

THE INSURANCE AND
REINSURANCE
LAW REVIEW

TENTH EDITION

Editor
Simon Cooper

THE LAWREVIEWS

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PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant: it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all the contributors for their work in compiling this volume.

One of the defining features of 2021 was the covid-19 pandemic, which has inflicted terrible human misery around the world. The insurance industry, like most other aspects of the economy, has been badly impacted by the pandemic. Although the financial loss to the industry seems likely to be manageable, it has undoubtedly raised issues about the suitability of a range of policy wordings for the modern commercial environment, while also raising various legal issues related to, for example, causation and the quantification of loss. The different jurisdictions represented in this book will have different responses to these developments so it is vital to hear from the lawyers in each of those countries on the factors that will govern the international response.

The year 2021 was another very bad year for insured losses from natural catastrophes. Hurricane Ida was the largest single loss event but other extreme weather events including deep winter freezes, severe thunderstorms, floods and heatwaves had a significant impact. These losses reinforce the continuing concern that climate change will see a long-term increase in the number and severity of such losses. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation to, for example, aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

The past year also saw no respite in the number or scale of cyber events, including the data breaches at the Microsoft Exchange Server and ransomware attacks on organisations as diverse as Bombardier, Acer, JSB Foods and Kia Motors. The insurer Axa also suffered a major ransomware attack which, interestingly, came shortly after the company indicated it would be amending some of its policies to exclude cover for the payment of ransoms. Events such as these test not only insurers and reinsurers, but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for

the courts and arbitral tribunals to consider. Aggregation will also be an area of uncertainty in relation to the treatment of all losses of this kind, and again different jurisdictions are likely to provide different responses.

Looking ahead, 2022 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence. The current instability in international relations means there may also be an increased focus on issues such as the impact of sanctions on insurance recoveries and the scope of war exclusion clauses; for example, in relation to state involvement in cyber events.

I hope that you find this volume of use in seeking to understand today's legal challenges, and I would like to thank, once again, all the contributors.

Simon Cooper

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TURKEY

Aysel Korkmaz Yatkin, Görkem Bilgin, Asena Aytuğ Keser and Edanur Atlı¹

I INTRODUCTION

i Nature of the insurance and reinsurance market

There are currently 67 active insurance companies incorporated in Turkey, consisting of 42 non-life insurers, 21 life and pension insurers and four reinsurers.²

The premiums collected in 2021 (as of December) amounted to approximately 105.3 billion Turkish lira, an increase of 27.5 per cent compared with the previous year. Of this aggregate value, approximately 87.6 billion lira was derived from non-life insurers, whereas approximately 17.7 billion lira was derived from life insurers.³

Insurance sales in Turkey are conducted via direct sales, agencies, bancassurance and brokers. Agencies have the biggest share with 49.6 per cent as of 31 December 2021. Agency sales are followed by bancassurance sales with 25.6 per cent as of 31 December 2021.⁴

Banks function as agents, bringing together insurers and clients demanding simple and low-cost products from trusted financial institutions. Bancassurance, just like other distribution channels, comes under close scrutiny from the Ministry of Treasury and Finance.

As there are only four Turkish companies active in the reinsurance market, reinsurance cover is mostly provided to Turkish insurance companies by foreign reinsurers.

Turk Re, one of the four local reinsurance companies, was established on 6 September 2019 with capital of 600 million lira and the Ministry of Treasury and Finance as the sole shareholder. Turk Re stated that it made a profit of 105 million lira with premium production of 1 billion lira for the year 2020.

In recent years, foreign investors' interest has grown significantly, thanks to efforts to comply with the European Union regulations and the considerable insurance potential in Turkey. Finance and insurance activities were the sector that grew the most, by 23.4 per cent in 2020.

Structural reforms and initiatives such as the promotion of a personal pension scheme are expected to foster development of the market. The Insurance and Private Pension Regulation

1 Aysel Korkmaz Yatkin and Görkem Bilgin are partners, Asena Aytuğ Keser is a managing associate and Edanur Atlı is an associate at Gün + Partners.

