

THE INSURANCE AND
REINSURANCE
LAW REVIEW

EIGHTH EDITION

Editor
Peter Rogan

THE LAWREVIEWS

THE INSURANCE AND REINSURANCE LAW REVIEW

EIGHTH EDITION

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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 of the contributors for their work in compiling this volume.

Although 2019 looks likely to be benign in terms of insured losses from natural catastrophes, there is continuing concern that climate change will see a long-term increase in the number and severity of such losses; the scope of the Australian wildfires at the end of the year may be a portent of things to come. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation, for example, to aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

Aggregation may also be an area of uncertainty in relation to the treatment of catastrophic losses such as the coronavirus outbreak originating in China but with worldwide consequences.

The year 2019 saw no respite in the number or scale of cyber events, including the huge data breaches at Facebook and at other global organisations such as Microsoft, Capital One, First American Corporation and government organisations in countries ranging from Bulgaria to Singapore. 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. Most recently the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2020 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.

I hope that you find this eighth edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand today's legal challenges, and I would like once again to thank all the contributors.

Peter Rogan

Ince

London

April 2020

TURKEY

Pelin Baysal and Ilgaz Önder¹

I INTRODUCTION

i Nature of the insurance and reinsurance market

There are 62 active insurance companies incorporated in Turkey, consisting of 38 non-life insurers, 17 life and pension insurers, five life insurers and two reinsurers.²

The premiums collected in 2019 amounted to approximately 69.2 billion Turkish lira, an increase of 26.7 per cent compared with the previous year.³ Of this aggregate value, approximately 57.9 billion Turkish lira was derived from non-life insurers, whereas approximately 11.3 billion Turkish lira was derived from life insurers.⁴ These values include the premiums collected from both inside and outside Turkey.

Insurance sales in Turkey are conducted via direct sales, agencies, bancassurance and brokers. Agencies had the biggest share in 2019, with their total sales accounting for over 50 per cent of the total, and worth around 35 billion Turkish lira.⁵ This significant amount of sales is because of the strong presence of agencies in Turkey; there were more than 15,000 actively operating agencies as at 2019.⁶

Agency sales are followed by bancassurance sales. Bancassurance grew from 23 per cent to 26 per cent from 2018 to 2019, exceeding 18.2 billion Turkish lira in total sales.⁷ As

1 Pelin Baysal is a partner and Ilgaz Önder is an associate at Gün + Partners.

2 Annual Report About Insurance and Private Pension Activities, 2018, Republic of Turkey Ministry of Treasury and Finance, Insurance Supervision Board, available at: <https://ms.hmb.gov.tr/uploads/2019/07/Sigortac%C4%B1l%C4%B1k-ve-BES-Faaliyet-Raporu-B%C3%B6l%C3%BCm-I.docx>.

3 Premiums Based on Sales Channel, Insurance Union of Turkey, [https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1C%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20\(11120Ay122019\).xlsx](https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1C%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20(11120Ay122019).xlsx).

4 *ibid.*

5 *ibid.*

6 Chain of distribution, Insurance Union of Turkey, available at: https://www.tsb.org.tr/images/Documents/Komite%20sunumu_Da%C4%9F%C4%B1t%C4%B1mKanallar%C4%B1Komitesi_20190206.pdf.

7 Premiums Based on Sales Channel, Insurance Union of Turkey, [https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1C%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20\(11120Ay122019\).xlsx](https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1C%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20(11120Ay122019).xlsx).

of 2015, bancassurance has been the main life-insurance distribution channel⁸ having an 83.4 per cent share in 2019.⁹ 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, is under close scrutiny of the Ministry of Treasury and Finance. In December 2019, the Ministry issued an administrative fine of 187 million Turkish lira to Yapı ve Kredi Bankası A.Ş. and 94.7 million Turkish lira to Akbank T.A.Ş. The latter had also been ordered to suspend its insurance-related activities for 15 days.¹⁰ According to public announcements made by the banks in question, the sanctions were due to violation of the Insurance Act concerning unfair trade and competition practices.

