Jean Monnet Module
‘Harmonisation of the Principles of Insurance Law in Europe’ (HOPINEU)
International Symposium

‘Contextualising Insurance Contracts: Interactions with Various Fields of Law’

Abstracts Book 2021

Edited by:
Dr. Ayşegül Buğra
Dr. Özgün Çelebi
Dr. Mehmet Polat Kalafatoğlu

HOPINEU
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Dr. Katica Tomic

This book contains the abstracts presented in the symposium entitled 'Contextualising Insurance Contracts: Interactions with Various Fields of Law' hosted in 2021 by Dr. Nüsret-Semahat Arsel International Business Law Implementation and Research Center of Koç University Law School. The abstracts were reviewed by the members of the Scientific Committee listed below and were subsequently selected for presentation and publication.

The titles and affiliations of the Scientific Committee members are listed below as they appeared in the call for symposium papers published in 2020.

The Scientific Committee of the Symposium
Prof. Helmut Heiss (University of Zurich, Switzerland)
Prof. Samim Ünan (Galatasaray University, Turkey)
Prof. Emine Yazıcıoğlu (Istanbul University, Turkey)
Prof. Zeynep Derya Tarman (Koç University, Turkey)
Assoc. Prof. Pierpaolo Marano (Università Cattolica del Sacro Cuore, Italy)
Assoc. Prof. Özlem Gürses (King's College London, United Kingdom)
Assoc. Prof. Johanna Hjalmarsson (University of Southampton, United Kingdom)
Assoc. Prof. Margarida Lima Rego (Universidade Nova de Lisboa, Portugal)
Dr. Kyriaki Noussia (University of Exeter, United Kingdom)

The Organising Committee of the Symposium
Prof. Bertil Emrah Oder (Koç University, Turkey)
Asst. Prof. Ayşegül Buğra (Koç University, Turkey)
Asst. Prof. Özgün Çelebi (Koç University, Turkey)
Asst. Prof. Mehmet Polat Kalafatoğlu (Koç University, Turkey)
Dr. Valentina Rita Scotti (Koç University, Turkey)

Preface

The international symposium entitled 'Contextualising Insurance Contracts: Interactions with Various Fields of Law' was an event organised as part of the Jean Monnet Module 'Harmonisation of the Principles of Insurance Law in Europe' (HOPINEU), and was generously funded by the Erasmus+ Programme of the European Commission. The event was initially scheduled to be held on 28-29 May 2020, however, due to COVID-19 and the subsequent restrictions, it eventually took place during six weekly sessions between 28 January 2021 and 4 March 2021.

The main purpose of the symposium was to focus on insurance contracts in terms of different fields of law in order to explore existing interactions and tensions. The Organising Committee were delighted to receive a high number of applications from scholars around the globe, including countries as diverse as the United States, New Zealand, Austria, Switzerland and Turkey.

The symposium commenced with a lecture entitled 'Insurance Law in the Vanguard of Contract Law Development' by Prof. Helmut Heiss (University of Zurich/Co-Chair, European Law Institute (ELI) Special Interest Group (SIG) on Insurance Law), and continued with weekly sessions chaired by eminent scholars in the field.

We would like to thank the distinguished members of the Scientific Committee for their reviewing of the abstracts submitted for the symposium, and everyone who spoke and participated in the event.

It is hoped that this electronic book will be useful for anyone who is interested in how insurance contracts and the different areas of law intersect.

On behalf of the Organising Committee
Dr. Ayşegül Buğra

Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 1)

Contractual Asymmetries and Balancing Tools

28 JANUARY 2021
THURSDAY
14:00 - 18:30 (GMT+3)

14.00 Welcome Note
Prof. Bertil Emrah Oder Dean, Koç University Law School

14.10 Opening Lecture: Insurance Law in the Vanguard of Contract Law Development
Prof. Helmut Heiss University of Zurich / Co-Chair, ELI Insurance Law SIG

Session I **Standard Terms in Insurance Contracts: Concept and Control**
Chair: Prof. Helmut Heiss University of Zurich / Co-Chair, ELI Insurance Law SIG

14.30 Standard Terms in Insurance Contracts
Dr. Yasin Alperen Karaşahin Assistant Professor, Koç University

14.50 Are the "General Conditions" in Insurance Contracts Subject to Legal Control over "Standard Terms and Conditions"?
Dr. Tuğçe Nimet Yaşar Assistant Professor, Ankara Yıldırım Beyazıt University

15.10 Control of Pre-formulated Special Terms in Insurance Contracts from a Consumer Law Perspective (A Comparative Analysis with the Provisions of the PEICL and Turkish Law)
Dr. Aslıhan Erbaş Açıkel Assistant Professor, Kadir Has University

15.30-16.00 Q&A

Session II **Protection of the Weaker Party in Insurance Contracts: Consumer Law and Beyond**
Chair: Prof. Samim Ünan Piri Reis University

16.30 Opening remarks

16.40 A Priori Determination of the Weaker Party in Contracts: The Critical Example of Insurance Contracts
Dr. Kemal Atasoy Assistant Professor, Çağ University

17.00 Issues Relating to Consumer's Withdrawal from Credit Life Insurance Contract
Dr. Evrim Akgün Assistant Professor, Bahçeşehir University

17.20 Credit-Related Insurance under Consumer Protection Law
Dr. Gülfer Meriç Assistant Professor, Özyeğin University

17.40 Q&A

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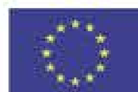

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Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 2)

"Data Protection and Digitalisation: What Implications for Insurance?"

4 FEBRUARY 2021
THURSDAY
14:00 - 16:00 (GMT+3)

Chair: **Prof. Pierpaolo Marano** Università Cattolica del Sacro Cuore / Latvijas Universitāt

14.00 **Opening Remarks**

14.10 **Digitalisation of Insurance Markets: Can it Lead to New Forms of Competition Law Infringements in the Absence of Block Exemptions for the Insurance Sector?**
Dr. Zeynep Ayata Assistant Professor, Koç University

14.30 **Insurance Contracts and Data Protection Law**
Dr. Arzu Şen Kalyon Research Assistant, Istanbul Medeniyet University

14.50 **The Legal Effects of Employee's Right to Disconnect on Cyber Insurance Contracts**
Dr. Başak Ozan Özparlak Part-Time Lecturer, Özyeğin University

15.10 **Applicant's Duty of Disclosure in the Light of Legal and Self-Regulatory Constraints on the Collection of Genetic Data for Insurance Purposes**
Dr. Ayşegül Buğra Assistant Professor, Koç University

15.30 Q&A

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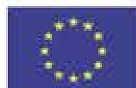

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Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 3)

Insurance Contracts in the Commercial Context

10 FEBRUARY 2021
WEDNESDAY
12:00 - 15:00 (GMT+3)

Moderators
Prof. Özlem Gürses King's College London
Prof. Robert Koch LL.M. (McGill) University of Hamburg, Director of the Institute of Insurance Law (est. 1916)
12.00 Opening Remarks
12.10 Insurance-Linked Securities: Establishing a Market in Canada
Christopher Whitehead Lecturer, Auckland University of Technology & Ph.D Candidate, McGill University
12.30 Banks' Duty of Good Faith as Insurance Intermediaries: Analysis with regard to the Concept of Unfair Competition
Dr. Aysel Çetinkaya Uyar Assistant Professor, Kırklareli University
12.50 Legal Consequences of Insurance Contracts when Both Parties are Traders
Dr. Elvin Kerime Silahtaroğlu Assistant Professor, Tarsus University
13.10 Break
13.20 Unfair Competition - General Terms and Conditions used in Insurance Agreements
Dr. Emek Toraman Çolgar Assistant Professor, Koç University
13.40 Warranty & Indemnity Insurance in M&A Transactions
Zahide Altunbaş Sancak Ph.D Candidate, Istanbul Bilgi University
14.00 Q&A

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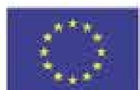

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Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 4)

Insurance and Transport Risks

19 FEBRUARY 2021
FRIDAY
16:00 - 18:00 (GMT+3)

Moderator

Dr. Kyriaki Noussia Senior Lecturer, University of Exeter

16.00 Opening Remarks

16.10 Proposal for an Insurance Scheme for Losses arising from Rescue Operations

Dr. Sinem Oğiş Part-Time Lecturer, Yaşar University & Lawyer, Oğiş Law Firm

16.30 The Geopolitical Character of Marine Insurance Exclusion Clauses

Dr. Richard Kilpatrick Assistant Professor of Business Law, College of Charleston

16.50 Increasing Cargo Theft Problem: an Analysis of Cargo Crimes and Comments from the Perspective of Insurance Law with Loss Prevention Methods

Dr. Metin Uğur Aytekin Assistant Professor of Maritime Law, Piri Reis University

17.10 Aviation (Aircraft) Insurance in Turkish Legislation

Dr. Ali Cengiz Assistant Professor, Aydın Adnan Menderes University

17.30 Q&A

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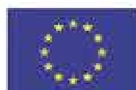

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Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 5)

Insurance Contracts: Intersections with Law of Obligations and International Law

22 FEBRUARY 2021
MONDAY
15:00 - 18:00 (GMT+3)

Session I **Insurance Contracts: Intersections with Law of Obligations**
Chair: Prof. Samim Ünan Piri Reis University

15.00 Opening remarks

15.10 Evaluation of the Provisions of TCC regarding the Negotiation and Conclusion Phases of the Insurance Contract with respect to General Principles of Contract Law
Dr. Kübra Yetiş Şamlı Assistant Professor, Istanbul University

15.30 Effect of Fraud in the Conclusion of Insurance Contract
Dr. Özgün Çelebi Assistant Professor, Koç University

15.50 Renewal Policies: A New Contract or Not?
Dr. Işık Önay Assistant Professor, Koç University

16.10 General Risk Liability under the Turkish Code of Obligations and its Implications in Insurance Law: Is it a "Frankenstein's Monster"?
Dr. Başak Başoğlu Associate Professor, Piri Reis University
Dr. Kadir Berk Kapancı Associate Professor, MEF University

16.30 Q&A

Session II **Insurance Contracts: Intersections with Public International Law**
Chair: Prof. Christoph Brömmelmeyer Professor, Europa-Universität Viadrina Frankfurt (Oder) & Co-Chair, ELI Insurance Law SIG

17.00 Opening remarks

17.10 Interaction between Insurance Law and International Law: A Terminological Inquiry into the Distinction between War Risk and Terrorism Risk
Mr. Onur Dur Ph.D Candidate, University of Basel

17.30 Precautionary Law: An Innovative Approach towards Pre-Damage Responsibility in Public International Law
Mr. Abdulkadir Nacar Ph.D Candidate, Istanbul University

17.50 Q&A

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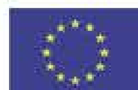

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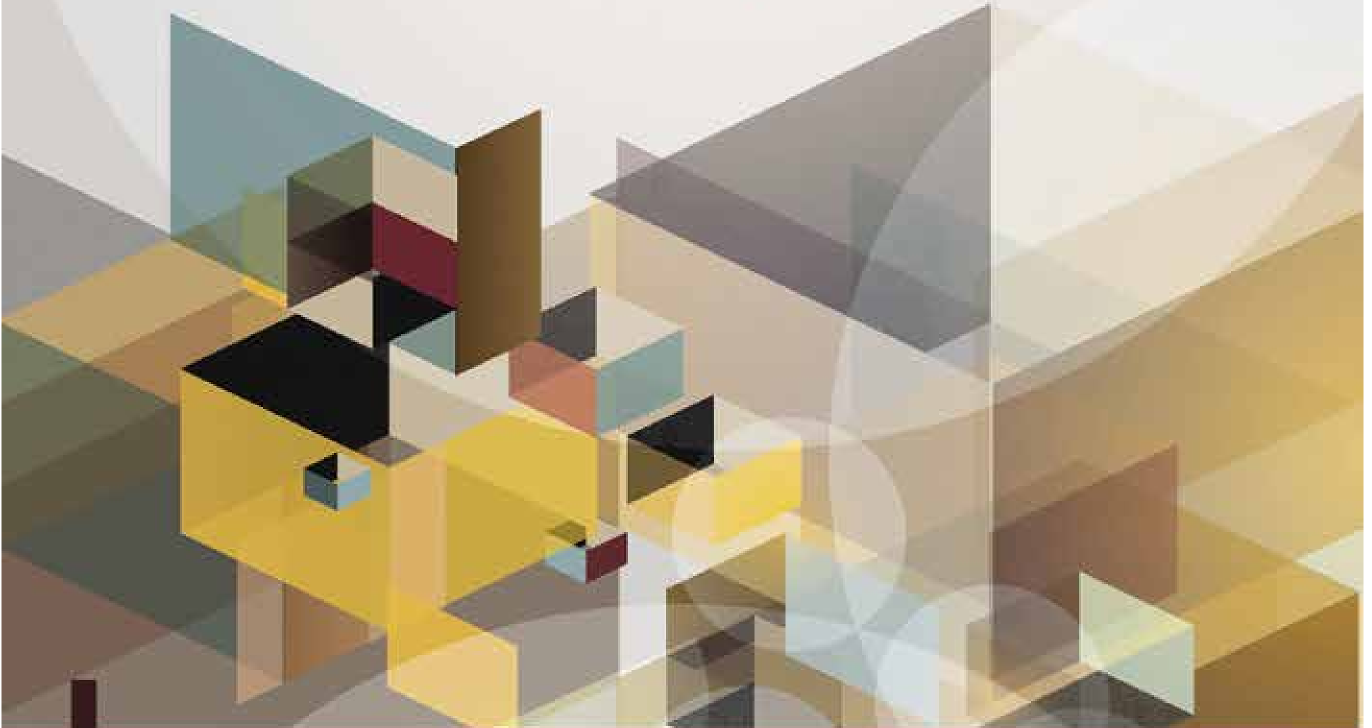
Contextualising Insurance Contracts: Interactions with Various Fields of Law (Day 6)