2 Sector Report 2020, Insurance Association of Turkey, available at: https://tsb.org.tr/media/attachments/TSB_SEKTOR_ENG20_0610.pdf.

3 Direct and Indirect Premiums 2021 – 12, Insurance Association of Turkey, available at: <https://www.tsb.org.tr/tr/istatistikler>.

4 Insurance and Private Pension Regulation and Supervision Agency of Turkey, Annual Report 2020, available at: <https://seddk.gov.tr/files/doc/raporlar/sigortacilik-ve-ozel-emeklilik-d%C3%BCzenleme-ve-denetleme-kurumu-faali%CC%87yet-raporu-2020.pdf>.

and Supervision Agency (IRSA) established a circular to integrate special insurance products such as education, health, personal accident and life insurance into personal pension schemes to meet the different needs of the citizens. IRSA also established a regulation that regulates the procedures and principles regarding the transfer of pension rights of associations, foundations, unions and other organisations in the relevant institutions to the private pension scheme. In addition, citizens under the age of 18 are also included in the personal pension scheme. With the new developments at the beginning of 2022, the age limit of 45 for employees has been removed and employees who are older than 45 years old can accordingly also be a part of the scheme. In addition, with this development, the state contribution rate will be increased to 30 per cent from 25 per cent.

Despite a growing awareness of insurance, there is a significant lack of legal and practical experience, particularly with respect to various types of complex policies, such as all risks construction and engineering policies.

ii The legal landscape for insurance and reinsurance disputes

Enforcement through the Turkish court system is a lengthy process. The vast majority of insurance disputes are handled by first instance commercial courts. In addition to other hurdles of Turkish litigation, lack of sufficient experience and specialisation coupled with the inadequacy of the legislative provisions of the old Commercial Code (replaced by the new Turkish Commercial Code (TCC) as of 1 July 2012) leads to a considerable level of uncertainty over the outcome of court proceedings.

Out-of-court settlements are therefore frequently used. Other than these arbitrary and voluntary settlement arrangements, there is also mandatory mediation prior to court litigation for commercial disputes, which was introduced by the legislature (see Section IV.vi for more information about mediation).

In 2007, a voluntary insurance arbitration system was introduced as an alternative to court proceedings. The total number of disputes settled by the Insurance Arbitration Commission was 566,826 as at 30 September 2021⁵ and 621,324 as at 31 December 2021.⁶ The dramatic and constant increase in disputes settled this way in recent years clearly demonstrates that arbitration is becoming more popular.

II REGULATION

i The insurance regulator

On 18 October 2019, IRSA was established by Presidential Decree No. 47 and became the new insurance regulatory agency.

An insurance company in Turkey can only operate in the form of a joint-stock company or, in the case of mutual insurance funds, as a cooperative company. Before incorporation, insurance companies must obtain approval from IRSA. They must also apply to IRSA to be licensed in each insurance licence class.

An insurance company is not allowed to be active in both the life and non-life insurance divisions or in any sector not related to insurance.

5 <http://www.sigortatahkim.org.tr/files/E-BULTEN-47.pdf>

6 <http://www.sigortatahkim.org.tr/files/E-BULTEN-48.pdf>

The minimum paid share capital of an insurance company which will be applying for a licence as of 29 November 2021, cannot be less than 36,576,000 lira paid in cash.

A foreign insurance company can only operate in Turkey by opening a branch, by incorporation of a company in Turkey or by acquisition of shares of a local insurance company. However, according to Undersecretariat of Treasury Circular No. 2007/5, IRSA does not consider an 'operation' to be conducted in Turkey if the foreign reinsurance company merely receives, and accepts, a proposal from a local insured or broker to underwrite a risk in Turkey – without the foreign company engaging in any marketing activities in Turkey.

Insurable interests of residents in Turkey must be insured by insurance companies established in Turkey with a limited number of exceptions, such as the import and export of freight, ship chartering and life insurance. Therefore, fronting arrangements are frequently made between foreign and local insurance companies, especially for facultative insurance for big projects with high-risk capacity.

There are a considerable number of areas of compulsory insurance in Turkey, particularly for hazardous activities. The most widespread type of compulsory insurance is cover for motor vehicles.