Having only two active reinsurance companies in the Turkish reinsurance market, reinsurance cover is mostly provided to Turkish insurance companies by foreign reinsurers. Statistics reveal that 73 per cent of the reinsurance market is dominated by reinsurance companies with foreign capital. The remaining coverage is provided mostly by Milli Re, established with local capital.¹¹

Turk Re, the other local reinsurance company was established on 6 September 2019 with a capital of 600 million Turkish lira by the Ministry of Treasury and Finance as the sole shareholder. Reportedly, Turk Re aims to keep 1.2 billion Turkish lira out of 8 billion Turkish lira transferred abroad through reinsurance. At the first stage, Turk Re has been designated for the management of the pool of natural disaster risks and contribution to domestic reinsurance capacity for the agricultural insurance. Ultimately, it is expected to serve for the purpose of 'healthy and sustainable growth' in the insurance market as stressed by the New Economic Programme introduced by the Ministry of Treasury and Finance.

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. The foreign share in the insurance sector at the end of 2018 totalled 67.9 per cent of active insurance companies whereas it was 61.29 per cent in 2013.¹² The premium to gross domestic product (GDP) ratio in Turkey, however, is still low, demonstrating potential for growth in the future.¹³ The ratio of gross premiums, which has increased by 18.4 per cent since 2012, constitutes only 1.5 per cent of GDP.¹⁴ While the Turkish insurance market is still underpenetrated, it witnesses fierce competition among market players, some of whom received turnover-based monetary fines levied by the Competition Board on 23 January 2020

8 www.insuranceeurope.eu/sites/default/files/attachments/European%20Insurance%20-%20Key%20Facts%20-%20August%202015.pdf.

9 Premiums Based on Sales Channel, Insurance Union of Turkey, [https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20\(11120Ay122019\).xlsx](https://www.tsb.org.tr/Document/istatistikler/2%20Sat%C4%B1%C5%9F%20Kanal%C4%B1%20Baz%C4%B1nda%20Primler%202019-12%20(11120Ay122019).xlsx).

10 <https://www.bloomberght.com/yapi-kredi-ve-akbank-a-sigortacilik-kanununun-ihlal-cezasi-2245011>.

11 2018 Annual Report of Milli Reasürans T.A.Ş., available at http://www.millire.com/FaaliyetRaporu_TR_2018.pdf.

12 Annual Report About Insurance and Private Pension Activities, 2018, Republic of Turkey Ministry of Treasury and Finance, Insurance Supervision Board, available at: <https://ms.hmb.gov.tr/uploads/2019/07/Sigortac%C4%B1%C4%B1k-ve-BES-Faaliyet-Raporu-B%C3%B6l%C3%BCm-I.docx>.

13 Investment Support and Promotion Agency of Turkey, 'The Financial Services Sector in Turkey: May 2019', <https://www.invest.gov.tr/en/publications/lists/investpublications/financial-services-industry.pdf>.

14 Investment Support and Promotion Agency of Turkey, 'The Financial Services Sector in Turkey: May 2019', <https://www.invest.gov.tr/en/publications/lists/investpublications/financial-services-industry.pdf>.

due to their agreements and concerted practices distorting or restricting fair competition in the field of facultative insurance for big projects with high risk capacity (including project financing).

The Turkish government has an objective to be the 10th largest economy in the world by 2023, aiming to generate US\$2 trillion worth of gross national product.¹⁵ In line with this objective, the government has the insurance sector, among others, in its sights. It is expected that structural reforms and initiatives taken, including promotion of a personal pension scheme, will foster the development of the market. Despite growing awareness of insurance, however, 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. 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, in addition to other hurdles of Turkish litigation, to a considerable level of uncertainty with respect to the outcome of court proceedings.

Out-of-court settlements are therefore frequently used. Courts cannot force parties to settlement or alternative dispute resolution but are required to remind them of their options at the end of the preliminary examination. Apart from arbitrary and voluntary settlement prospects, the legislature introduced a mandatory mediation for commercial disputes preceding the court litigation (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 reached 195,775 as at 30 September 2018¹⁶ and 321,741 as at 31 December 2019.¹⁷ This dramatic and constant increase over the past years clearly reveals that arbitration is becoming more popular. Traffic insurance and car insurance disputes accounted for approximately 98 per cent of the applications.¹⁸

II REGULATION

i The insurance regulator

The insurance regulatory agency in Turkey was the Undersecretariat of Treasury (the Undersecretariat) until 10 June 2018. Then, the Undersecretariat merged with the Ministry of Finance, forming the Ministry of Treasury and Finance (the Ministry) assuming all the regulatory duties and powers. On 18 October 2019, the Insurance and Private Pension Regulation and Supervision Agency (IRSA) was established by Presidential Decree No. 47 and became the new insurance regulatory agency. Pursuant to this Decree, all references previously made to the Ministry the Undersecretariat in the field of insurance shall be made to IRSA.