Insurance Contracts and Dispute Resolution



4 MARCH 2021
THURSDAY
14:00 - 15:30 (GMT+3)

Moderator

Prof. Derya Tarman-Pekbey Professor, Koç University

14.00 Opening Remarks

14.10 The Law Applicable to Obligations Arising From Insurance Contracts under Turkish Private International Law and Rome I Regulation

Ms. Ekin Deniz İlhan Research Assistant, İhsan Doğramacı Bilkent University

14.30 Protection of Weaker Parties in International Insurance Contracts with respect to the Choice of Court Agreements

Dr. Mehmet Polat Kalafatoğlu Assistant Professor, Koç University

14.50 Institutional Arbitration & Litigation and Insurance Contracts

Dr. Banu Bozkurt Assistant Professor, Akdeniz University

15.10 Q&A

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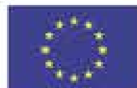

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Standard Terms in Insurance Contracts

Dr. Yasin Alperen Karaşahin
Assistant Professor, Koç University

General rules of contract law can play an important role for insurance contracts even though insurance contracts are – in many legal systems – regulated specially by statute. This role of contract law is evident with regard to standard terms in insurance contracts, since codifications of insurance contract law do not contain detailed provisions about standard terms. In such legal systems, general rules about standard contract terms will be applicable to insurance contracts. In this context, the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter "Unfair Contract Terms Directive") has to be regarded in Member States of the European Union, which shapes the general rules of contract law about standard contract terms. Principles of European Insurance Contract Law contain a provision about "abusive clauses" in insurance contracts. It should be remarked, however, that this provision is modelled after the Unfair Contract Terms Directive and constitutes an application of its provisions to insurance contracts.

Standard terms are indispensable for insurance contracts which require the standardization of the risks covered. Unlike in other contracts, in insurance contracts, standard terms actually shape the "product", i.e. the insurance coverage. Due to this feature and other special features of insurance contracts, the control of standard terms is of a special importance and difficulty in insurance contracts.

In order to be effective, standard terms have to be incorporated into the individual contract. With regard to the incorporation of standard terms into insurance contracts, two issues require special consideration.

- Standard terms must be incorporated into the contract at the time of its conclusion. However, it might be the case that the parties do not agree on the incorporation of standard terms when an insurance contract is concluded and the insurer later makes reference to the standard terms in the insurance policy. In such cases, it should be examined whether the insurance contract includes the standard terms of the insurer.
- In some legal systems, special rules exist for the incorporation of standard terms into contracts. If the standard terms of the user include a clause which is so unusual that its presence would surprise the other party, the relevant clause will not be covered by the global consent of the other party and therefore not be incorporated into the contract. In insurance contracts, clauses in standard terms that would deprive the insured person essentially from the coverage expected from the relevant type of insurance could constitute such clauses.

When standard terms have been incorporated into the contract, these terms will have to be interpreted. If a clause in standard terms is unclear and can be interpreted in several ways, the interpretation in favor of the policyholder should be preferred. This rule could play an important role in the interpretation of standard insurance terms.

In several legal systems, the content of standard terms can be reviewed by courts with regard to their substantive fairness. In Member States of the European Union, the Unfair Contract Terms Directive sets the minimum criteria for the review of standard terms in consumer contacts. With regard to the content control of standard terms in insurance contracts, two issues require special examination.

- As it is expressly provided for in the Unfair Contract Terms Directive, control of substantive fairness cannot be exercised with regard to the main obligations of the parties. In insurance contracts, many standard terms affect the main obligations of the parties, i.e. insurance coverage and premium. It is submitted that only so-called “core terms” constitute clauses which cannot be reviewed. This approach is accepted in the Principles of European Insurance Contract Law which exclude only “terms that state the essential description of the cover granted” from review. The delimitation of such (core) terms from other terms that affect the insurance coverage and the premium proves to be difficult.
- Core terms are only exempt from content control, if they are in plain and intelligible language. Thus, core terms are subject to transparency control. However, there are uncertainties about the method of this control and the effect of non-transparency of a core term of the insurance contract as a whole.

Are the "General Conditions" in Insurance Contracts Subject to Legal Control over "Standard Terms and Conditions"?

Dr. Tuğçe Nimet Yaşar
Assistant Professor, Ankara Yıldırım Beyazıt University
Faculty of Law, Department of Commercial Law

The principle of freedom of contract constitutes a main pillar of the Turkish contract law. However, some provisions regulating insurance contracts in Turkish Commercial Code (TCC) and Insurance Code vitiate this principle, since the insured[1] is regarded as the weak party in an insurance contract.

Although -as a rule- the insurance contract is a consensual contract formed by the consent of the parties, Art. 11/I of the Insurance Code states that "the main content of insurance contracts is to be arranged in compliance with the general conditions approved by the Undersecretariat of Treasury[2] and applied by all insurance companies in a similar way". In practice, the Undersecretariat of Treasury does not approve the "general conditions" but drafts them directly. These "general conditions" are published in the Official Gazette as communiqués[3] and the insurers (insurance companies) have to incorporate them in their insurance contracts. Otherwise pursuant to Art. 34/II, (f) of the Insurance Code administrative penalty may be levied against these insurers[4]. With regard to the "general conditions" the question arises, whether these conditions qualify as "standard terms and conditions" as regulated in the Turkish Code of Obligations (TCO). There are differing views among scholars concerning this question[5]:

The "standard terms and conditions" are non-negotiated terms, that are drafted in advance and made part of the contract on the request of one of the parties (Art. 20/I TCO). As a matter of fact, in an insurance contract, the insured is not able to negotiate the terms of the "general conditions". Hence the "general conditions" could be considered as "standard terms and conditions". If the "general conditions" are considered as "standard terms and conditions", they would be subject to the control over "standard terms and conditions" according to Art. 21 (the test of application) and Art. 25 (the test of content) of the TCO. This approach would be in compliance with the European Insurance Law. Under Art. 2:304 of the Principles of European Insurance Contract Law (PEICL) "abusive clauses" (unfair terms) in insurance contracts do not bind the insured. However, in case of "general conditions" neither the insurer is able to influence the substance of the pre-formulated "general conditions", since the Insurance Code imposes these conditions on the insurer. Therefore, the "general conditions" could not be regarded as "standard terms and conditions" as well.

The approaches of the courts are also divergent. On the one hand, the Turkish Court of Cassation mostly finds that it is impossible to apply the provisions of TCO regulating "standard terms and conditions" to "general

1 In this study, the policyholder and the insured will be deemed the same person. This study will not focus on consumers.

2 Today the Ministry of Treasury and Finance.

3 e.g. General Conditions for Highway Motor Vehicles Compulsory Liability Insurance, Official Gazette 14.05.2015, No. 29355.

4 The insurers also have the right to determine "special conditions" depending on the case (Art. 11/I of the Insurance Code).

5 *Atamer*, Yeşim M./*Ünan*, Samim: "Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement", Transparency in Insurance Law, İstanbul 2012, p. 69; *Memiş*, Tekin: Sigorta Sözleşmesi Şartlarının Yargısal Denetimi, İstanbul 2016, p. 29 and 34; *Yeşilova Aras*, Ecehan: "Sigorta Sözleşmelerinde Genel İşlem Şartlarının Kullanılması", İBD 2015, p. 465.

conditions"[6]. On the other hand, there are some decisions where the court of first instance rules that the "general conditions" are subject to the "test of content" pursuant to Art. 25 TCO and the Regional Court of Appeal approves them[7].

The aim of this study is to examine whether the "general conditions" in insurance contracts should be subject to the control over "standard terms and conditions" and under which circumstances these "general conditions" can be deemed unwritten or invalid according to Turkish and European law.

6 Court of Cassation, 17th Civil Chamber, 04.03.2019, Decision No. 2019/2351; 17th Civil Chamber, 27.06.2018, Decision No. 2018/6439; 17th Civil Chamber, 15.06.2017, Decision No. 2017/6854.

7 Regional Court of Appeal of Ankara, 22nd Civil Chamber, 04.12.2018, Decision No. 2018/1896.

Control of Pre-formulated Special Terms in Insurance Contracts from a Consumer Law Perspective (A comparative analysis with the provisions of the PEICL and Turkish Law)

Dr. Aslıhan Erbaş Açıkel
(LL.M. Hamburg)
Assistant Professor, Kadir Has University Law Faculty, Commercial Law Department

Insurance contracts consist of general terms and special terms, which are attached to the policy. The purpose of the special terms is to determine the risks covered. Consequently, they specifically list the risks, the exclusions and the conditions of the insurance coverage. Those special terms are generally pre-- formulated and standardized by the insurer. It is therefore vital to inform the policyholder before the conclusion of the contract to enable him to understand exactly which risks are covered in the insurance contract. Hence the insurer's duty of disclosure plays a significant role at this stage and mainly serves to let the policyholder consider whether or not to conclude the contract or, at least, to offer the insurer the chance to also cover some excluded risks in return for a higher premium.

It is clear that if the insurer does not perform his duty to provide full information about the risks covered, the policyholder may face at a later stage the likelihood that the incident occurred was not according to a risk covered under the insurance contract. In such cases, the policyholder would raise the invalidity of the exclusion clauses stated in the pre--formulated special terms or, at least, file for damages for not having been informed about those exclusions. The court will then have to deal with these questions and decide whether those terms became binding on the policyholder despite the insurer's violation of his duty to inform. To find an answer to this question might be difficult in jurisdictions such as that of Turkey, where the legal consequences of such violations are not specifically stipulated by the statutory law. The court will then have to apply the general provisions of contract law and consumer law, in cases where the policyholder is a consumer in the subject dispute.

The aim of this paper is to analyse the interaction of the insurance contract with the law of obligations and consumer law. Special emphasis will be put on the legal consequences of the breach of the insurer's duty of information regarding the risks excluded in the pre--formulated special terms, which are attached to the policy and sent to the policyholder, the latter being a consumer, after the conclusion of the insurance contract. This analysis will be made by taking into account the related provisions of Turkish law and the rules of the PEICL, which can be deemed as the most modern and most recently updated rules applicable to insurance contracts.

A Critical Example of the a priori Determination of the Weaker Party in Contract: Insurance Contracts

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The prevailing opinion about insurance contracts is that the policy owner is typically the weaker party. The policy owner should be protected against insurer, who has specific and technical knowledge about insurance, a legal and abstract product, within the Turkish Code on Consumer Protection (CCP). Hence according to CCP art. 3/ sub-para. 1, insurance contract is a type of consumer transaction. However, classical concept of merchant should be reconsidered in terms of weaker party. The policy owner, as a merchant, needs legal protection in the field of insurance, even if the subject of contract is within his professional or commercial scope. Thus, on the matter of *a priori* determination of weak party, being a merchant does not mean automatically becoming strong party who does not always need any legal protection because of the obligation to be prudent in commercial law. The perception that merchant has an economic strength against other party in *a priori* determination of weak party, does not guarantee the just resolution for conflicts within insurance contracts. Hereby, the notion of weaker party is expanded.