Various activities, including transactions related to the commencement of operations, voluntary windings-up or mergers and acquisitions, acquisitions of other companies and their assets and liabilities, and the transfer of insurance portfolios are all subject to authorisation by IRSA.

ii Taxation

Insurance company transactions remain exempt from value added tax but are subject to a banking and insurance transaction tax (BSMV) and fire insurance tax. Except for the specific exemptions, the general rate of BSMV is determined as 5 per cent of the insurance companies' transactions and the fire insurance tax, levied at 10 per cent, applies to insurance premiums collected on fire insurance purchased for movable and immovable properties within municipal boundaries and adjacent areas.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Turkey's adopted legal system is one of continental law and legislation is the principle and primary source of law. The provisions of the Turkish Code of Obligations are applicable to insurance contracts where the insurance chapter of the TCC is silent.

Although court decisions are in principle not binding, in giving their judgments, local courts tend to rely heavily on the judgments of the Supreme Court of Appeal. However, established and consistent case law is lacking with regard to analysis and interpretation of insurance terms and conditions in most disputes, especially if the dispute requires technical or engineering expertise, because such disputes are mostly resolved by means of out-of-court settlements.

Turkish law does not explicitly contemplate reinsurance contracts. The only and main provision that particularly concerns reinsurance agreements is included in the TCC. Accordingly, insurance companies may reinsure the risk on whatever terms and conditions

are deemed fit and necessary.⁷ Despite the wording of this particular provision and the fact that there is no other provision that directly concerns reinsurance agreements in TCC, many academics take the view that reinsurance agreements are ultimately subject to the mandatory pro-insured provisions governing insurance agreements. Therefore, in addition to the general rules of contract law, insurance law provisions in the TCC would, to the extent possible, apply to reinsurance relations by analogy. However, it is not clear to what extent and how provisions of insurance law in each case would apply to reinsurance.

The Insurance Act and subsidiary legislation provide the regulatory framework for the insurance and reinsurance industry.

ii Making the contract

The insurer must issue an insurance policy, recording the mutual rights, obligations (including default and special provisions) and general conditions predetermined by IRSA and signed by the insurer. Written form is not a condition for validity but a regulatory requirement, as a tool for evidencing the content and scope of the coverage, for the protection of the insured.

In this respect, the Insurance Act requires insurance contracts to be drafted in Turkish and devoid of any words in a foreign language. Similarly, the Law on Compulsory Usage of Turkish Language among Commercial Entities (Law No. 805)⁸ also requires all private law contracts to be drafted in Turkish.

Scholars suggest that the provision in the Insurance Act stipulating the form of the policies should not apply to policies concluded abroad. However, they are concerned that Law No. 805, which is an imperative piece of Turkish law by reason of its particular purpose of public order, is applicable regardless of the designated law and place of execution. The courts, according to recent precedents, apply this requirement for contracts concluded with entities established under the laws of foreign states. There is no concrete consequence of violation of this requirement. However, use of foreign language, depending on the circumstances, may cause exclusions incorporated into the contract or insurance policy to be deemed void or interpreted to the detriment of the insurer.

The following can be identified as the main elements of insurance to be taken into account when drafting the contract or insurance policy, apart from formal requirements.

Insurable interest

The TCC refers to an ‘interest measurable in monetary terms’. According to established doctrinal views and practice, an insurable interest in indemnity insurance consists of proprietary, intellectual or personal rights and receivables that are measurable in monetary terms and capable of enforcement by legal action.

With respect to life insurance, the TCC provides that the policyholder can take out insurance on the policyholder’s own life or on the life of another person (the person subject to the risk) against death or survival. In the case of insurance on the life on another person, it is required that the beneficiary has an interest in the survival of that person.

Lack of insurable interest, not only at the time of the conclusion of the contract, but also at any stage, will result in invalidity of the contract. Provisions to the contrary will render the insurance contract invalid.

7 Article 1403.

8 Law No. 805 published in Official Gazette No. 353 dated 22 April 1926.

According to the TCC, insurance cannot be provided to cover a loss which is the result of an action that is against mandatory rules of law, moral values, public order or personality rights.