15 Turkey's 2023 Export Strategy and Sectoral Breakdown, Turkish Exporters Assembly https://www.tim.org.tr/files/downloads/2023/2023_english.pdf.

16 <http://www.sigortatahkim.org.tr/E-BULTEN-35.html>.

17 <http://www.sigortatahkim.org.tr/E-BULTEN-40.html>.

18 <http://www.sigortatahkim.org.tr/files/isttstk40.pdf>.

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. Before incorporation, insurance companies must obtain approval from the authority. They must also apply to IRSA for licensing in each insurance licence class. Companies that fail to apply for an insurance licence within one year of their incorporation lose their right to use 'insurance' in their commercial names, as well as becoming subject to criminal and administrative penalties.

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.

The minimum paid share capital of an insurance company is 5 million Turkish 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, IRSA, according to the Undersecretariat's Circular No. 2007/5, does not consider it to be an 'operation' conducted in Turkey if the foreign reinsurance company, without engaging in any marketing activities in Turkey, merely receives – and accepts – a proposal from the local insured or broker to underwrite a risk 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. In addition, earthquake insurance for private dwellings, third-party liability for passengers on intercity and international transport, medical malpractice, professional indemnity insurance for independent auditors and those providing services to banks are other types of compulsory insurance.

In 2015, to enhance working conditions and ensure workers' safety after the mining disaster in Soma (Manisa), which is Turkey's worst-ever industrial accident resulting in the deaths of 301 miners, the Council of Ministers introduced compulsory personal accident insurance for miners. Furthermore, in 2015, the amendment to the Regulation on the Tracing of Compulsory Insurance specifically stipulated that those insurance companies authorised to provide insurance services covering an area of compulsory insurance, cannot refrain from issuing compulsory insurance and cannot amend insurance policies in such a way that excludes risks related to the compulsory insurance.

The Insurance Act provides security funds as a precaution for losses to be indemnified because of compulsory liability insurance. For instance, injured persons can resort to the fund for physical injuries if the injury cannot be attributed to anyone or those responsible for the injury are uninsured, or for physical injuries and pecuniary damages in the event the insurance company is bankrupt or its licence is cancelled owing, for instance, to insolvency.

Various activities including transactions related to the commencement of operations; voluntary windings-up or mergers and acquisitions; acquisition by another company with its assets and liabilities; and the transfer of insurance portfolio are all subject to authorisation by IRSA.

ii Taxation

Insurance company transactions remain exempt from VAT but are subject to a banking and insurance transaction tax (BSMV) and fire insurance tax. Save 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, shall apply 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 adopts a continental law system, and legislation is the principle and primary source of law. The provisions of the Turkish Code of Obligations shall be applicable on the insurance contracts where the Insurance Chapter of TCC is silent. The principles of freedom of contract apply subject to the mandatory and protective measures of these Codes.

Although court decisions are in principle not binding, in giving their judgments, local courts tend to rely heavily on the judgments of the Court of Appeal. However, established and consistent case law is lacking with regard to analysis and interpretation of insurance terms and conditions in most of the 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. With the exception of the special provisions under Agriculture Insurance Act No. 5363, 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 (Article 1403). Despite the wording of this particular provision and the fact that there is no other provision that directly concerns reinsurance agreements, many academics take the view that the 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. It is, however, 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 of the insurance and reinsurance industry.

ii Making the contract

Insurance contracts are defined in the TCC as:

[A] contract under which the insurer undertakes, in exchange for a premium, to indemnify a loss caused by the occurrence of a danger or risk, harming an interest measurable in monetary terms of a person concerned or to effect payment or to fulfil other performances based on the lifetime or upon occurrence of certain events in the course of the lifetime of one or several persons.

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,¹⁹ an old law that is still in force and taken into account by the courts, 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 the recent precedents, apply this requirement for the contracts concluded with the 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 the 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 Code 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 its own life or on the life of another person (person subject of the risk) against death or survival. In the case of insurance on the life of 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 at any stage will result in invalidity of the contract. Provisions to the contrary will render the insurance contract invalid.