Another crucial issue about the policy owner's weakness in contract is the information asymmetry between parties, which is contrary to the principle of protecting weaker party. The one, who affords advantage by using his knowledge as a powerful instrument against other party, benefits from the information asymmetry. Protecting the weaker party requires stronger party's obligation to inform. Insurance contracts differentiate because information asymmetry exists bilaterally. Thus, both parties have obligation to inform about relevant issues and at particular stages of contract. Insurer's obligation include informing about contract's characteristics and sharing technical knowledge on insurance at the stages of negotiation and establishment of contract. This obligation is typically a legal measure for protecting weaker party. Information asymmetry occurs against the insurer when the policy owner has more knowledge about risk identification and environmental factors of loss. Policy owner's obligation to inform is introduced in order to determine the scope of the insurer's risk responsibility and ensure the fairness of the contract. Turkish Commercial Code art. 1435, 1445-1147 and PEICL art. 2:101, 4:202, 6:101 are examples of this specific measure in insurance contracts. Plus, policy owner's obligation to inform is aimed to prevent insurance fraud. The prediction that policy owner, who is weaker party at first place, suffers from information asymmetry about every issue of contract is not accurate. On this matter, the notion of weaker party becomes vague.

The expansion and vagueness of the notion of weaker party make difficult to answer the questions that which criteria should be taken into account for determination of weaker party in contract or whether weaker party could be *a priori* determined. Firstly, the economic needs and situation of parties are more important than their personal characteristic to determine weaker party, especially when merchant assures the merchandises related to his profession. It is possible that subject of contract could be so specific and intangible that restricts

merchant's substantive freedom of contract. Thus, it must be considered whether merchant-policy owner benefits from the consumer protection in each case.

Secondly, the assumption that the weaker party is always the same facilities *a priori* determination of weaker party but must be revised in the light of the policy owner's obligation to inform. Calculating premiums and determining scope of insurer's risk responsibility depend on the policy owner's knowledge. This is a good example of possibility that power balance between parties can change in different stages of contract. Shifting power of information is the result of *sui generis* characteristic of insurance contracts, instead of the protection of weaker party. Thus, in order to equilibrate the economic balance of contract and secure the contractual justice, bringing set of rules that can be adapted to characteristics of contract is more efficacious then strict, *a priori* determined rules in terms of protecting weaker party. Referring policy owner, who has not professional or commercial objectives in contract, as the weaker party is questionable. Because it will be contrary to insurance contracts' characteristics and obstruct the protection of professionals, who have no idea about insurance, in free market.

Issues Relating to Consumer's Withdrawal from Credit Life Insurance Contract

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In this paper we will focus on the problem about the assurance of the receivables of the credit institution which arises from consumer's right of withdrawal from the insurance contract. We will examine this problem in the scope of Turkish Commercial Code, Turkish Civil Code, pledge-related regulations and principles in insurance law and propose a number of solutions to this problem.

Under the Turkish Consumer Protection Act (CPA) No. 6502, consumer is defined as "*any natural or legal person acting for non-commercial or non-professional purposes*". Pursuant to paragraph 1(I) of Article 3 in CPA, insurance contracts are explicitly recognized as consumer transactions. Therefore, if a natural or legal person enters into an insurance contract for non-commercial or non-professional purposes, they will be accepted as both the policy holder and the consumer.

Life insurance contracts are almost always sought for as assurance in loan agreements concluded by consumers. The credit institution may conclude the insurance contract itself and thus earn the "policy holder" title or the consumer may conclude the related contract and designate the credit institution as beneficiary and/or credit institution with a pledge right (*dain-i mürtehin*[1]). In this second case, when the consumer exercises some of the rights arising from the consumer law legislation, a number of problems may arise in the fields of insurance law and pledge law.

When the credit institution is registered as *dain-i mürtehin*, it means credit institution's receivables are secured by a pledge right under the relevant laws and it secures that the insurance money or compensation will be paid by the insurer to the credit institution, if the policy holder or the insured fails to pay the loan sum. If the person who enters into the insurance contract and borrows the loan is also a consumer, the provisions of consumer law legislation will also be applicable. In the relevant legislation, consumers are entitled to have a right of withdrawal from a contract in specific circumstances. For example, if insurance contract premiums are paid in installments rather than in a lump sum, a credit sale agreement is entered into within the meaning of CPA, and in accordance with the Article 18/1 of CPA, the consumer may use its right of withdrawal within seven days from the credit sales agreement without stating any cause or paying any penalty. Another example would be on distance contracts; according to the Article 49/5 of CPA right of withdrawal can be exercised within 14 days after entering into the insurance contract.

In accordance with Article 6/A of the Circular No. 2015/20 issued by Turkish Undersecreteriat of Treasury, when the pledge right is registered under the credit institution's name in the insurance contract and if the policy holder exercises its right to withdrawal from this contract, such request will be notified to the credit institution that has the pledge right. The insurance contract will continue to be valid for another three working days after the notification, however after that period, it will be withdrawn from as requested by the policy holder.

1 Credit institution with pledge right (dain-i mürtehin) is defined as a credit institution who has a pledge right on the insurance money or compensation. Discussions regarding the validity of this registration will not be discussed in this paper.

If the consumer exercises its right of withdrawal from the insurance contract, which was concluded to serve as an assurance of the debt borrowed from the credit institution, the loan granted will lose its security. Thus, exercising this right means not only withdrawal from the insurance contract but also withdrawal from the loan collateral provided by the credit institution.

As it is stated above, it constitutes a critical problem for the credit institutions, if the loan cannot be paid neither by the debtor itself nor by the insurer because of the withdrawal from the insurance contract. Therefore, we will try to determine the rules to apply to this problem and if there are no rules to be applied, then we will find which rules can be used as an inspiration to create a solution for this problem.

Interaction of Insurance Law with Consumer Protection Law

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Consumer Protection Law, which entered into force in 2014, stipulates the insurance contracts among consumer transactions. Therefore, insurance contracts fall within the scope of the Consumer Protection Law. Insurance contracts are regulated under some of the provisions of the relevant law and the provision concerning credit related insurance is one of them.

Credit institutions request a security from the consumers in order to grant credits[1]. Another type of security is insurance. In this type of insurance, the insurer undertakes to pay the credit loans in case the risk realizes. For this reason, in practice most of the credit agreements contain a clause requiring consumer to conclude an insurance contract related to credit or a clause granting the credit institution the right to conclude such a contract[2]. In Turkey this type of insurance is very common and usually a life insurance policy is issued where the credit institution is the beneficiary[3].

The concept of "credit institution" substantially refers to the banks[4]. Under Turkish Insurance Law, banks are entitled to be insurance agents. The bank functions as the insurance agent and simultaneously it functions as a credit institution[5]. Having two different titles yields the bank two different types of revenue[6]. This is another reason why the lawmaker seeks to protect the consumer and provides following obligations[7].

Consumer Protection Law article 29 requires the explicit request of the consumer in order for such an insurance contract to be concluded. The lawmaker is laying down conditions and making it more difficult for such an insurance to be concluded, rather than making it easier even though such insurance is for the good of both the credit institution and the consumer and his heirs[8]. Actually the main problem is that who is going to pay the premium for such an insurance contract[9]. Article 4/3 of the Consumer Protection Law stipulates the credit institution shall incur the insurance premium both in circumstance of the consumer concluding the contract directly by himself and in circumstance of the credit institution concluding such an insurance contract on behalf of the consumer and this constitutes a proper solution[10].

Secondly, if the consumer requests to enter into an insurance contract, the law sets forth that the consumer is entitled to choose the insurance company and the credit institution is obliged to accept the insurance cover

1 Samim Ünan, Sigorta Tüketici Hukuku, On İki Levha Yayıncılık, İstanbul, 2016, p. 62-63 (hereinafter "Sigorta Tüketici"); Samim Ünan, Türk Ticaret Kanunu Şerhi Altıncı Kitap Cilt III Can Sigortaları, On İki Levha Yayıncılık, İstanbul, 2017, p. 213 (hereinafter "Şerh").

2 Ibid.

3 Meltem Deniz Güner-Özbek, Insurance Law in Turkey, Wolters Kluwer, 2016, Netherlands, p. 35.

4 Ibid.

5 Ünan, Sigorta Tüketici, p. 64; Ünan, Şerh, p. 215-216.

6 Ibid.

7 Ibid.

8 Ünan, Sigorta Tüketici, p. 62-63; Ünan, Şerh, p. 214.

9 Ünan, Sigorta Tüketici, p. 64; Ünan, Şerh, p. 215.

10 Ünan, Sigorta Tüketici, p. 64; Ünan, Şerh, p. 215.

given by the insurance company chosen by the consumer. There is a similar provision stipulated under Insurance Activities Act article 32/5; where it is provided that if a contract requires a contracting party to conclude an insurance contract, provisions requiring the contracting party to conclude the insurance contract with a specific insurance company is null and void. Therefore this provision is in force since 2007 and there was no need for such a provision under Consumer Protection Law[11].

Thirdly, the coverage of the credit related insurance should comply with the subject matter of the credit. In case of a fixed sum insurance, it should also comply with the remaining loan balance and its term. However the law already requires the explicit request of the consumer, therefore the consumer will be entitled to determine the coverage, the term and etc. at his discretion[12].

Parallel to Consumer Protection Law article 29, Bylaw Regarding the Implementation of Individual Credit Related Insurances has been issued and this bylaw shall also be scrutinized.

11 Ünan, Sigorta Tüketici, p. 67; Ünan, Şerh, p. 219.

12 Ünan, Sigorta Tüketici, p. 68; Ünan, Şerh, p. 220.

Digitalisation of Insurance Markets: Can it Lead to New Forms of Competition Law Infringements in the Absence of Block Exemptions for the Insurance Sector?

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For almost 25 years, the European Union regulators have provided sector specific rules for the insurance sector. Insurance markets is one of the most regulated markets and as in all regulated markets it is marked by limited competition. As a matter of fact, insurance markets are often highly concentrated, especially in terms of products such as health insurances. Despite such natural limitations of competition in these markets, cooperation among competitors is often seen as a commercial requirement. According to rules established by article 101(1) of the Treaty on the Functioning of the European Union, cooperation and exchange of information between direct competitors (undertakings that are active in the same horizontal market) generally constitutes an infringement of competition law rules. Furthermore, there is a well-established line of case of law of the European Union Court of Justice which sees exchange of information among competitors as an infringement by object.

However, for more a long period of time, certain information exchanges between competitors in the insurance sector were protected by a Block Exemption Regulation (on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to certain categories of agreements, decisions and concerted practices) in the insurance sector. In the European Union competition law system, block exemptions are a regulatory tool used to provide rules for specific sectors or specific types of agreements under the general framework provided by article 101(3). The first Block Exemption Regulation for insurance sector dates back to 1993 and had was revised in 2003 which led to the entry into force of second Regulation in 2010. The most important purpose of the block exemption regulations was to legalise and to a certain extent facilitate the sharing of information by insurance companies on the coverage of certain types of risks and certain data used for comparison purposes. Thus, the Regulation 267/2010 provided a safe harbour for insurance companies by setting the framework under which they could legally exchange information. In 2014, three years before the expiry of the second regulation, the Commission launched a consultation process whereby it tried to determine whether it was necessary to uphold sector specific exemption rules in insurance markets. As a result, the Commission reached the conclusion that the framework provided in the Guidelines on Horizontal Co-operation agreements was sufficient and that sector specific rules were not needed to regulate information exchanges in the insurance sector.

