therefore the insured must disclose them.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The automatic right of subrogation is stipulated under the TCC; under the general provision of insurance and explicitly under liability insurances. There is no need to have a separate clause entitling subrogation; however, there are certain conditions to be met for automatic subrogation to apply, such as:

- The insurer must pay the indemnity to its insured. The right of subrogation only covers the amount which is paid by the insurer to the insured and the interest applied to such amount starting from when the payment was done.
- The insured should be entitled to ask for indemnification from the third party, in order for the insurer to ask for the same.

3 Litigation - Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial Courts, as courts specialised in the area of commercial disputes, are competent to hear insurance disputes irrespective

of the amount or value of the dispute. Commercial Courts are mostly present in cities that have a high number of commercial disputes; whereas, Courts of First Instance have jurisdiction to hear commercial cases in cities that do not have specialised Commercial Courts due to insufficient volume of such disputes.

Insurance disputes arising out of maritime law, for example, insurance for freight, are heard by the Specialized Courts of Maritime.

In the Turkish legal system, courts do not have juries.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

Civil claims can be completed within two years before the Court of First Instance. It takes four years on average, with an appeal stage of 1.5 years and a revision of decision phase of approximately six months. In some complex commercial cases involving multiple appeal examinations, the litigation process can take up to 10 years.

Focusing on insurance cases, it should be noted that courts have less experience on complex insurance matters, thus the duration of a lawsuit may take 7-8 years.

4 Litigation - Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

The principle of "preparation of case by parties" dominates the Turkish Civil Procedure system. The judgment is rendered on the basis of the evidence or other documents brought up by the parties. There is not a disclosure and discovery mechanism regarding the inspection of documents.

The judge is under the obligation of illuminating the dispute where there are mistakes of fact or legal ambiguities or contradictions. In this regard, the judge is entitled to ask questions, demand explanations and request the submission of evidence from the counter- and third parties. Judges can order a third party or an institution to submit the documents having crucial importance to evidence the claims. There are sanctions against those who do not comply with such an order, however, they are not sufficiently deterrent.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

Parties are entitled to withhold all of the above.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Insurance disputes are subject to written proceedings. It is possible to submit witnesses by having the approval of the counterparty or provide a list of the witnesses they would like the court to hear, together with the personal details of such witnesses. This list can only be submitted once and the list cannot be widened. Courts hear the witness after the preliminary hearing, during the examination stage.

The evidence of a "witness" is discretionary evidence, where the judgment is not tied to the statements of the witness.

4.4 Is evidence from witnesses allowed even if they are not present?

In principle, evidence from witnesses is only allowed if the witness is present before the court. However, only if it is required, i.e. when there is limited time, when the witness is in a foreign country, where there is no need to listen to the witness before the court or when the witness is only able to respond by writing, the judge may decide to send a questionnaire to the witness and have him answer in writing. If the answers to the questionnaire are insufficient, the judge may call the witness to the hearing.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Court-appointed experts are very common in Turkish jurisdiction and according to the Court of Appeal precedents, it is obligatory for matters which require technical examination. The legislation prohibits having a court-appointed expert regarding questions of law, which should be resolved by the judge.

Party-appointed experts are introduced with the new legislation. It is possible for parties to submit their own expert opinions and it is in the judge's discretion whether or not to take such a report into consideration.

4.6 What sort of interim remedies are available from the courts?

In general, judges have full discretion over the kind of interim remedy depending on the case. The judge may order to protect, in other words to freeze, the asset or right of the parties, transfer such to an escrow agent or decide on any other remedy that would remove the risk or prevent any further damage.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

It is possible to appeal the final decision of the Courts of First Instance. Following such decision, both sides are entitled to appeal the court's decision where the subject matter is over TRY 1,890 (around EUR 700 as of November 29, 2014). During the appeal stage, the decision of the Court of Appeal is given by only reviewing the case file. However, in order to request a hearing, the subject matter must be over TRY 18,280 (around EUR 6,600 as of November 29, 2014).

There are two different grounds for appealing decisions:

- grounds related to the merits of the case; and
- grounds related to procedural matters.

The decisions of the Civil Court of First Instance, where insurance claims are brought, can be appealed with an appeal petition within 15 days from the notification of the decision to the parties.

The Turkish litigation system also has another stage of appeal for the correction/revision of the decision of the Court of Appeal, within

15 days from the notification of the appeal decision to the parties. There are also monetary limits to apply for correction. The revision of the decision is only possible on the following grounds:

- the duly raised objections of the parties, which might have affected the decision of the Court of Appeal, were left unanswered;
- the legal grounds in the decisions are contradictory within themselves;
- the decision is not in compliance with the law or with procedural matters; and/or
- the evidence which forms the legal basis of the case was forged or subject to fraud.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of claims; however, the claim for the interest must be stated within the list of claims when initiating the case.