Risk

The definition of the TCC includes ‘risk’, namely danger that leads to harm to the insured interest. The TCC also explicitly refers to the obligation of the insurer to ‘carry the risk’.

Accordingly, depending on the type of the insurance contract, the risk is transferred to the insurer as soon as the premium is paid or the contract is 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.²⁰

As insurance and reinsurance contracts are contracts of utmost good faith, one of the statutory duties of the policyholder is the duty of disclosure and not to misrepresent facts known or reasonably expected to be known to him or her before the conclusion of the contract.

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

20 Under Article 1429 of the TCC, the common rule is stipulated as ‘Unless otherwise agreed, the insurer shall pay losses arising from the negligence of the insured, the insured, the beneficiary and the persons for whose acts these persons are legally liable.’

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. The TCC also provides that questions asked verbally or in writing by the insurer are presumed to be important unless proven otherwise.

The TCC, after confining the duty of the policyholder to the questions in a list provided by the insurer, explicitly provides an exception where facts were concealed in bad faith. In cases of non-compliance with the duty of disclosure before policy inception, the TCC provides alternative rights for withdrawal of the policy or asking for a change in the premium, both to be used within 15 days of becoming aware of the non-disclosure of important facts. When the request for a change in the premium has not been accepted within 10 days, the insurance will terminate automatically.

When breach of the duty of disclosure has been discovered after the occurrence of the risk, a reduction on the insurance indemnity will be made according to the degree of negligence of the policyholder in its failure to disclose, provided that the negligence has the potential to affect the occurrence of the risk or the amount of the indemnity. When the policyholder acted wilfully, the insurer has no liability for insurance indemnity 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.

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 in order 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 also apply to insurance contracts, especially the principles of utmost good faith and honesty. 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 TCC provides that, in case of any discrepancy between the policy and the insured's proposal form, the terms and conditions included in the policy that do not exist in the proposal form shall be deemed invalid.

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 business 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. These provisions prevent the insurer from simply rejecting cover on the basis of non-compliance and subject sanctions to various conditions, such as a causal link between the failure in compliance and the occurrence of the risk or the amount of indemnity.

The TCC introduces a specific provision in that regard and provides that where the insurance contract provides for partial or entire avoidance of the contract by the insurer for non-compliance with the contractual duties by the insured (where the sanction of non-compliance with such duties has not already been specifically provided for in the TCC – as explained above), avoidance shall not take effect unless the non-compliance is based on fault. Where non-compliance is based on fault, the right to avoid the policy will cease when

it has not been used within one month of learning of the circumstances. Also, the insurer will have no right to avoid the policy unless the non-compliance had any effect on the occurrence of the risk and the extent of the obligations of the insurer.

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, brokers must conduct extended research when appointing insurers, and while they 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.

Under the new Brokers Regulation, the requirements on equity capital and assets have also been amended. A legal entity broker's minimum capital is set as 250,000 Turkish lira and 50,000 Turkish 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 and obtain the approval of IRSA, and shall be registered on the Agency Registry indicating whether or not the agencies 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

Apart from the disclosure duties regarding the conclusion of the contract (as set forth in subsection ii, 'Risk'), the TCC provides for the duty of immediate notification of the 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. When the increase has been learned 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 premium difference within one month of becoming aware of the increase in the risk. When the non-disclosure was wilful, the insurer will keep the paid premium. When payment of the premium difference has not been accepted within 10 days, the policy will be deemed terminated.

When 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. When the policyholder was intentional in its non-disclosure, the insurer has the right to terminate the policy, provided that there is a connection between the increase in the risk and the occurrence of the insured event. In such cases, the insurer will not pay any indemnity and not return the paid premium. When there is no connection, however, the insurer must pay the indemnity, taking into consideration the proportion of the paid premium and the premium that should have been paid.

When the risk has occurred before the right of termination has taken effect or within the period for use of the right of termination, insurance indemnity must be paid taking into consideration the ratio between the paid premium and the premium that should have been paid, provided that there is a link between the increase and the occurrence of the risk.

The policyholder also has a duty of disclosure at the occurrence of the risk that relates to the disclosure of the facts affecting the occurrence of the loss.

In the case of liability insurance, the TCC provides that the policyholder has a duty to immediately notify the insurer upon learning of the occurrence of the risk, and in the case of property insurance, the policyholder must notify the insurer without delay. As regards third-party liability policies, the TCC introduces a new duty on the insured to also notify events that may give rise to his or her liability within 10 days of learning of the event. When the notification of occurrence of the risk has not been made or the policyholder was late in his or her notification, a reduction will be made in the indemnity according to the degree of negligence in the failure to disclose, provided that the failure caused an increase in the insurance indemnity.