Hence since the expiry of the Regulation 267/2010 cooperation between insurance companies do not benefit from sector specific rules and are assessed under general rules applicable under article 101(1) and 101(3). This may lead to certain problems which may have seemed crucial in 2017. As a matter of fact, in the past five years, competition law analysis has become increasingly weary of digitalisation of transactions and the use of data. Although this a general phenomenon that affects all sectors, it may lead to specific problems with regard to the insurance sector. As the block exemption regulations have demonstrated, the most important characteristic

of insurance markets in the need or the demand for cooperation and exchange in terms of data regarding the insured. In all sectors, digitalisation has led to an increase in both data that is generated and data that is used for commercial transactions. However, access and possession of data is not evenly spread among companies and this may be valid in the insurance sector. Large global insurance companies may be more capable of acquiring and accumulating relevant data or may have easier and better access to Big Data holders. Insurance companies that have access to such data may refuse to cooperate with smaller insurance companies, especially in the absence of a block exemption system that provides a safe harbour. Considering that Big Data may constitute dominance in the market behaviour of such insurance firms needs to be considered under article 102 of the TFEU which forbids abuse of dominant position. Furthermore, firms that have access to Big Data may enter into agreements or collusion in the sense of article 101 TFEU. This paper will discuss whether digitalisation and use Big Data may create new problems in terms of competition law. After providing a general overview of the characteristics of insurance markets and its digitalisation, the paper will firstly examine the relevance of Big Data in insurance markets. Secondly, the paper will discuss how behaviour of dominant firms may lead to exclusionary practices especially in the form of refusal to deal in the sense of article 101 or article 102 TFEU. The paper will finally consider whether exchange of data is a commercial requirement and hence may be considered an essential facility that must be provided by dominant undertakings.

Insurance Contract and Data Protection Law

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In this study, our main purpose is to examine the Turkish Data Protection Law, General Data Protection Directive(GDPR), European Convention on Human Rights(Convention) and decisions of the the European Court of Human Rights (ECHR) and Court of Justice of Union European (CJEU) which are leading document in the field of data protection, in order to reveal the general principles of data privacy in the field of insurance contracts.

In respect of Turkish legislation, the Law on the Protection of Personal Data No. 6698, which entered into force at the beginning of April 2016, is the first specific and comprehensive law in this field. The right to privacy and protection of an individual's private life is also enshrined in the Turkish Constitution of 1982. Accordingly, everyone has freedom of communication, and privacy of communication is a fundamental right. Also, under the last paragraph of Article 20 of the Constitution, everyone's right to demand protection of personal data related to him is guaranteed as a constitutional right.

Confidentiality Under EU law, the secure processing of data is further safeguarded by the general duty on all persons, controllers or processors, to ensure that data remain confidential. The introduction of the GDPR[1] is going to have a significant impact on the insurance industry due to the large amount of personal data processed by insurers.

Also, ECHR and CJEU played an important role in the protection of personal data. Although the protection of personal data in the Convention is not regulated as a separate item, it is considered under Article 8 of the Convention[2], which regulates the privacy of private life. Since the protection of personal data is protected under the privacy clause, it is necessary to examine how privacy is defined by the ECHR[3].

Insurance companies need information about the insured coverage. Furthermore, one of the statutory duties of the party of the insurance contract 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 insurance contract. The question is what will insurance companies do with this information and to what extend they will protect it accordingly the data protection regulations. Outside the main subject of the insurance contract, party of insurance contract expect that confidential data will not be shared with people or organizations not authorized to have such information and that legitimate users of the data will not exploit such access for purposes other than those for which the information was originally obtained[4]. Insurance companies will also need to be able to justify why they must obtain and hold the data in question.

1 The regulation entered into force on 24 May 2016 and applies since 25 May 2018.

2 Leander v. Sweden, (Application no:9248/81), 26.03.1987; Amann v. Switzerland, (Grand Chamber), (Application no:27798/95), 16.02.2000, § 65; Rotaru v. Romania, (Grand Chamber), (Application no: 28341/95, 04.05.2000

3 Niemietz v. Germany, (Application no. 13710/88), Veeber v. Estonia (no:1), *(Application no. 37571/97)* 7.11.2002, Amann v. Switzerland [GC], (Application no. 27798/95), 16.02.2000

4 Institute of Medicine (US) Committee on Regional Health Data Networks; Donaldson MS, Lohr KN, editors.
Washington (DC): National Academies Press (US); 1994.

It should be balanced the interest of the insurance companies who are willing to prevent fraudulent application and the respect of the personal data of the insured person[5]. Limitation to the personal data right should be comply with the principle of proportionality[6]. Transparency of the database needs for the future insurance investments. Data should be processed in the respect of the law, and the processing of this data outside of its purpose is realized especially in the form of unauthorized transfer of data. In its 2015 decision[7], CJEU decided in the subject of unauthorized data. In that case, Romanian law allows public institutions to transfer personal data to health insurance funds. The Court found that the transfer of information without informing the concerned person against the Directive 95/45/EC[8] and set a high standard that protects individuals in this regard.

5 Von Hannover v Germany, Application no. 59320/00, 24.06. 2004

6 Article 13 of the Turkish Constitution: Fundamental rights and freedom may be limited without interfering with their nature and only for the reasons stated in relevant articles of the Constitution and only by the Law. These limitations may not be contrary to the wording and spirit of the Constitution, to the requirements of the democratic public order and the secular Republic and to the principle of proportionality.

7 Case C-201/14, Smaranda Bara and Others v Președintele Casei Naționale de Asigurări de Sănătate and Others

8 Directive 95/46/EC is repealed with effect from 25 May 2018. 1References to the repealed Directive shall be construed as references to this Regulation. (Art 94 GDPR)

The Legal Effects of Employees' Right to Disconnect on Cyber Insurance Contracts

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Human factor is known as the weakest link for cyber security and connected "everything" increases the cyber risks for organisations. Cyber security weakness of a company results in lack of regulatory compliance, which leads financial and legal burdens as well as loss of reputation. Therefore, cyber insurance contracts covering the loss of cyber-attacks are on the rise. What digital economy alters also that it enables employees to work outside from the workplaces. Not only "things" but also the human factor becomes more connected through IoT and digital transformation in general, which enables tele- working models to grow. In Finland, according to the new version of Working Hours Act, took effect in 1 January 2020, employer and employee can agree on in cases where the employee can independently schedule and determine the location of at least half of their working hours. While working outside the office trend diminishes the costs and balancing the work and life of the employees but also increases the cyber risks for all kinds of businesses. For example, when an employee connects a wireless network other than the workplace's, she endangers the data protection responsibilities and cyber hygiene of her organisation including her co-workers. On the other hand, employees' right to disconnect from work during rest periods and leaves begins to be accepted as a right for employees in some national legislations, like in France (as of 2016) and Spain (as of 2018). A legislation limiting the workers connection in order to provide compliance to legal limits of working times is being considered in the European Union legal framework as well. These facts result in a compulsory intersection between employment law, cyber security law and insurance law. The employees' behaviours are vital for cyber hygiene at all workplaces. In this study, employees' right to disconnect is analysed not as a mere subject belongs to the employment law field, but also a vital element altering the risk assessment and contractual obligations of cyber insurance contracts. This article suggests teleworking as an important business risk against cyber security and employees' right to disconnect as a cyber resilience factor effecting the right and obligations of cyber insurance contracts. Before 5G and in 2030 6G communication technologies will bring working through virtual, augmented and mixed reality applications, it is vital to shed light on how to set workers' disconnectivity right as an obligation for cyber security resilience effecting the legal consequences of insurance contracts. Hence, the importance of the cooperation between these legal fields (insurance, employment and cyber security) is tried to be underlined before internet of things, human-robot interaction and brain computer interaction become common denominators of the world of work.

Applicant's Duty of Disclosure in the Light of Legal and Self-Regulatory Constraints on the Collection of Genetic Data for Underwriting Purposes

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Genetic characteristics play a key role in assessing the decision of underwriters as to whether or not to undertake the risk. They are particularly relevant in the context of insurance policies offering cover for life, health, critical illness, income protection and disability. The genetic disposition of an applicant may express itself through genetic diseases which may already be manifest at the time the insurance cover is sought and may be identified through diagnostic genetic tests. In other cases, however, the applicant may be carrying the risk of developing a genetic disease without there being any symptoms at the time the insurance contract is concluded – this can in turn be detected through predictive genetic tests. The results of these tests (which may be undertaken for medical as well as reproductive reasons) would constitute personal data relating to the inherited characteristics of an applicant which would provide information about the physiology or health of that person and be categorized as 'genetic data'.

On the one hand, the underwriters' access to genetic information – even if no current symptoms are in place – will arguably enable a more accurate actuarial assessment of the risk: if the applicant's chances of suffering from a late-onset genetic disease is known to underwriters from the outset, they will be able to calculate the premium more precisely and design the insurance contract accordingly so as to allow regular increases of premium. For this reason, underwriters may choose to pose carefully drafted questions to applicants in proposal forms so as to prompt applicants to disclose any genetic information already held by them. Where no such practice is followed by the underwriters, applicants may nevertheless be required to disclose any such information as per their pre-contractual duty of disclosure emanating from insurance contract law rules. Moreover, genetic data of an applicant may – with or without its consent – be shared directly with insurance companies (through data selling) or indirectly through third-party data brokers feeding this type of information to underwriters.

On the other hand, the foregoing practices also raise intricate concerns as to the applicant's right of access to insurance, particularly where the processing of data results in negative differential treatment where the applicant is denied the benefit of the contract or is charged an excessively high premium. Considering that genetic condition is beyond the control of the applicant (especially where the genetic predisposition is to a monogenic disorder rather than polygenic, where lifestyle habits of the applicant may also play a role in acquiring the disorder), being deprived of cover or being charged an unaffordable premium following disclosure of such sensitive personal data may seem even more controversial.

Amid these concerns, a number of instruments have been adopted over the years to specifically regulate and delimit the procedures that are meant to be followed by underwriters in collecting and processing this type of genetic data. With a view to take a snapshot of the policy approaches adopted in this regard, the presentation will seek to analyse the relevant provisions of data protection regulations, Council of Europe (CoE)

recommendations on the processing of health-related data for insurance purposes, as well as relevant codes of practice such as the Concordat and Moratorium on Genetics and Insurance and opt-in instruments such as the Principles of European Insurance Contract Law (PEICL) that serve as standard-setting instruments. The paper will aim to identify the nexus between the foregoing rules and the boundaries of the duty of disclosure of applicants.

Insurance-Linked Securities: Establishing a Market in Canada

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An organisation may finance its operations in many ways. One is to issue debt securities, colloquially known as "bonds". The process of issuing debt securities involves the "sponsor" organisation creating an "issuer" entity; having the issuer borrow capital from investors; and then having this capital reinvested. Many of the investors will be financial institutions. Also, one or more investment banks will buy the securities from the issuer and resell them to the investors, in effect guaranteeing the debt owed to the investors.

Sponsors of debt-security issuances include (re)insurers. Roughly twenty-five years ago, (re)insurers started issuing a specific type of debt security known as the "insurance-linked security" (ILS). Historically, commentators of the law have shown considerable interest in the asset underlying the ILS, the insurance contract, but little in the ILS itself—despite the public having an interest in ILS markets performing properly, and despite the interest that the ILS presents from an intellectual perspective.

In this paper, I bring the perspective of a common- and civil-law jurist to bear on the world ILS market, introducing it and undertaking a thought experiment: more specifically, I consider what measures federal and provincial lawmakers would have to take to establish an ILS market in Canada—which does not have such a market.

Because the ILS is a complex operation, perhaps the best way to understand it is through an example. Consider a property (re)insurer that is highly exposed to the risk of losses arising from large-scale fires (or "conflagrations") domestically. The (re)insurer therefore sponsors an ILS issuance: the investors transfer capital to the issuer for a specific term; and in return, the issuer pays them interest on the capital. When the term expires, the (re)insurer has the capital transferred back to the investors—unless it first incurs conflagration losses of $100 million or more domestically. If the (re)insurer incurs such losses, ownership of the capital transfers from the investors to the (re)insurer. Accordingly, the (re)insurer enjoys a particularly timely influx of capital, preventing the relevant claims from bankrupting it. This ILS is an example of the most common type, the "catastrophe bond" or "cat bond". It is known as such because it is a *catastrophe*—in this example, conflagration loss—that "triggers" the transfer in ownership of the capital from the investors to the (re)insurer.

If a (re)insurer wishes to sponsor an ILS issuance, it must look outside Canada. Ever since the world's first ever ILS issuance in December 1996, the world ILS market has been dominated by issuances in Bermuda and the Cayman Islands. Now, these financial centres face competition from others, such as Singapore and the UK. Though indeed a speciality of the common-law world, ILSs have now started to appear elsewhere. In 2019, French state-owned reinsurer CCR Re sponsored an ILS issuance, a first for France and for the civil-law world.