Risk

Depending on the type of insurance contract, the risk is transferred to the insurer as soon as the premium is paid, or the contract concluded.

The insurer's obligation to indemnify is subject to the occurrence of the identified risk and the occurrence of a loss as a result of the occurrence of the risk. However, if the risk occurs because of intentional acts of the insured, the insurer shall be released from liability and shall not reimburse the premiums paid.

Insurance sum

The insurance sum is subject to the limit of the insured value and the actual loss in indemnity insurance. The TCC forbids agreeing on an insurance sum exceeding the value of the insurable interest.

Insurance premium

The TCC provides that 'unless otherwise contracted, liability of the insurer starts at the time of actual payment of the premium or the first instalment'.

Compliance with the payment schedule is crucial for the insured to retain coverage because, subject to certain notification prerequisites, the TCC provides the insurer with the opportunity to avoid the insurance contract without any legal consequence if the insured or policyholder fails to pay the premium instalments.

iii Interpreting the contract

General principles concerning interpretation of contracts in civil law apply to insurance contracts. When trying to establish the actual meaning of the wording, the definitions of the Turkish Language Association are considered. When ambiguity or contradictions exist in the wording, interpretation in favour of the insured prevails because the primary duty of providing proper wording is on the insurer. The principles of protection of the insured and keeping the insurance contract alive are dominant. One of the main points to be considered in the interpretation is the principle of balance between the risk carried by the insurer during the term of the contract, the premium collected and the interests.

Incorporation of terms

Each and every insurance contract should refer to a set of general conditions, which are approved by IRSA. Apart from the general conditions, it is possible to incorporate special provisions according to needs of the insured within the framework of the mandatory provisions under the TCC; however, insurers should ensure that there is no ambiguity when interpreting the contracts.

The Insurance Act provides that the insurer should not content itself with merely writing down the risk covered under the contract; it must also expressly mention the exclusions. If exclusions are not mentioned by the insurer, they shall be deemed to be part of the insurance coverage.

The insurer, when negotiating and concluding the insurance contract, is under a strict duty to enlighten the insured about the details of the coverage; in the absence of which, the insured is entitled to rescind the insurance contract owing to the undesired terms incorporated into the insurance policy within 14 days.

Types of terms in insurance contracts

Special provisions of insurance contracts have to be drafted in accordance with the standard general terms approved by IRSA and the mandatory provisions of the TCC. Non-compliance with mandatory provisions may render the contract or the relevant contract provision invalid. There are various legal provisions that cannot be contracted out contrary to the interests of the policyholder, the insured or the beneficiary.

Warranties – conditions precedent

Sanctions attached to certain warranties or conditions precedent to cover do not necessarily give the terms the intended effect and may be caught by semi-mandatory or mandatory provisions of the TCC. Where a condition or warranty relates to the duties already provided for by the TCC, such as the duties of disclosure and notification before and during the contract (regarding any increase in the risk) and upon the occurrence of the insured-against event, then semi-mandatory provisions that cannot be amended contrary to the interests of the policyholder, the insured or the beneficiary with respect to such duties and sanctions are highly likely to be applicable.

iv Intermediaries and the role of the broker

Position of brokers

According to the definition of the Insurance Act, a broker is the person who acts independently and impartially to appoint the insurance companies for contracting insurance policies.

Pursuant to the Regulation on Insurance and Reinsurance Brokers (the Brokers Regulation) enacted in mid 2015, brokers must obtain a brokerage licence from IRSA.

How brokers operate in practice

There are various obligations and prohibitions set out for brokers in the Brokers Regulation. For instance, although brokers can conclude protocols with insurance and reinsurance companies, they are prohibited from engaging in any other business. Brokers are also prohibited from preparing insurance policies and similar documents. Brokers established in a foreign country can continue its operations in Turkey only by establishing a branch.

Under the Brokers Regulation, a legal entity broker's minimum capital is set at 250,000 lira and 50,000 lira for any additional type of insurance.

Agencies and contracting

Agencies operate on behalf of insurers, on the basis of a contractual relationship between them and the insurance company.