Good faith and claims

Even though the insured's interest is covered in exchange for the payment of premiums, he or she must still take appropriate precautions and not negligently cause further losses or aim to achieve enrichment upon the occurrence of the risk.

In the event that risk materialises or that materialisation of 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 premium due from the indemnity amount or the fixed sum to be paid with the exception of liability insurance. Set-off may be applicable even in the event where the insured and the beneficiary are different persons.

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 cannot be contracted out. Accordingly, 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.

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.

Regarding the choice of arbitration in insurance and reinsurance contracts, see subsection iv.

ii Choice of applicable law

Unlike jurisdiction agreements, there is no specific restriction on the law applicable to insurance contracts. 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. Where, however, the insured is not a merchant but a real person, consideration of public policy and the law on 'standard contract terms' protecting the weaker party of the contract may prevail for the sake of protection of the insured.

The requirement of the existence of a foreign element, however, is controversial. In a decision of the 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, by itself, would suffice for the fulfilment of the 'foreign element requirement' even if there is no foreign element with respect to the dispute.

Reinsurance agreements with a foreign element are much less likely to be subject to the above restrictions of applicable law although there would obviously be issues of back-to-back cover where different rules could potentially apply to the local insurance.

iii Litigation

Claims to be pleaded directly towards 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.

Stages of litigation

Insurance disputes are, in principle, dealt with by the first instance commercial courts.

Stages of litigation before the commercial courts are as follows:

- a* The parties submit 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 (e.g., existence of the judiciary power of the court, disputes on capacity to file and pursue a lawsuit, and allocation of a security if necessary) and preliminary objections (jurisdiction, division between the civil and commercial courts, existence of an arbitration agreement) are to be resolved. The judge shall carry out the required procedure to collect the parties' evidence. At the preliminary hearing, the judge will also encourage the parties to settle or resort to mediation. In this stage, the parties can amend their evidence and assertions only if the counterparty gives its consent.
- c* The courts almost always revert to court-appointed expert examinations even in legal matters. 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.
- e* According the Turkish civil procedure law, which was introduced on 4 February 2011 by the Civil Procedural Code and became operational for judgments rendered after 20 June 2016, the appeal procedure is to be conducted by a two-tier system comprised of regional appellate courts²¹ and the Supreme Court.²² Accordingly, the decisions of first instance courts concerning a dispute amounting to no less than 5,390 Turkish lira can be appealed before the regional appellate courts. Decisions of the regional appellate courts can be appealed before the Supreme Court, provided that the dispute amounts to no less than 72,070 Turkish lira.

Despite being operational since 2016, the positive effects of the judicial system are yet to be seen. It is expected to decrease the workload of the appellate courts and accelerate the appeal stage. For this purpose, the Ministry of Justice, referring to European Commission for the efficiency of justice guidelines, implemented new measures on 3 September 2018 for judicial time management and set target lengths for judicial proceedings for the first instance courts. The target for each individual proceeding was made available to parties on 1 January 2019. Mediation was introduced as a compulsory remedy to be resorted to before filing a lawsuit in commercial matters to decrease the workload of the judicial bodies (see subsection vi).

This would also enable the Supreme Court to evaluate the merited issues of a dispute and prepare more diligent reasoning for their awards, which may hopefully develop case law where legislation or practice is ambiguous. This is particularly important for insurance law, because the Supreme Court has not, thus far, provided guiding principles for complex insurance disputes that often require a considerable effort to interpret the facts and contracts in order to solve a wide range of issues (e.g., deductibles, exclusions, subrogation).

21 Article 341 of the CCP.

22 Article 361 of the CCP.

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 4,480 Turkish 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. As a novelty, the parties are granted the opportunity to submit expert views subject to the questions of the judge and the parties (without any common-law-style cross-examination procedure)²³ as supportive evidence 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.²⁴ One-quarter of this amount must be paid to the court in advance by the claimant. Court fees and court expenses (the most significant of which are expert fees – approximately 4,000 to 5,000 Turkish lira per expert examination) 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 Centre²⁵ 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. As mentioned in subsection i, provisions of the

23 Umar, Bilge; HMK Şerhi sayfa 801 vd.

24 www.gib.gov.tr/index.php?id=1079&cuid=pMzD40A9M4IP6oCJ&type=teblig.