There are many reasons for Canada to consider establishing its own ILS market. The Canadian economy would stand to benefit, as would the world's—the more geographically diversified any risk, the better. Also, the country already enjoys infrastructure suited to the trading of debt securities: the Toronto Stock Exchange (TSX) (Ontario) and the Montreal Exchange (MX) (Quebec).

Ontario is a common-law jurisdiction, as are all the Canadian provinces and territories but Quebec. Quebec is a common-law jurisdiction in its public law only; its private law belongs to the civil-law tradition. Canada would be the world's first ever hybrid common- and civil-law ILS market. This is one reason that the case of Canada has such potential as a thought experiment for the commentator of ILS law.

Establishing the market would raise many questions for Canada's lawmakers. In this paper, I identify the main questions and attempt to answer them, referring to federal, Ontario, and Quebec law. Because the ILS is a complex transaction, I use a Cartesian approach. More specifically, I divide the transaction into parts, successively discussing the questions relevant to each—though mainly legal, they include questions of tax policy. In doing so, I hope to draw the attention of other commentators of Canadian law to these questions—with a view (one day) to seeing the first ILS issuance on the TSX or MX.

Banks' Duty of Good Faith as Insurance Intermediaries: Analysis with regard to the Concept of Unfair Competition

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Turkish Insurance Law defines insurance intermediaries as insurance agents and brokers. Banking Law specifies the services of insurance agency and individual private pension intermediary within the banks' field of activity. Banks, therefore, play role as actors in Turkish insurance sector. The paper will study unfair competitive practices of banks, who act as insurance intermediaries, specific to article 32 of the Insurance Law after a broad analysis of the topic from an international comparative law angle. Article 32 regulates unfair competitive practices in terms of insurance contracts, which is an up-to-date issue at the intersection of commercial law and criminal law. Recent substantial administrative fines imposed on the banks who act as insurance intermediaries are, indeed, based on the article 32. The study will, therefore, constitute both theoretical and practical contribution due to the evaluations from legislative and adjudicative aspects.

Every actor has the freedom of trade in laissez faire economies. The freedom of trade, as a principle of economic liberalism, accommodates multiple socioeconomic rights within itself. This principle has two elements. First, everyone has the freedom to engage in any occupation, art or trade he wishes. The freedom of trade is, however, subject to its limitations as any other right. The second element relates to this limitation. Actors, who conduct activities pursuant to the freedom of trade, are required to carry on their business in accordance with the fundamental rules and necessities of the social life. Actors who takes place in the free market, therefore, have to abide by the governing rules. Banks, among those actors, are also required to comply with the rules especially governing the competition.

All competitors shall ensure the duty of good faith and fair dealing and refrain from acts against the law and/or good faith such as aggressive commercial practices, which are identified as unfair competition. The related actors would be banned in the event of unfair competition, which is why the notion of unfair competition constitutes a key concept in laissez faire economies.

The concept of unfair competition is governed by the provisions of TCC[1] and TCO[2]. Other legislative rules, which are directly or indirectly related to economic field, such as IPC[3] also contain provisions related to unfair competition. Some of those provisions are explicitly associated with unfair competition. Some of them, however, may require interpretation to be considered in association with the unfair competition. In insurance law, indeed, certain rights and obligations of the banks are regulated within the frame of unfair competition.

1 Turkish Commercial Code (TCC)

2 Turkish Code of Obligations (TCO)

3 Industrial Property Code (IPC)

Banks shall act in good faith and refrain from unfair competition while carrying out insurance activities, as is the case for all other activities. The provision with the title of the "Good Faith" regulated by article 32, indeed, considered within the scope of unfair competition.

Article 32 regulates the competition between the institutions carrying out insurance activities in terms of unfair competition. The regulation also serves the purpose of the consumer/insured protection. Unfair competition provisions, therefore, ensure both the relationship between the competitors and the consumer rights.

First paragraph states that insurance companies and intermediaries cannot issue prospectus and other documents or advertisements that constitute misleading, deceptive and unfair competitive practices. Misleading advertisements can be reported to the Advertisement Committee in accordance with the Consumer Protection Law. Consumers, related institutions and organizations as well as competing companies can place such report. The Advertisement Committee is also entitled to launch examination *ex officio*.

Third paragraph also prohibits banks conducting insurance activities to postpone the payment of insurance indemnity in a way breaching the covenant of good faith. The last paragraph prohibits restricting the right to choose the insurance company. Any provision imposing consumers obligation to conclude an insurance contract with a certain insurance company shall be void.

Acts of the banks carrying out insurance services that violate article 32 will result in both administrative and punitive damages in accordance with the articles 34 and 35 respectively. In this context, acts breaching the "good faith" in accordance with article 32 can also be regarded as insurance fraud from a broader perspective. Beyond the analysis of article 32, therefore, the paper will initiate a discussion regarding the acts constituting unfair competition to fall within the ambit of fraud in a broad sense.

Legal Consequences of the Insurance Contract when Both Parties are Traders

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Traders, who are operating commercial enterprises, dominates the states economy by their commercial desicions and behaviours. Therefore, like other legal sytstems, legal consequences of commercial matters and being traders, place a particular importance under Turkish legal system. In this respect “traders and commercial matters” are clearly defined under several provisions of Turkish Commercial Code number 6102 (TCC). The determination of whether a matter is commercial or not affects many traders’ applications. Commercial matters are subject to commercial provisions and disputes arising from commercial matters that fall under the jurisdiction of commercial courts.

Since the scope of the consumer transaction is widened by the Consumer Protection Code number 6502 (CPC) the nature of the legal transactions became more important. According to the aricle 3 of the CPC any kind of legal transaction is accepted as a consumer transaction if one of the parties is acting as a consumer. These regulations especially restricted the applicability of the articles of TCC. As a result of these provisions laid down with this regulation, legal transactions are branched as ordinary transactions, commercial transactions and consumer transactions by the doctrine. After these widened regulations, status of the parties in the transaction become the main criteria in order to branch the nature of the legal transactions.

According to article 1401 of TCC, an insurance contract means a contract under which the insurer promises, in exchange for a premium, to indemnify a loss caused by the materialisation of the danger (risk) having the consequence of harming the interest, measurable by money, of the concerned person or to effect payment or to fulfil other performances based on the lifetime or upon the occurrence of certain events in the course of the lifetime of one or several persons. Insurance contract is a synallagmatic contract that depends on utmost good faith.

As it is mentioned above, the legal status of the parties to a contract may have serious effect on the applicable law and governing jurisdiction. Therefore it is important to determine the legal status of the parties to an insurance contract yet commercial provisions are only applied to commercial matters. Therefore in an insurance contract if the parties are traders or acting as traders, this contract is going to be deemed as a pure commercial transaction and it is undisputed that commercial clauses are going to be applied.

Under this article first “traders”, “commercial matters” and their consequences are defined under the provisions of TCC. Thereafter, this article will examine how these provisions of TCC are applied to an insurance contract.

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Unfair Competition: General Terms and Conditions Used in Insurance Agreements

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The Turkish Commercial Code No. 6102 dated 2012 has regulated the use of general terms and conditions against good faith as a state of unfair competition for the first time. *Pre-written terms which (i) substantially deviate from the legislation that is applicable directly or through interpretation or (ii) stipulate rights and obligations that are contrary to the nature of that agreement to a significant extent* are provided by law as examples of general terms and conditions that are against good faith. As is known, the General Directorate of Insurance of the Ministry of Treasury and Finance sets out certain general terms and conditions to be included in insurance contracts. Even though these terms are also pre-written by a single party and not negotiated individually, since these terms must be included in the contracts concluded by all insurance companies concerned, their inclusion do not give rise to unfair competition. On the contrary, since the terms specified by the Directorate are "*business conditions which are also imposed on competitors*," failing to comply with these business conditions will constitute unfair competition (TCC art. 55/I, e). The main points this paper aims to address is whether the "special terms" prepared and imposed on the other party by insurance companies can be classified as general terms and conditions and what the consequences of doing so would be. If these terms are accepted as general terms and conditions, it will be possible to raise claims of unfair competition, as well as asserting the invalidity of the relevant provision under the Turkish Code of Obligations. For this purpose, the concept of a general terms and conditions, which is expressed in different ways in the Code of Obligations, Law on Consumer Protection and Commercial Code, but which is more or less the same concept, will be addressed first. The TCC defines the state of including a GTC as a contract provision as unfair competition. However, the TCC does not explain when a provision can be labelled as GTC, when a provision labelled as GTC will be invalid, which rules of interpretation will be used for GTC, and under which conditions GTC will be null and void. Therefore, this paper seeks the answers to these questions. GTC need to be identified in accordance with TCO Art. 20. Pursuant to this provision, in order for a provision to be deemed GTC, it must be a) a contract provision, b) prepared unilaterally prior to the conclusion of the agreement, c) imposed on the other party by the preparer / not be negotiated, d) intended for use in multiple contracts. The inclusion of GTC in a contract does not necessarily cause the GTC to be invalid (content review), nor does it cause unfair competition. In order for the GTC to be evaluated under unfair competition, the term must be against the principle of good faith. In this paper, the situations in which using GTC could be against good faith, whether or not a contract including GTC must have been concluded for there to be unfair competition, the relationship between good faith and validity and whether or not a term that is deemed invalid or null pursuant to the TCO can still give rise to unfair competition will be discussed. Moreover, the paper also looks at if, when and how the TCC, TCO and insurance legislation interacts as far as GTC are concerned. As is known, on one side of the insurance contract there are insurance companies that are statutorily required to be established as joint stock companies, which are merchants under Turkish law. However, if the opposing party of the contract is a consumer, then the provisions of the Law on Consumer Protection and the Regulation on Unfair Terms in Consumer Contracts will be relevant. If the insurer is another merchant,

then the question of whether or not the relevant provisions of the TCO are excluded or not will be answered in light of the scope of TCO with regard to persons and the principle requiring merchants to act as prudent businesspersons. Lastly, the parties to the unfair competition case and the claims that can be made in this case will be evaluated to the extent of their importance in terms of insurance law.

Warranty & Indemnity Insurance in M&A Transactions

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Warranty and indemnity insurance (also known as "representation and warranty insurance"; hereinafter referred to as "W&I Insurance") is basically an insurance policy that provides coverage for financial losses resulting from breaches of representation and warranty promises made by the seller in a purchase agreement in favour of the buyer in a merger and acquisition (M&A) transaction. The W&I Insurance has its roots in the Anglo-American market where the "caveat emptor" ("buyer beware") principle applies, and is becoming a phenomenon in the European market, too. It can be used in any M&A transaction, either in the form of a share deal or an asset deal.

Seller's representations and warranties as well as the remedies available to the buyer in case of breach of the same constitute one of the most contentious (if not, the most) parts of any M&A negotiations. While sellers prefer a clean exit by immediately pocketing the full purchase price and without responsibility for unknown contingent liabilities, buyers want to ensure that the target is worth the purchase price she agreed to pay and that the seller is a reliable party with good financial standing so that the buyer will be indemnified for any losses incurred due to any breaches of the representations and warranties set out in the agreement. Such gap between the desires of the parties leads to long negotiations which may end up in frustration. That is when a W&I insurance steps in: it fundamentally bridges the gap between the protection the buyer needs and the protection that the seller is willing to provide in connection with an M&A deal. Additionally, W&I Insurance policy shifts the transactional risk to an insurer, meaning that the seller is no longer financially liable. Therefore, it also eliminates the need for complex escrow or holdback mechanisms that the buyer would normally prefer as security.

W&I Insurance policies can be designated as buy-side or sell-side, while a considerable portion of the policies placed are buy-side protecting the buyer for any breaches of the seller's representations and warranties within the scope of the policy coverage. There is no standard policy; it is tailored for each deal considering the specifics. On the other hand, certain risks are frequently excluded from W&I policies, such as fraud or known risks. Policies may further contain some deal specific exclusions, like environmental or product liability.