Agencies can be a real person or a legal entity. The headquarters of legal entity agencies should be located in Turkey. Legal entity agencies also need to be incorporated as joint-stock or limited liability companies, obtain approval from IRSA and be registered on the Agency

Registry, indicating whether or not they are granted power to conclude contracts and collect premiums. The approval shall be then promulgated by the Turkish Union of Chambers and Commodity Exchanges.

In April 2013, insurance agencies were prohibited from engaging in business other than agency work in the insurance sector.

v Claims

Duty of disclosure

One of the statutory duties of the policyholder is the duty of disclosure, which includes the duty not to misrepresent facts known or reasonably expected to be known to him or her before the conclusion of the contract.

The TCC imposes a duty of disclosure on the insured at three different stages, namely, before the conclusion of the contract, during the contract and at the time of occurrence of the risk.

Regarding the duty of disclosure before policy inception, the TCC provides that the policyholder is under a duty to disclose important facts that are, or should be, known to him or her. When the undisclosed facts are of a nature that would require the contract not to be concluded or to be concluded with heavier terms, such facts are considered important. Questions posed by the insurer orally or in writing are presumed important unless proven otherwise. The policyholder is also obliged to disclose facts that are not queried by the insurer if he or she can reasonably predict that these would be deemed important by the insured.

In cases of non-compliance with the duty of disclosure before policy inception, the TCC provides alternative rights for withdrawal of the policy or to request a change in the premium. Where such a request for a change has not been accepted within 10 days, the insurance will terminate automatically.

Where a breach of the duty of disclosure has been discovered after occurrence of the risk, a reduction of the insurance indemnity will be made according to the degree of negligence of the policyholder in failing to disclose, provided that the negligence has the potential to affect the occurrence of the risk or the amount of the indemnity.

Furthermore, the TCC provides for the duty of immediate notification of an increase of the risk during the term of the contract and provides that the insured and the policyholder must refrain from acts that would increase the amount of insurance indemnity by way of aggravating the risk or current conditions. Where the increase has been learned of subsequently, the policyholder must notify the insurer within 10 days of learning at the latest.

The insurer has the right to terminate the policy or request a premium difference within one month of becoming aware of the increase in the risk. Where the non-disclosure was wilful, the insurer will keep the paid premiums. If payment of the premium difference has not been accepted within 10 days, the policy will be deemed terminated.

Where the increase has been learned of after the occurrence of the risk, the insurance indemnity will be reduced according to the gravity of negligence in the failure to disclose, provided that the non-disclosure is of such gravity that it may affect the amount of the insurance indemnity or the occurrence of the risk. Where the policyholder's non-disclosure was intentional, the insurer has the right to terminate the policy, provided that there is a connection between the non-disclosure and the occurrence of the risk. When there is no connection, the indemnity shall be paid taking into consideration the proportion of the paid premium and the premium that should have been paid if the circumstances had been disclosed.

The policyholder also has a duty of disclosure upon occurrence of the risk that relates to the disclosure of the facts affecting the occurrence of the loss. Upon occurrence of the risk, the TCC introduces a duty for immediate notification of the occurrence. The insured shall also notify events that may give rise to his or her liability within 10 days. When the notification of occurrence of the risk has not been made or made with delay, the indemnity to be paid shall be reduced according to the gravity of negligence, provided that the failure increased insurance indemnity.

Good faith and claims

Although the good faith principle exists in all kinds of contractual relationships, it has a heightened importance in insurance law. The Insurance Act expressly requires the insurers to act in good faith in particular when carrying on marketing activities, enlightening the policyholders, protecting the insured's rights and making timely insurance payments.

In the event that a risk materialises or that materialisation of the risk becomes highly probable, the policyholder must, as long as circumstances permit, take measures to prevent the loss or the increase in its likelihood, to mitigate the loss and to protect the insurer's rights of recourse against third persons.

Set-off and funding

The insurer is entitled to deduct the premiums due from the indemnity amount or the fixed sum to be paid with the exception of liability insurance.