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

Civil Procedure Code apply to parties in arbitration in local disputes, whereas the International Arbitration Act²⁶ applies if there is a foreign element in the dispute, particularly in disputes between local insurers and foreign reinsurers where the place of arbitration is Turkey.

Insurance Arbitration Commission

The Insurance Act foresees an institutional arbitration proceeding irrespective of the existence of an arbitration clause. Even if the insurance company is not a member of the arbitration system, the insured shall benefit from the relevant arbitration procedure regarding the disputes arising from compulsory insurance. Since proceedings before the Insurance Arbitration Commission lack certain elements of traditional arbitration, as no arbitration agreement is concluded between the parties and the arbitrators are appointed by the Commission, instead of the parties, from the arbitrators registered in the Commission's list, this procedure is regarded as a unique, ombudsman-like dispute resolution mechanism, instead of regular arbitration. The total number of disputes settled by the Insurance Arbitration Commission reached 293,698 as of 30 September 2019.²⁷

Format of insurance arbitrations

The Commission may appoint a tribunal consisting of a minimum of three arbitrators specialised in life or non-life insurance in cases of arbitration based on the Insurance Act. However, where the disputed amount is equal to or above 15,000 Turkish lira, it is compulsory to form a tribunal. The tribunal decides by majority. According to the Regulation Amending the Regulation on Insurance Arbitration, which was published in 2019, insurance arbitrators are subject to the criteria of (1) having five years of uninterrupted experience in insurance law; or (2) having 10 years of uninterrupted experience in the insurance sector.²⁸

Procedure and evidence

The requirement for application to the Commission is a partial or total rejection of the insurance claim.

Applications may not be filed with the Commission regarding disputes that have been referred to a court or to the Arbitration Committee for Consumer Problems.

The application to the Commission shall be first examined by rapporteurs. Applications that cannot be settled by rapporteurs are referred to the insurance arbitrators. Arbitrators have to issue their awards within four months, at the latest, of the date they have been commissioned.

In addition to the procedure of arbitration adopted by the Civil Procedure Code, the arbitrator may consider the case on submitted documents only. Unless otherwise agreed, the tribunal or the sole arbitrator can decide on the provisional injunctions or evidence determination.

26 Drafted in consideration of the UNCITRAL Model Law on International Commercial Arbitration, the International Arbitration Act is applicable to those disputes involving a foreign element.

27 www.sigortatahkim.org.tr/E-BULTEN-39.html.

28 Regulation Amending the Regulation on Insurance Arbitration, published on 18 April 2019, <https://www.resmigazete.gov.tr/eskiler/2019/04/20190418-26.htm>.

Costs

Attorneys' fees ordered in favour of the party whose request is partially or wholly accepted are one-fifth of the attorneys' fees that would be rendered if the dispute had been resolved before the state court.

The application fee is determined by IRSA and varies from 100 Turkish lira to 350 Turkish lira, or even more in certain cases, depending on the amount of the dispute.²⁹

The fees of arbitrators are paid by the Commission. Arbitrators shall decide on the additional costs as regulated under the Civil Procedure Code.

Awards

Most of the awards rendered in 2019 by the Commission concerned car insurance policies, compulsory traffic insurance, and property insurance policies. Compared with court judgments, the awards contain more comprehensive examinations and reasoning.

v Alternative dispute resolution

Complaints of the insured

If the insured has a complaint arising from interpretation of the regulations or conduct of an insurance company, it can apply to the Insurance General Directorate, incorporated under the Ministry of Treasury and Finance.

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,³⁰ which entered into force on 1 January 2019, mediation became a compulsory remedy for all commercial claims (including insurance disputes) that had to be resorted, leaving filing a lawsuit before the state courts as a last resort, as a cause of action that must be exhausted before the proceedings are commenced.

The compulsory mediation for commercial disputes under the TCC is designed to be finalised within six weeks, and this can be extended by two weeks if deemed necessary by the mediator.

In the event of a settlement at the end of 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.