The commercial legal interest rate to be accrued is set every year, this year being 12.75 per cent. With respect to foreign currency, the legal interest rate will be the highest interest rate applied to deposit accounts with one-year maturity, unless a higher rate is stipulated in the contract.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The claimant is obligated to fund the litigation when filing the case. The losing party shall reimburse the litigation costs, together with the attorney fees of the winning party. It should be noted that the "attorney fee" referred to here is not the actual fee that is set as per the agreement between the party and the attorney, but the attorney fee tariff set for the litigation costs.

It is predominantly observed that settlement is not preferred during litigation by the parties and usually disputes are resolved before the courts.

There are no cost advantages for offering settlement. However, parties may decide to share or regulate the costs in the settlement agreement.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Courts cannot compel parties to mediate disputes, but they invite them to mediation. In practice, the judges are required to ask parties whether it is possible for the parties to mediate or to settle in the preliminary hearing. Other than this, courts do not have any other power to direct parties to mediation.

4.11 If a party refuses to a request to mediate, what consequences may follow?

The parties to the dispute are free to request, refuse, continue or terminate mediation. If a party refuses a request to mediate, the court shall continue to hear the case and no penalty costs are imposed on the refusing party.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of arbitration? If so, on what grounds and does this happen in many cases?

In addition to national or international arbitration, the Insurance Arbitration Commission ("Commission"), incorporated under the Insurance Association of Turkey, is a promising alternative to avoid prolonged litigation procedures and get a viable solution.

Although the legislation is more than sufficient to direct parties to arbitration, Turkish courts usually prefer to hear the case brought before them and they usually do not have a positive approach towards arbitration.

In arbitration cases, the principle is that courts should refrain from seeing the merits of the case, but only deal with the procedural matters and exceptionally, interim measures. There are certain circumstances where the intervention of the courts is possible as per the International Arbitration Code dated 05.07.2001, numbered 4686, for international arbitration, and the Civil Procedural Law numbered 6100 and dated 04.02.2011, mostly with regards to procedural issues and interim remedies, e.g. lack of mutual understanding regarding the appointment of an arbitrator, challenge of the arbitrator by the parties and the request of interim measures.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

As per the regular arbitration rules, the arbitration clause must reflect the true will of the parties and be explicit in writing. Additionally the arbitration clause should be linked to a specific legal relationship, such as agreements.

With regards to the Commission, no clause is needed to apply to the tribunal. Even when there is no such clause in the policy, the insured, beneficiary and the policyholder is entitled to initiate arbitration proceedings against an insurer who is a member of the Commission. Additionally, if the insurer is not a member of the Commission, in disputes arising out of mandatory insurances the insured is still entitled to apply to the arbitral tribunal.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Provided that the intent of the parties is towards arbitration, the dispute shall be resolved by arbitration, if not, the dispute shall be resolved by litigation. However, in some cases, despite the presence of a valid clause, it is seen that courts proceed to hear the case and the Court of Appeal then reverses the judgment for lack of jurisdiction.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The International Arbitration Code explicitly states that it is possible to request interim remedies from the courts and refers to the Civil Procedural Law, as explained under question 4.6.

As per the Civil Procedural Law, in national arbitration it is possible to apply to the court for interim decisions provided that it is not possible for the arbitrators to act immediately and efficiently. Otherwise, either the permission of arbitrators must be obtained or it must be mutually agreed by the parties in writing.

The Arbitration Code and the Civil Procedural Law do not specify the types of interim measures; however, examples to interim measures would be the prohibition to transfer the asset or right and the decision to freeze such.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The International Arbitration Code and the Civil Procedural Law stipulate the details of an award and it clearly states that the legal justifications behind its reasoning should be mentioned in the award. The lack of justification is not specifically listed in the grounds for not enforcing the award. As per the recent precedents, with regards to foreign court decisions, the lack of justification is not considered to be against the public order alone. Such decision of the Court of Appeal may also constitute a precedent for arbitration awards.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The International Arbitration Code and the Civil Procedural Law stipulate that it is possible to apply for the correction or interpretation of the award from the arbitral tribunal, provided that the counterparty is notified of such request.

Additionally, both laws rule out the possibility of an appeal on the merits of the dispute. However, they provides for the cancellation of the arbitral award to be filed before the competent Civil Court of First Instance. The grounds for cancellation mainly consist of procedural matters, the arbitrability or competency of the arbitration, and public order.

A cancellation action should be filed within one month from the delivery of the award or within 30 days of the interpretation, correction or the supplementary award.

The parties are also entitled to appeal the decision of cancellation, however, such appeal is limited to the legal grounds applicable to the setting aside of the award.

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