IV DISPUTE RESOLUTION

i Choice of jurisdiction

The Turkish Civil Procedure Code, applicable to local disputes, restricts the freedom of choice of local jurisdictions to agreements between merchants and agreements between public legal entities. Insurance agreements with no 'foreign element' concluded with those who do not qualify as merchants shall therefore be subject to the jurisdiction rules provided for in the Civil Procedure Code and this cannot be altered contractually. Accordingly, for loss insurances, the courts of the place where the insurable interest or risk is located are vested with jurisdiction, as an alternative to the courts of the respondent's domicile and the place of performance agreed under the contract. For life insurances, the courts of the domicile of the policyholder, insured or beneficiary have exclusive jurisdiction.

The Code on International Civil Procedure, regulating conflict of laws, provides with respect to insurance contracts involving a foreign element that the following jurisdiction rules cannot be avoided by contract: (1) claims against insurers are subject to the jurisdiction of the courts at the insurer's principal place of business or the place of incorporation of the insurer's branch or Turkish-incorporated agent that concluded the contract; and (2) where the claim is against the policyholder, the insured or the beneficiary, the courts that have jurisdiction are the courts of its domicile in Turkey.

ii Choice of applicable law

The main limitation to the application of foreign law would generally be the absence of a foreign element and Turkish public policy. The general approach under Turkish law is that mandatory rules are not necessarily matters of public policy.

The requirement of the existence of a foreign element, however, is controversial. In a decision of the Supreme Court of Appeal in an insurance case filed by an insured, it was concluded that the choice of a foreign law between two Turkish parties would, in itself, suffice for fulfilment of the foreign element requirement even if there were no foreign element with respect to the dispute.

iii Litigation

Claims to be pleaded directly to the insurer

With regard to liability insurance, the TCC provides that third parties are entitled to direct their claims to the third-party liability insurer of the person responsible for the loss.

Notification before the pleading

The insured shall notify the loss that is thought to be within the insurance coverage as soon as possible. Maturity of the indemnity payment arises upon conclusion of the insurer's investigations into the scope of the indemnity and, in any case, 45 days after notification of the occurrence of the risk. The investigation of the insurer must be concluded within three months of notification. The policyholder is obliged to provide each and every document that is necessary to determine the extent of the risk or the indemnity upon the request of the insurer in a reasonable amount of time. Also, the policyholder is obliged to take the appropriate measures expected from him or her and to let the insurer carry out an inspection in the places where the risk has occurred.

Stages of litigation

Insurance disputes are, in principle, dealt with by the first instance commercial courts. The stages of litigation before the commercial courts are as follows:

- a* the parties make a written submission of their claim, defence, rebuttal and rejoinder, and evidence;
- b* a preliminary hearing date is set, where issues such as case conditions and preliminary objections are to be resolved;
- c* hearings are held on the disputed elements of the case, where the court can hear witnesses and obtain expert reports;
- d* upon assessment of all evidence and facts, the court delivers a short judgment followed by a reasoned judgment; and
- e* according to the Turkish Civil Procedural Code, the appeal procedure is to be conducted by a two-tier system comprised of regional appellate courts⁹ and the Supreme Court.¹⁰

Mediation is a compulsory remedy to be pursued before filing a lawsuit in commercial matters, to decrease the workload of the judicial bodies (see Section IV.vi).

This is also to enable the Supreme Court to evaluate the merited issues of a dispute and prepare more diligent reasoning for its awards, which, hopefully, may develop case law where legislation or practice is ambiguous. This is particularly important for insurance law, because

9 Article 341 of the Civil Procedural Code.

10 Article 361 of the Civil Procedural Code.

the Supreme Court has not thus far provided guiding principles for complex insurance disputes, which often require considerable effort in interpreting facts and contracts to resolve a wide range of issues (e.g., deductibles, exclusions, subrogation).

Evidence

Under Turkish civil law, the adversarial system prevails.

The burden of proof of the existence of the contractual relationship, the occurrence and amount of the loss lies with the insured. The insurer, on the other hand, must prove the lack of cover and application of exemptions. Every transaction exceeding 6,640 lira must be proven by a deed. Witness evidence would only constitute supportive evidence.