V YEAR IN REVIEW

In the last quarter of 2018, the Ministry of Treasury and Finance announced the New Economic Programme, which outlines that 2019 to 2021 will be years of fiscal discipline accompanying a rebalancing of the economy to overcome rapid inflation and reduce the budget deficit. Within the scope of this programme, Berat Albayrak, the Minister of Treasury and Finance, announced that the Turkish insurance and reinsurance market will undergo a transformation as, thus far, it has failed to provide sufficient cover for every type

29 www.sigortatahkim.org/index.php?option=com_content&view=article&id=67&Itemid=92.

30 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.

and magnitude of risk. This is why building completion insurance policies, among others, have not gained momentum until now.³¹ Against this background, Turk Re was established on 6 September 2019, with a capital of 600 million Turkish lira and its sole shareholder being the Ministry of Treasury and Finance. Ms Selva Eren, general manager of Turk Re, has stated that they plan to keep 1.2 billion Turkish lira domestically out of 8 billion Turkish lira transferred abroad through reinsurance.³²

As another feature of the transformation, IRSA was incorporated on 18 October 2019 with Presidential Decree No. 47 to act as the new insurance regulatory agency in replacement of the former Undersecretariat of Treasury. As the most significant benefit, IRSA is expected to adopt a friendlier approach towards the market participants and react more quickly to the market's needs for secondary legislation. At the same time IRSA aims to foster the popularity of insurance and enhance awareness on the part of consumers.

Referring to the New Economic Programme, the Turkish Wealth Fund announced in December 2019 that insurance and personal retirement insurance companies controlled by public banks were being merged into one under the Fund. Reportedly, this merger will give birth to a strong insurance movement capable of offering building completion insurance, surety insurance, credit insurances and the like, which have long been awaited by the real sector. On a broader scale; this transaction ultimately aims to increase the share of the insurance market in financial services, which is currently 4 per cent and underachieving.

Building completion insurance policies, credit insurance policies and short-term trade credit for small and medium-sized enterprises (SMEs) were introduced in 2015 as products, serving the purpose of limiting the effects of economic slowdown and currency volatility.³³ Building completion insurance, in particular, was aimed at providing relief to the construction sector. However, the contractors' access to this tool was very limited as the insurance companies were reportedly unable to secure reinsurance coverage for themselves. Similar difficulties in obtaining insurance and reinsurance cover had been reported in other sectors, such as textiles and chemicals.³⁴ However, the endeavour for transformation of the local (re)insurance market, which now involves a state-owned reinsurance company, is seen as a promising development. In this vein, IRSA took over the flag from the Undersecretariat, which issued a communiqué on 24 December 2018, effective as of 1 January 2019, setting the guidelines and tariffs to be adopted by insurance companies for credit insurance foreseen for SMEs.³⁵

Apart from the above cornerstones of structural reforms, the Ministry highlighted legal protection insurance in its 2018 Activity Report.³⁶ Although this insurance tool, together with the approved general conditions, was announced back in 2006, it turned out to be a dead duck because of its incompatibility with the practice and lack of awareness on the part of

31 <http://www.hurriyet.com.tr/yazarlar/noyan-dogan/milli-sigorta-devi-kuruluyor-41089661>.

32 Interview with Selva Eren dated 30 October 2019, available at: <http://www.hurriyet.com.tr/yazarlar/noyan-dogan/doviz-cikisini-engelleyecekiz-41340329>

33 Turkish Insurance Market Outlook 2016–17, p. 33, http://www.jlt.com.tr/upload/files/Turkish_Insurance_Market_Outlook_2016-17.pdf.

34 <http://www.hurriyet.com.tr/yazarlar/noyan-dogan/milli-reasurans-sirketi-kuruluyor-41038431>.

35 Official Gazette No. 30635 dated 24 December 2018.

36 <https://ms.hmb.gov.tr/uploads/2019/05/Hazine-ve-Maliye-Bakanl%C4%B1%C4%9F%C4%B1-2018-Y%C4%B1l%C4%B1-Faaliyet-Raporu.pdf>.

consumers. Against this backdrop the Ministry currently endeavours to adopt the existing general conditions to the market needs and relevant legislation as well as taking actions to increase awareness and education on this specific insurance tool.