Given that the W&I Insurance is a brand-new product in the Turkish market, there is not much written on the topic. Accordingly, the purpose of the paper is to describe the W&I insurance and its various elements in light of the articles in UK law and German law. The presentation will further provide insight the symposium participants on how the process is carried out in practice based on my personal experience. The ultimate purpose is to illustrate how the field of insurance interacts with the field of M&A. Accordingly, main points to be discussed on the paper and in the presentation will include:

- Definition, short historical background and increased popularity of the W&I Insurance;
- Roles and benefits of the W&I Insurance and typical motivations of the parties to the insurance in M&A deals;
- Types of W&I Insurance, namely buy-side and sell-side policies, and differences between the two types;

- Coverage of a W&I Insurance policy, in particular, "loss" definition, standard risks that are excluded from policies and common deal specific exclusions;
- Term of W&I Insurance policies, and whether it provides coverage for interim period between signing of the purchase agreement and closing of the transaction;
- Pricing of a W&I Insurance policy, responsible party for payment of premiums and allocation of related costs between the parties;
- Customary process timeline, potential legal issues (proper due diligence, liability limitations in the purchase agreement), and pitfalls of W&I Insurance policies;
- Highlights from the reports published by international insurance companies that provide W&I Insurance policies and recent trends in the sector;
- Legal framework in Turkey in relation to the W&I Insurance, and whether Turkish insurance companies are permitted to offer W&I Insurance policies pursuant to the applicable legislation.

Application of Political Risk Insurance on Immigration Matters at Sea

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Critiques have echoed over the years within the political spectrum about the governance of immigration. For instance, lately, the Dutch-flagged Sea Watch 3 has been stuck in the Mediterranean. After over two weeks at sea, the captain of the ship, Carola Rackete, decided she had no choice but to enter Italian waters illegally to bring the remaining 42 migrants to safety.

However, the shipmasters and captains often face difficulties when trying to disembark people at the nearest safe port. In legal theory, a shipmaster should be able to pick up those in distress at sea with confidence that the local Rescue Coordinating Centre (RCC) will assist him to disembark those rescued with the minimum of disruption to his voyage. In the meantime, the shipmaster has the duty to inform the shipowner or operator, agent, and ship's insurers, including the P&I Club, of the rescue. The shipmaster will also need to be ready to provide the RCC responsible for the search and rescue region (SAR) with the assisting ship's details including name, flag, the ship's owner, the ship's position and next intended port of call, current safety and security status and endurance with additional persons on board.

Nevertheless, there is currently no mechanism in place to ensure compensation in the case of delays, fines, loss or other expenses incurred, leaving shipowners to absorb the cost of SAR operations. Even though governments have an obligation to assist the ships (such as by coordinating and cooperating with the ship and releasing the shipowner from the obligation with a minimum further deviation from their intended voyage), until the time governments agree to cover the cost through state funded resources, the scale of the crisis has led the shipping industry to call for greater coverage for SAR.

In fact, the shipowner could be freed from the coverage by having a political risk insurance. Political risk insurance (PRI) covers political events, including the direct and indirect actions of host governments that negatively impact investments and are not properly compensated for.

The private market's PRI falls into two main categories: (i) political risk activities similar to that of the public insurers, such as coverage for investments in developing countries against expropriation, political violence, and other such risks; and (ii) developing country non-payment insurance covering contract frustration and default by governments.

In such cases, where the ship X deviated from the route for a SAR operation, unless such cost is covered by the government (in which the nearest and safest port is located), such cost then could be protected by PRI. Even though the main protection under PRI is given to the investors and financial institutions which possibly face loss of money because of political events, the understanding of insured person could be extended in a way that could involve shipowners. By doing so, the shipowner who had experienced a large financial loss (due to delay and cost of SAR), could protect himself against many of these risks. Providing this insurance allows also shipmaster's ability to operate smoothly for the rescue operations.

Therefore, in this symposium, I intend to analyse the possible application of political risk insurance (PRI) into migrant rescue operations at sea.

The Geopolitical Character of Marine Insurance Exclusion Clauses

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In recent years, political risk has increasingly impacted contractual choices across the shipping industry. From economic sanctions restricting maritime activities to politically motivated attacks against merchant ships, commercial maritime actors have been forced to adapt to a continuous stream of geopolitical challenges through express contract language. In the marine insurance sector, industry participants have excluded or altered cover for unlawful trades linked to sanctioned entities through the use of sanctions clauses in hull and cargo policies, as well as P&I club rules. These clauses assign express compliance warranties and shift the risk of civil and criminal liabilities imposed by sanctions enforcing authorities. Addressing war risk, insurers have also used exclusionary language to place certain geographic regions off limits for trading, or to modify premiums for special war risk products. What these insurance exclusion clauses have in common is their dependency on an assessment of geopolitical context and risk exposure.

To justify invoking such provisions, insurers must demonstrate that the circumstances surrounding a given trade correspond with the prescribed risk assessment criteria. For instance, the Lloyd's Market Association (LMA) 3100 Sanctions Exclusion Clause provides that the insurer shall not be liable to pay any claim if it "would expose" the insurer "to any sanction, prohibition or restriction" under UN, EU, UK, or US law. The Nordic Association of Marine Insurers clause similarly grants the insurer the right to cancel coverage if the trade "may expose" the insurer to sanctions. Various P&I clubs employ similar exclusionary language, sometimes varying in the phraseology and the level of discretion offered to evaluate the risk. On the war risk side of things, hull policies and P&I club rules generally exclude cover for war, capture, seizure, terrorism, piracy, and other similar hostile acts. But even prior to such an event occurring, coverage may be terminated or modified under exclusionary clauses if the vessel is trading in an unauthorized area exposed to enhanced risk of hostile attack.

In both scenarios, the insurer must turn to geopolitical conditions when evaluating whether the circumstances surrounding the trade enhances the risk to the point that it justifies triggering the exclusionary clause. This challenge involves not only shrewd contract drafting that identifies a workable measure of risk assessment and acceptable grant of discretion, but it may also demand an awareness of emerging contextual developments such as rapidly evolving political conflicts. In this way, certain exclusionary clauses in insurance contracts are inextricably linked with contemporary geopolitics and potentially also international law principles. This paper attempts to demonstrate this nexus and argues that the dependency on political determinations could cause uncertainty and inconsistency in the interpretation of exclusionary clauses in the marine insurance context. In an attempt to offer possible solutions, it evaluates whether the marine insurance sector could borrow lessons from recent clause modifications of other complementary maritime contracts such as charterparties.

Increasing Cargo Theft Problem: An Analysis of Cargo Crimes and Comments from the Perspective of Insurance Law with Loss Prevention Methods

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Cargo theft appears in different forms in different modes of transport. The geographic region where the transportation is being performed plays an important role due in part to the demography or population and more interestingly to the legal configuration of the country in which the transport is being operated.

The same factors also shape the methods of the thefts. While cargo thieves could employ traditional methods, they could also resort to new methods. In the recent years the cargo theft is reported to be reaching alarming levels. It is also reported that cargo thieves are becoming increasingly innovative, resorting to new and more sophisticated methods from posing as legitimate transportation companies to jamming vehicle tracking systems. These new perpetrators could act as well-organised professionals who may have fellow culprits in the different stages of the carriage of a cargo, which could vary from the local agents, cargo sellers, port incumbencies to the transporters' employees. The increasing use of open electronic trading platforms makes it easy to sell the stolen cargo.

The transport industry, together with its affiliated industries, is facing consequences of this increasing cargo theft problem as it causes business interruption, loss of reputation, delay in delivery, problems on the pricing of the products and all of these are challenges for the insurance industry to be addressed with advanced loss prevention methods to secure the society.

The loss prevention needs delicate handling and it must be acknowledged that coercive measures to control the transport industry could also be harmful in terms of vulnerability to cargo theft if they are adopted without careful consideration. In Europe and North America there are strict regulations that compel truck drivers to give compulsory breaks which at the same time causes truck drivers to park at unsecure locations which thieves may take advantage of to gain access to truck, consequently causing an increase in the cargo thefts. The European Union tries to address this issue by bringing standards for the truck parking locations which appears costly but essential.

Cargo theft is also a problem in shipping industry. Theft attempts could take place when a vessel is at anchor lying in wait. It is also a very common issue in container shipping and loss prevention methods needs to address the most frequent container cargo theft methods.

Although "protection and indemnity insurance", one of the types of marine insurance, covers the third party liabilities including cargo loss which could occur due to cargo theft, according to the international shipping law that has developed mainly to protect the carriers are likely to cause gaps in the insurance coverage for the cargo owners as the carriers could avoid or limit legal liability in case of a cargo loss. As a result, protection and indemnity insurance system along with the liability regime of shipping law causes a serious gap in insurance

contracts. This gap intensifies the need for marine cargo insurance contracts and effective use of ever-growing loss prevention methods.

Therefore, with the increasing disturbance around the globe and the increased use of sophisticated methods with new technology by the criminal organizations the transportation industry is facing growing number of cargo thefts that constitutes greater problem for insurance industry.

This paper aims to analyse the increasing cargo theft problem and point out the gaps between different insurance types and contracts with a view to provide comments on the new methods for cargo loss prevention that are essential for the secure business and society.

Aviation (Aircraft) Insurance in Turkish Legislation

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The aftermath of World War I, a relatively new branch of insurance on civil aviation matters launched as an essential business for both sectors. However, insurers were reluctant to conclude such a contract containing some challenges pertaining varieties of imperceptible risks, technical improvement and modern inventions in aviation providing gradually stabilized safety records, encouraged plenty of companies. Pool agreements among the insurers did not only vary between the suppliers but also internationalized the business. In 1934 International Union of Aviation Insurers (IUAI) was created as an advisory, non-political association in the field of aviation insurance. Since then aviation insurance clauses are negotiated and adjusted by the association, with specific references to evolved aspects of international conventions regarding air law.

Chicago Convention[1] widely known as the constitution of air law without mentioning any insurance adequacy, by Article 9, stipulates the restrictions of a contracting state relying on "public safety" clause for foreign aircrafts while benefiting from the rights provided by the Convention and may be acquired by bilateral agreements. The Warsaw system used prior to 1999 Montreal Convention[2] founded the legal liability principles and limits as well of aircraft operators and airline carriers in respectfully international acceptance. Montreal Convention then explicitly clarified the ambiguous provisions of the former convention in details and respectively took more attention and awareness in international law which is transposed to national legislations applicable to insurance matters. Also, EU 785/2004 of 21 April 2004[3] Regulation on *insurance requirements for air carriers and aircraft operators* has to be referred as an effort in multinational manner and effective to the adherents of EU law. Obviously, Cape Town Protocol supplementary[4] to the "*Convention on International Interests in Mobile Equipment on Matters Specific Aircraft Equipment*" and its transposition to national law commenced some observation of such conflicts with civil law provisions on one side and the Convention provisions on the other, particularly regarding integral parts and accessories. This quarrel originating from two different approaches towards conceptualization of the aircraft as a component single or separate vehicle composing of hull and the equipment namely engines and other electronic devices providing air navigation and operation by means of aerodynamic principles and law of air, made international clauses set forth in insurance policies more complex and a fountain for legal argumentations in such national laws as in Turkey is.

Aviation insurance legislation in Turkey is unfortunately incapable to pursue to follow the new trends, contemporary aspects and requirements of the field. The gap in this specific field may be deriving from the eagerness to leave the area to practice in litigation as it is common in Anglo-American legal system relying on the doctrine of "stare decisis". Nevertheless, there are few provisions relating to aviation insurance in Turkish Legislation with the note that the legislator is not aware of, at least silent on the issue of non-commercial usage

1 Ratified on 07.12.1944 by TGNA, OJ 6029 on 12.06.1945

2 Ratified on 28.05.1999 by TGNA, OJ 27716 on 01.10.2010

3 EU OJ L 138, effective since 30 April 2004, p. 1-6

4 Both Ratified on 16.11.2001 by TGNA, OJ 27984 on 04.07.2011

of the aircraft[5]. Turkish Civil Aviation Act[6] (Coded 2920) and Insurance Act[7] (Coded 5684) comprise few disconnected provisions indicating insurance.

In this paper with the intention of specifying misinterpretation of concepts regarding aviation law in Turkey and its confusing effect on insurance law will be discussed in civil and commercial law aspects. However, both insurance and aviation business are accurately running in international level, domestic sector is struggling with the unfamiliar definitions and concepts. In the first part aviation insurance policies relating to hull insurance, insurance of the liability of the carrier and the operator of the flight towards passenger and airway bill holders, also third persons on the ground, insurance of product liability will be briefly discussed and some exclusion clauses frequently drafted will be emphasized. Following part of the paper will attempt to underline the similarities and differences of marine and aviation insurance and other means of transportation insurance incase. In the third and last part of the paper, present tendencies and possible future developments will be considered.

5 Currently, it is not so common of an aircraft for non-commercial benefits, since the vehicle is not yet deemed to have a meaning as a personal property in socio-economic terminology and jurisprudence as well. Insurance introduced with Art. 77 and following two provisions are relatively applicable to all aircraft without any distinction of its purpose of usage.