Turkish courts frequently refer disputes to a court-appointed panel of experts, even in legal matters. In a change to procedure, parties are now granted the opportunity to submit expert views, subject to questioning by the judge and the parties (without any common-law-style cross-examination procedure),¹¹ as supportive evidence and without the need to obtain a judge's order in this regard.

Costs

Of the claimed amount, 6.831 per cent must be paid as court fees. One-quarter of this amount must be paid to the court in advance by the claimant. Court fees and court expenses are recoverable in the event of the case being found in favour of the claimant. The court orders legal fees in favour of the winning party (or to the extent of acceptance by the court of the claimed amount) in accordance with an official tariff. The parties cannot recover actual fees they may have paid to their lawyers. Lawyers' fees ordered by the court belong to the lawyers unless agreed otherwise between the lawyers and their clients.

Claimants who are of foreign citizenship may also be obliged to submit a warranty to the court, the amount of which shall be determined by the court, subject to exemptions provided by bilateral and multilateral agreements (such as the Hague Convention on Civil Procedure).

iv Arbitration

Pursuant to Law No. 6570 dated 29 November 2014, the Istanbul Arbitration Centre¹² was established and parties have the opportunity to refer disputes, in addition to ad hoc arbitrations and conventional arbitration institutions, to the Centre or to the Insurance Arbitration Commission, whose functions are explained below. The Centre presents an efficient alternative to court litigation, as the costs are low and the length of proceedings is short.

Arbitration clauses

Parties can refer to arbitration for the resolution of insurance disputes by inserting an arbitration clause into the insurance and reinsurance agreement or concluding a separate arbitration agreement between themselves.

11 Umar, Bilge; Civil Procedure Code Annotation, page 801.

12 <http://istac.org.tr/en>.

Insurance Arbitration Commission

The Insurance Act foresees an institutional arbitration proceeding irrespective of the existence of an arbitration clause. Proceedings before the Insurance Arbitration Commission (Commission) lack certain elements of traditional arbitration as no arbitration agreement is concluded between the parties and the arbitrators are appointed by the Commission (rather than by the parties) from its list of registered arbitrators. This procedure is therefore regarded as a unique, ombudsman-like dispute resolution mechanism, instead of regular arbitration. The arbitrators in the Commission must finalise the dispute within four months of their appointment, otherwise the dispute shall be resolved by the competent courts. However, it is possible to extend this four-month period with the clear and written consent of the parties.

Most of the awards rendered by the Commission in 2021 concerned car insurance policies, compulsory traffic insurance, voluntary liability insurance and state-sponsored herbal products. Compared with court judgments, the awards contain more comprehensive examinations and reasoning.

A decision of the Supreme Court of Appeal dated June 2020 on the unification of conflicting judgments ruled that as of 20 July 2016, decisions of the arbitration committee of the Commission shall be directly subject to the highest appellate procedure, bypassing the appellate examination before the regional court of appeal, to ensure a more expeditious and cost-effective trial.

v Alternative dispute resolution

If the insured has a complaint arising from interpretation of the regulations or conduct of an insurance company, it can apply to IRSA via the Turkish government's online system. This system is established for IRSA to transfer the disputes arising from insurance and pension contracts to the insurance and pension companies. In this way, the disputes should be resolved easily and quickly by receiving a response from the insurer. IRSA does not have authority to resolve the disputes as an expert, an arbitrator or a court, but rather acts as an intermediary to transfer the claims from the insurer to the relevant insurance company.

vi Mediation

Mediation was recognised in Turkish law for the first time by the Mediation Act, which entered into force in June 2013. With the amendment of the TCC,¹³ which entered into force on 1 January 2019, mediation became a compulsory remedy to be pursued for all commercial monetary claims (including insurance disputes) as a cause of action to be exhausted before proceedings are commenced, leaving filing a lawsuit before the state courts as a last resort.

In the event of a settlement following mediation, the parties may request an annotation regarding the execution of the agreement from the court at the place of jurisdiction. The annotation gives the agreement the power of a court judgment.

¹³ Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements No. 7155, published in the Official Gazette No. 30630, dated 19 December 2018.