Another concept on which the Ministry conducted studies was the concept of surety insurances. The Ministry announced that it had included surety insurances in its agenda, as specified in the Export Master Plan.³⁷ With the amendment made to the Public Procurement Law published in the Official Gazette on 5 December 2017, it was allowed for companies to give surety policies to the banks instead of letters of guarantee. Recently, the Association of Insurance, Reinsurance and Pension Companies announced it was working on a system that will enable verification of the validity and authenticity of the security bonds that are presented as security in tenders.³⁸

One of the main hot topics continues to be the private pension scheme that became compulsory for employees and public servants. The government is encouraging private pension systems and annuity products by providing contributions to the premiums paid by the policyholders and introducing compulsory pension schemes. With the amendment of the Personal Pension Savings and Investment System Law,³⁹ employees under 45 were automatically included in the pension system, the premium for which is deducted from the insured's salary. The latest finance news, however, reports that this product has not been as successful as hoped, as 60 per cent of the insureds opted to abandon the scheme shortly after their automatic inclusion.⁴⁰ The number of contracts has been at a standstill since 2017.⁴¹ Being unsatisfied with the level of remaining participants, the Presidency recently issued a new regulation which allows those who leave the system to re-enter the system with further incentives.⁴² With the new 'Supplementary Pension Scheme', on the other hand, it is projected that employer contribution will be integrated into the participants' savings in addition to the current governmental incentives and wage stoppages.⁴³

Another hot topic on the insurance sector's agenda was cybersecurity. The cyberattack on 27 October 2019 targeting some banking and telecommunication institutions in Turkey brought to the fore the importance of the issue. The attacks have caused the banking systems and communication operators to stop serving, and disabled access to their digital channels. The experts reiterated the importance of investing in cyber infrastructure and drawing up a cybersecurity strategy. Being aware of the demands and the necessity, the private sector took the initiative to place insurance products covering the damages incurred due to attacks targeting digital platforms.

37 Turk Eximbank's Role in 11th Development Plan and Export Master Plan, <https://www.eximbank.gov.tr/content/files/3b3a03cc-8819-464c-baaf-1198853cc7d2/turk-eximbank-s-role-in-11th-development-plan-and-export-master-plan-20-09-2019>.

38 <https://www.sigortacigazetesi.com.tr/kefalet-senetlerinin-internetten-dogrulanabilmesi-icin-yeni-bir-sistem-hayata-gecirilecek/>.

39 Law No. 4632.

40 <http://www.hurriyet.com.tr/yazarlar/noyan-dogan/yepte-otomatik-bes-zorunlu-oluyor-40965509>.

41 KPMG, Sectoral Outlook 2020, page 13, <https://home.kpmg/tr/tr/home/gorusler/2020/01/sektorel-bakis-2020-sigortacilik.html>.

42 Regulation Amending the Regulation on Private Pension Scheme published on the Official Gazette dated 27 December 2018.

43 <http://www.hurriyet.com.tr/yazarlar/noyan-dogan/kideme-guney-kore-modeli-41204469>.

Climate change is the other critical field where the private sector took the initiative. In September 2019, one of the insurance companies introduced the first ever climate insurance in Turkey, in the context of a social responsibility project named ‘Respect for Earth’.

VI OUTLOOK AND CONCLUSIONS

According to the European Commission’s Turkey 2019 Report, ‘Turkey has a good level of preparation in the area of financial services’ while noting that there has been no progress during the reporting period.⁴⁴ Some progress was made in the previous period, notably with regard to making it compulsory for employers to automatically enrol employees in pension schemes.⁴⁵

The government has an objective to be the 10th largest economy in the world by 2023, aiming to generate US\$2 trillion worth of gross national product. In line with this objective, the government is focusing on the insurance sector, among others. Because of the increase in foreign investment and developments in the Turkish economy, it is expected that the insurance sector will gain momentum in the coming years.

Newly emerging risks, disasters that have been experienced and the economic climate are important motives when shaping the underlying legislation and insurance tools. In that vein, in 2019 the government aimed at enhancing insurance regulations to incentivise participants in the insurance market and to develop new products that will create opportunities for insurance companies.

The dynamics, age and growth of the population is encouraging for all the stakeholders to accomplish the goals set by the government. That being said, low risk awareness and level of insurance knowledge stand as the biggest obstacles in the way. With the revival of the economy throughout 2020 and the structural developments, the insurance sector is projected to make a bolder move forward in the coming year.

44 Turkey 2019 Report, p. 71, https://www.ab.gov.tr/regular-progress-reports_46224_en.html.

45 Turkey 2018 Report, p. 71, <https://www.ab.gov.tr/siteimages/kapbtablolar/20180417-turkey-report.pdf>.

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