6 OJ 18196 on 14.10.1983

7 OJ 26552 on 14.06.2007

Evaluation of the Provisions of the TCC Regarding the Negotiation and Conclusion Phases of the Insurance Contract with Respect to General Principles of the Contract Law

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The main focus of this submission is the relation between the insurance law and the contract law. Considering the width of the interaction zone between these two fields, it is a necessity to restrict the subject matter. Therefore, it will be focused on negotiation and conclusion phases of the insurance contract. Two main topics have been chosen. The first one is the pre-contractual information duty of insurer. The second topic is the conclusion of the contract if written application is not rejected by the insurer within thirty days as of date of the application.

The special provisions regarding the insurance contract are regulated in the sixth book of the Turkish Commercial Code Nr. 6102. In addition to these provisions of the TCC, there are also general provisions of the Turkish Code of Obligations Nr. 6098 and general principles of contract law in relation to these issues. The aim of this submission is to examine the similarities and differences between the provisions of the TCC and general principles of contract law in relation to these issues. Here, it will be aimed to contextualize the provisions of the TCC regarding the pre-contractual information duty of insurer and the conclusion of the contract if the written application is not rejected by insurer within thirty days. Furthermore, the practical and concrete outcomes of the solutions adopted in the TCC and possible problems which may arise therefrom will be studied.

The TCC imposes a pre-contractual information duty both on insurer and future policyholder. In the contract law, there is also a general duty to negotiate with care, and not to lead a negotiating partner to act to his detriment before the contract is concluded. If one party violates this duty, that party shall be liable for the loss of other party resulting from the violation. The pre-contractual information duty of the policyholder has been regulated under the former TCC Nr. 6762, as well. On the other hand, the statutory regulation of the correlated duty of the insurer is relatively recent. Prior to the statutory regulation of the pre-contractual information duty of the insurer, it has been suggested that, the general duty to negotiate with care imposes on the insurer a duty of clarification of the future policyholder about the essential points with respect to the contract to be concluded. Yet, the regulation of the TCC and the relevant general principle of contract law is not completely compatible with each other.

The provision relating conclusion of the contract if the written application is not rejected by the insurer within thirty days as of the date of the application is also worth to be analyzed with regards to the compatibility with general principles on the conclusion of the contract. This solution leads more problems rather than it solves. The possible problems which may arise therefrom will be studied.

Effect of Fraud in the Conclusion of Insurance Contract

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As a result of the recognition of the flaws of the liberal view of contract and the consecutive rise of the concept of solidarity, the principle of good faith has become source of new duties in contract law. Aware of the fact that contract negotiation creates a legitimate need to trust the potential contract partner, law systems have gradually expanded the duties that must be respected during this phase on the grounds of principle of good faith. As a result, the duty to inform the other party on issues which may be relevant to their decisions has become a core preoccupation of legal ethics of contract negotiation.

Contract *uberrimae fidei*, the insurance contract is, by its very nature, at the center of any legal development interpretative of the principle of good faith. Both parties rely upon the information conveyed by the other party to find the solution which is best for their interests. It is therefore not surprising that, the duty of the insured to reveal the exact nature and potential of the risks that he transfers to the insurer and the duty of the insurer to inform the insured to make sure that the potential contract fits their needs, have been explicitly regulated in several law systems. This is also the case in Turkish law, where the pre-contractual duties of information are explicitly regulated in the field of insurance contract.

Nevertheless, such regulation is subject to controversies, both regarding the scope of these duties and consequences of their breach. Especially, in case where one of the parties breaches their pre-contractual duty to inform the other party, strict application of such regulation is likely to put the party affected by the breach in a position which may be less advantageous than the position which is provided by the general rules of the law of obligations. This conflict between the rules governing insurance contracts and the rules of the law of obligations is particularly visible in cases where the duty of information is breached intentionally. Indeed, the act of knowingly providing the other party with false information or knowingly concealing relevant circumstances at the pre-contractual stage is one of the cases recognized as breach of duty of information by the provisions governing insurance contracts. But this kind of behavior also constitutes “fraud” as cause of defective consent and is regulated by the Turkish Code of Obligations (Law No. 6098). In comparison to the remedies set forth for the intentional breach of duty of information in the insurance contract, remedies for fraud provide a better protection for the party affected by the breach: Application of this general mechanism enables the injured party to avoid the contract within a relatively long period, to claim damages following avoidance and perhaps more interestingly, to maintain the right to damages even in case where the contract is not avoided. Not all these options exist if the fraud appears as a case of breach of the duty of information in the insurance contract under its specific regulation.

Presence of larger remedies in application of the concept of fraud as cause of defective consent invites to meditate upon the effect of fraud in the conclusion of insurance contract, more specifically, upon the effect of the provisions governing insurance contracts on the availability of the remedies attached to fraud by the Turkish Code of Obligations, in case where the duty of information is intentionally breached by the insured or the insurer. This interrogation provides the opportunity to review the meaning of one of the fundamental

rules of legal reasoning, *lex specialis derogat legi generali*. In order to determine whether such maxim is applicable to the question at hand, one must determine whether specific regulation of insurance contract is actually *lex specialis* with regards to the regulation of fraud and whether the imbalance of power between the insured and the insurer can be seen as a factor justifying to reach at different conclusions depending on which party has acted fraudulently.

Renewal Policies: A New Contract or Not?

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The relationship between contract law and insurance law is self-evident, as the legal relationship between the insurer and the policyholder is based on a contract. Nevertheless, the scholarly work on these fields are strangely divided. This paper aims to contribute to the dialogue between these fields in the context of the differences between modification of the contract and novation (formation of a new contract replacing an old one) or simply the formation of a new contract after the end of the former contractual term.

It is common practice for insurers to conclude contracts with the policyholder for a fixed time and continue the relationship afterwards. This could either take place by tacit prolongation [e.g. Principles of European Insurance Contracts Law (PEICL) Article 2:602] or with the agreement of the parties. Where parties agree, they can do that by signing a new policy, which sometimes indicates that this is a renewal policy and sometimes not. In such cases the question arises whether parties have concluded a new insurance contract, independent from the former one, or simply modified the former one.

The answer to this question has significant practical outcomes, as in many jurisdictions cover starts with the payment of the first premium (e.g. Turkish Commercial Code, Article 1421; German Insurance Contracts Act, § 37; Austrian Insurance Contracts Act § 38; also see PEICL 5:101). If one qualifies the agreement as a new and independent contract, the insurer will not be liable if the risk occurs prior to the payment. If the agreement is qualified as a mere modification of the contract, the next payment would be a subsequent premium and would not have an effect on cover. In other words, in the first scenario a discontinuation occurs due to the formation of a new contract, whereas in the second one the identity of the first contract is preserved, and it continues to exist.

The described question is one of contractual interpretation and is closely related to the distinction between novation and modification. In most jurisdictions, novation (or the formation of a new contract) is the exception and is only recognized if parties' intention to that end is clear (e.g. Turkish Code of Obligations, Article 133; Austrian Civil Code, § 1379). Such intention needs to be determined in light of their interests. Several indicators may be useful in determining it. The paper will among others focus on the following indicators to inquire whether those are useful to determine parties intention to form a new contract or not: Whether a new policy has been issued or the policyholder has made a new application; whether the parties have decided to incorporate a new risk to be covered by the contract; whether they have changed the insured sum, the insured object or whether there has been a change of parties to the contract.

The paper will firstly describe the courts' approach to the problem in different jurisdictions, particularly Turkish law, Austrian Law and German law and then will inquire whether there are lessons to be learned from other jurisdictions for Turkish law.

General Risk Liability under The Turkish Code of Obligations and Its Implications in Insurance Law: Is it a "*Frankenstein's Monster*"?

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Risk liability is the strongest of all types of non-contractual liabilities. It is a strict liability where demonstrating that there is no causality is the only way to be exempted. Therefore, risk liability can never be considered without insurance. This type of liability is usually regulated for specific types of risks. So, there is always a typical risk defined for a particular operational activity which may cause unavoidable frequent or severe damage, regardless of how much due care is taken.

In 2012, Turkish Code of Obligations has introduced a new general clause on risk liability which is applicable to all kinds of dangerous activities without defining the specific type of risk (art. 71). According to this provision, liability could be established if it is demonstrated that an activity of an enterprise causes an inevitable and significant danger. The said provision is stipulated as follows:

> "*When damage occurs from the activity of an enterprise presenting a significant risk, the owner of such enterprise and, if any, the operator are severally liable for such damage.*
>
> *Considering the nature of the enterprise or materials, tools or powers used in the activity, if one concludes that an enterprise is likely to cause frequent or severe damage even if all due care expected from a specialist in such activities is exercised, such enterprise is deemed to present a significant risk. Particularly, if a special risk liability is envisaged in any other law for enterprises presenting the similar risks, such an enterprise is also considered to present a significant risk.*
>
> *Special provisions governing liability for a specific risk are reserved.*
>
> *Even if such activity of an enterprise presenting a significant risk is permitted by the legal order, those who are injured may claim to balance out the damage caused by the activity of such enterprise at an appropriate price.*"

This clause was originally inspired from the article 50 of the Swiss Draft Project for the Reform and Unification of Tort Law (Widmer-Wessner Draft Project) but ended up as the "*Frankenstein's monster*" as it has not considered this Draft Project in its entirety. At the end, this provision has widened the liability of owners and operators of enterprises which presents a significant risk. But to what extend?

The highly debated answer to this question is of utmost importance to set the boundaries of insurance. In order to answer this question, one must firstly evaluate the criteria used for assessing the risk and also the meaning of its vague final paragraph. Accordingly, this paper aims to understand the rationale for this provision, to evaluate the legal debates regarding the conditions and scope of liability under this provision and its implications on both tort law and insurance law. Furthermore, this paper intends to discuss the possible role of a general risk clause in our times of climate crisis. So, in a nutshell, the ultimate question of this paper is whether this provision is the "*Frankenstein's monster*" or a gateway for climate liability?

Interaction between Insurance Law and International Law: A Terminological Inquiry into the Distinction between War Risk and Terrorism Risk

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Terrorist attacks cause casualties, bodily injuries and business interruption. In this context, insurance companies are preoccupied with the compensation payments arising from existing policies and the application of exclusion clauses. In determining the scope of the subsequent compensation payments due to the harm caused by a terrorist attack, the definition of the risk determines the compensation framework. However, the definition of terrorism is neither undisputed among stakeholders nor clearly distinguished from similar violence related risks. Three are three challenges arising from this terminological non-distinction of war risk from terrorism risk. To address these challenges, this paper explains the possible solutions coming out of the interaction between insurance law and international law.

Firstly, in the absence of clear definition of terrorism in general, confusion with neighboring concepts[1] such as war is a particular concern. War has been used by politicians as a powerful rhetorical tool to influence the public, most notably with the "war on terror" doctrine. This tendency also influenced the insurance law jurisprudence. For instance, in the case of *If P&C Insurance v Silversea Cruises*,[2] the court deemed the 9/11 attacks as an act of war although a terrorist group was behind the incident.

Secondly, the confusion between terrorism and neighboring concepts cause detours in the litigation which results in costly delays in the court process. For example, in the insurance law case of *Pan American World Airways v Aetna Casualty and Surety*[3], the US District Court reviewed all the exclusion clauses that comprises of a long list of violence related risks including war in an event of plane hijacking for political purposes both at the first instance and appeal level. Whereas, international law has already acknowledged the plane hijacking for political purposes as an act of terrorism with an international convention. Therefore, with a comparative analysis with international law, there would have been no detours in that lengthy litigation.

Thirdly, there is a current technological challenge regarding the terminological delimitation in between war and cyber terrorism. The pending case, *Mondelez v Zurich American Insurance*[4], *concerns a* cyber-attack was allegedly supported by Russian government in 2014. The court needs to decide whether it is a war-like action because there was an exclusion clause for war-like actions in the policy. The case is considered a test case and further litigation on similar questions is highly possible.