V YEAR IN REVIEW

In 2021, with the ongoing effects of the covid-19 pandemic, use of technology has become important for business life just as it has become an important part of daily life. This has triggered some digitalisation projects in the insurance market as well. For instance, IRSA started to work on policy digitalisation in 2021. Within the scope of the digital policy application, the insured will have the opportunity to securely sign, store and access all documents in the transaction processes in the digital environment. It is believed that the operation rate will increase, and expenses will be reduced by this project.

Turkey is reported as one of the countries where cyberattacks show most growth. Although cyber insurance is still a new and emerging concept in Turkey and the legislative regulations are yet to come into effect, the insurance sector has started issuing new products regarding cyberattacks, under the name of identity protection insurance, digital protection insurance or personal and commercial cybersecurity insurance to cover the damage incurred because of the attacks targeting digital platforms such as computers, electronic devices or automated teller machines.

With the Circular on Shared Insurances and Private Pension Activities published by IRSA, Türkiye Sigorta AŞ and Türkiye Hayat ve Emeklilik AŞ started to provide services with non-life, life, personal accident and pension products in accordance with the principles of shared insurance as of 1 September 2020.

IRSA also established this Circular to integrate special insurance products such as education, health, personal accident and life insurance into personal pension systems to meet the different needs of citizens. IRSA also published a regulation on the procedures and principles regarding the transfer of pension rights of associations, foundations, unions and other organisations in the relevant institutions to the private pension system. In addition, citizens under the age of 18 are also included in the personal pension system.

On 8 September 2021, Turk Re established its subsidiary Türk Katılım Reasürans AŞ, which is the first reinsurance company to operate in the field of shared reinsurance. Turk Re also established the Catastrophic Modelling Competence Centre to efficiently manage 'earthquake risk'. Trade credit insurance has been introduced for small and medium-sized enterprises (SMEs). This insurance covers any risk of non-payment of debts on sales that are not subject to any security instruments. SMEs with net annual sales of less than 125 million lira (around US\$9.3 million) will be able to benefit from this insurance.

There are also new amendments made in the general conditions of the compulsory traffic insurance where it is regulated that in repairing the vehicles, original parts shall be used. If it is not possible to replace the damaged part with an original part or to get the consent of the vehicle owner, a part equivalent to the original part can be used.

The chairman of IRSA explained that they are working on the creation of an Extraordinary Risks Management Centre for the management of the risky insureds pool and others. This is to increase the accessibility of state-supported credit insurance and compulsory traffic insurance that have been developed to ensure the vitality of commercial life and a balanced distribution of risk between the insurance companies.

VI OUTLOOK AND CONCLUSIONS

According to the European Commission's Turkey 2021 Report, the Turkish economy was resilient and rebounded from the crisis quickly; however, the recovery was uneven across sectors.¹⁴ The report also mentions that Turkey has a good level of preparation in the area of financial services and made some progress with enacting the Regulation on the Preparation of Prevention Plans by Systemically Important Banks in financial services.¹⁵

The government still has an objective to be the 10th largest economy in the world by 2023. In line with this objective, the government is focusing on the insurance sector, among others, by enacting new regulations and establishing new institutions.

Due to the global effect of the pandemic in the financial market and the recent global trends in the insurance sector, it is possible that the Turkish government will implement systems that would be effective to keep up with these trends, such as developing insurtech by implementing the services into e-state system and providing digital policies.

Regarding the trends specific to the insurance sector, shared insurance in particular is a topic in which the Turkish government has recently invested in both for the insurance and reinsurance sectors. Insurance and pension systems attempt to be integrated to provide both services efficiently.

With the new emerging risks such as cyberattacks, climate change and the covid-19 pandemic, developments in the insurance and reinsurance sector with regard to legislation and practice will keep on evolving in the future.

14 Turkey 2021 Report, p. 55, available at: <https://www.ab.gov.tr/siteimages/birimler/kpb/turkey-report-2021-v2.pdf>.

15 Turkey 2021 Report, pp. 82–83, available at: <https://www.ab.gov.tr/siteimages/birimler/kpb/turkey-report-2021-v2.pdf>.

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