In this paper, it is submitted that the doctrinal and jurisprudential guidance from international law increases the efficiency of insurance law in distinguishing between war risk and terrorism risk. The main inquiry of this

1 Violence related risks i.e. war, civil war, piracy, rebellion etc.

2 [2004] 2 Lloyd's Reports IR 696

3 [1975] 1 Lloyd's Reports 77

4 Mondelez Intl. Inc. v. Zurich Am. Ins. Co., No. 2018-L-11008, 2018 WL 4941760 (Ill. Cir. Ct., Cook Cty., complaint filed Oct. 10, 2018)

paper is how the contribution of international law reinforces the conceptual understanding of insurance law related to the distinction between war and terrorism. The paper acknowledges that use of international law is not authoritative in insurance cases[5]. However, long-lasting doctrinal and jurisprudential sources of international law would be a strengthening contribution for defining war and terrorism. An international law approach would also remedy the differences between domestic insurance laws which might cause discrepancies in the interpretation of the terms. Furthermore, war and terrorism are concepts related to the public order. Hence, any qualification of a particular incident by judicial authorities could entail ramifications beyond the will of the contractual parties as it can be used as a precedent or a reference point in other cases.

The paper firstly analyzes the existing interpretation difficulties in the definition of war and terrorism for insurance purposes. Subsequently, the author explains the possible inputs from international law on the definitions of war risk and terrorism risk in insurance law. In the final part, the paper addresses the contribution of international law for the particular manifestations of terrorism risk in insurance law which are cyber-terrorism risk and state- sponsored terrorism risk.

Regarding the methodology, this article considers the national insurance laws of the UK, the US and Switzerland as insurance law due their representativeness in the context of war risk and terrorism risk. These three countries are leading jurisdictions in insurance market. Additionally, war risk and terrorism risk insurances are available in these three jurisdictions. In the examination of these three jurisdictions, this paper adopts functional comparativism as methodology.

5 [1975] 1 Lloyd's Reports 77 at 93

Precautionary Law: An Innovative Approach towards Pre-Damage Responsibility in Public International Law

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Introduction

One of the important principles adopted in the field of international environmental law is the precautionary principle. After it becomes apparent in the environmental policies of the German Federal Republic, this principle, which is also stated in the 15th principle of the Rio Declaration, points out that the damage is not an essential element within the framework of the article 2 in the draft articles on state responsibility from a wrongful act. The content of the precautionary principle in international environmental law is that if there is a risk of damage in the case of scientific uncertainty, the cost is not taken as a priority. However, the application of the precautionary principle before the international courts (MOX Plant, Southern Bluefin Tuna, Pulp Mills ... etc) could not go beyond encouraging cooperation and communication between states. Although environmental facts require a deeper analysis of the issue.

The function and importance of precaution in human civilization are much broader. Predicting the future is one of the basic dynamics that establish civilization. This advanced thought-form that regulates prevention, compensation, and reinstatement order keeps human resilience against future risks. The highest acquis of human experience against the risks is the insurance law. Based on the insurance contracts we know today, the deep-rooted accumulation of insurance law, which started with the practices of medieval Italian merchants, can be a procedural guide in establishing the state's responsibility order on environmental risks. The first thing to be done here is to bisect conservation law as precautionary law and measure law. This distinction is based on whether the risk is realized or not. It is envisaged to apply the precautionary law system before the risk is realized. This system is based on the risk mapping and pricing of losses that have not yet occurred to make the application of the precautionary principle more functional. Depending on this pricing, international courts will enforce governments to insure environmental risks under the precautionary principle by establishing a revisable constitutive provision. Various theoretical, practical and methodological dilemmas of this proposal, which intersect procedural law, natural sciences and insurance law, can be seen. These dilemmas will be overcome with innovative ideas, such as the idea of the legal personhood of environment represented by scientists, or as in the Eco-Insurance Initiative application, being able to go beyond classical pricing in terms of sustainability of nature. The study aims to integrate natural sciences, procedural law, and insurance law disciplines.

Background

1- Primarily, it is based on a mathematical method in which
   a- existing data are evaluated,
   b- problems arising within these data are identified,

c- answers to these problems from different disciplines (insurance law in particular in this study) are searched and the function established is processed. This method has a claim of uniqueness in its legal methodology.

2- With my master's study titled "Acquis and international legal contradictions towards sustainable development", it is part of a sustainable futurity system that provides an alternative system to the concept of sustainable development. Contrary to human-centered approaches such as sustainable development or intergenerational equity, it emphasizes the legal personality of the environment we see in New Zealand and India, also in the constitution of Ecuador. In this context, a common theory is established in which Popper's scientific norm theory and legal norm theory are handled together.

3- Insurance law forms the "damage" part of the ongoing doctoral study titled "The optimal responsibility scheme for international law". This thesis has a structure that compares the responsibilities of the states arising from unlawful action with the regime of obligation in Roman law and claims new solutions.

The Jurisdiction of the Courts Arising From Insurance Contracts under Turkish Private International Law Act and Rome I Regulation

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Turkish Private International Law and International Civil Procedure Code no. 5718 (PIL Code) has special provisions regarding insurance contracts which has a foreign element, within the scope of international jurisdiction of Turkish courts. The international jurisdiction of Turkish courts under insurance conflicts PIL Code referred to Art.46. In our study it is examined the grounds behind the international authority of the Turkish courts under Turkish International Procedural Law and the analysis of the relevant procedural rules under PIL Code.

The main objective of this study is to analyse international civil procedural rules, according to the judgements of the legislation of Brussels I under European Union Law Statue comparing with the Turkish Procedural law and PIL code. In this context, under first section of this study, the manner of the Art.46 will be criticized. According to the Art.46, the court of the place where insurer's actual place of work or the branch office or agency where the insurance contract is located in Turkey. Nonetheless the authorized court of jurisdiction in lawsuits against the insurance holder or the beneficiary is the court of the place of insurance holder's or the beneficiary's domicile or habitual residence in Turkey.

PIL code and Brussels I Regulation has special productive regime consist of three major elements: favorable bases for jurisdiction are available for weaker party, a restriction prescribing that the weaker party is in position as a defendant may only be sued in the place of weaker party's domicile, the possibility for the parties to enter a jurisdiction agreement deviating from the aforementioned jurisdictional regime is significantly restricted. In this manner, disagreements arising from insurance contacts, the counterparties will be authorized a foreign court or a Turkish court by virtue of making an authority agreement within the scope of Art.47. According to Art.47, considering the weaker party and their position on the insurance contracts, the competency of courts cannot be removed by an authority agreement. In this context, the validity of the choice of court agreement regarding insurance contracts will be scrutinized from EU and Turkish law perspective.

The author also intends to give brief analysis of the legal frameworks, case law and the difference between Brussels I Regulation and PIL Code on the international jurisdiction of the courts regarding insurance conflicts. For this reason, it could be aforementioned that Brussels I Regulation is much more protective in comparison with Brussels I Regulation in respect of the authority of insurance matter. Although these changes improve the procedural protection of the weaker parties in principle, some new dilemmas arise, which are liable to jeopardize certainty and predictability of the jurisdictional regime. Consequently, the research concentrates on whether, EU Law can be guide for Turkey to cope with its international procedural law deficiencies.

Protection of Weaker Parties in International Insurance Contracts with Respect to the Choice of Court Agreements

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The objective of this presentation is to analyze the interactions between Insurance Law and Private International Law (PIL) in the context of choice of court agreements.

Insurance contracts are generally described as contracts where the insurer insures a risk in exchange for premium payments paid by the policyholder. This contractual relationship can create legal disputes between the insurance company on the one side and the policyholder, the insured and the third-party beneficiary on the other. It is presumed that these parties are, particularly when they are qualified as consumers, in an economically weaker position and they are less experienced in legal matters than the insurer. They are often faced with a standard form contract and they do not possess an adequate opportunity to negotiate its terms and conditions. In the objective of protecting these parties, national laws contain some mandatory rules to limit the freedom of contract and provide the supervision of a public authority.

This need for protection is also present in the context of the PIL when the insurance contract or the dispute arising in relation to it contains a foreign element. This foreign element may relate, for example, to the parties' nationality, domicile, habitual residence or place of business or to the location of the risk or the subject of the insurance contract. PIL tries to cure this presumed inequality between the parties with its own methods such as special rules of conflict of jurisdictions in favor of the weaker parties or special conflict of laws rules which generally foresee the application of the national law with which the weaker party or the contract has certain connections. Another tool to protect weaker parties in insurance disputes is to limit the party's freedom of contract in respect of choice of applicable law or choice of court agreements. Especially, national laws require the fulfillment of specific conditions in order to accept the validity of choice of court agreements conferring international jurisdiction to the courts of the State chosen by the parties before or after the dispute.

The insurer may impose a choice of court agreement to the disadvantage of the weaker party by benefiting from its stronger position. Therefore, the validity of the choice of court agreements in insurance contracts requires comprehensive analysis. In this respect, a comparative study of the Turkish PIL and the EU PIL will be useful to note the differences between these two regimes and potential areas where there is a need for harmonization.

Turkish PIL has two different regimes depending on whether the parties confer jurisdiction to Turkish courts or to a foreign court. In the first case, the articles 17 and 18 of the Turkish Civil Code of Procedure will be applicable and in the second case, article 47 of the Turkish Private International Law Act provides the conditions of validity. The latter is generally qualified as "a limited exclusive jurisdiction rule in favor of the weaker party" and accepts, in principle, the validity of the choice of court agreements which provide an additional forum for the weaker party in alternative to the regular conflict of jurisdiction rule.

The EU PIL provides a more detailed provision, and compared to the Turkish law, accepts the validity of choice of court agreements in a variety of scenarios depending on the timing of their signature (post-dispute clauses); on the effect of the agreement in favor of the weaker party (an additional forum for the weaker party or conferring jurisdiction to the courts of the domicile or habitual residence of the weaker party located in the EU); on the case when the weaker party does not deserve a protection (the case of non-EU domiciled policyholders or “large risks”).

This comparative analysis will show that under the Turkish PIL all policyholders, insureds and beneficiaries are categorically considered as weaker parties against insurance companies. However, the EU PIL creates some sub-categories to define the cases where there is a real need for the protection of the weaker party and where the weaker party does not need or deserve specific protection.

Institutional Arbitration and Litigation Arisen from Insurance Contracts

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Under Turkish law, insurance contracts and insurance and reinsurance companies are regulated in the 6th Book of the Turkish Commercial Code (TCC) and in the Turkish Code of Insurance (TCI).

Article 30 of the TCI entitled "*Arbitration in the domain of insurance*" foresees the creation of an Arbitration Commission for the settlement of disputes between insurer and the beneficiary of insurance (that might be the policy holder, insured or third party) arising from the insurance contracts.

According to the second paragraph of the above mentioned article, the Arbitration Commission should be constituted by a representative of the of the Unsecreteriat of Treasury; two representatives of the Union of the Insurance, Reinsurance and Personal Retirement Insurance companies; a representative of the Consumer Association and a lawyer academician nominated by the Unsecreteriat of Treasury.

The relevant companies who want to be part of this system of arbitration should be registered by a notification done to the Commission.

In case of the application of the beneficiary to the insurer (or more precisely "*to the party assuming the risk*" as stipulated in the article) with a request; if the insurer rejects totally or partially this request or did not respond within 15 (fifteen days); the article gives possibility to the beneficiary to apply to the Commission for the settlement of the dispute by the arbitration.

Afterwards, in the ongoing procedure, the Commission works as the secretariat of the arbitration. Accordingly, the Commission fulfills the following duties as secretariat: acceptation of the dispute (after the preparation of a report by the reporter nominated by the Commission); the nomination of the arbitrator(s) (from the persons registered to the list of the Commission); the notification of the decision of the arbitration panel to the parties and submission of the arbitration panel decision to the tribunal for preserving.

This above explained insurance arbitration system might be classified as an alternative dispute resolution system for the litigation arising from insurance contracts. Therefore, this system has on one hand similarities with institutional arbitration whereas on the other hand it has very interesting differences as well.

That is why, in the light of the above explanations, the main aim of this work would be to give a general overview on the functioning of this arbitration procedure in the domain of insurance contracts and compare it with regular institutional arbitration system in private international law and procedural law.

The Intersection of Insurance and Insolvency Law: Bankruptcy of the Insurance Companies

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The economic and social significance of the insurance sector and indispensable role of insurance and reinsurance companies raise a question of their survival and development. Turbulent financial markets, decreased profitability, demographic changes or natural disasters and catastrophes have brought that a number of cases of insolvent insurers have climbed in the insurance sector in recent years. Considering relevance of the insurance sector for the stability of the financial system, the consequences of insurer´s insolvency or reorganisation and winding up procedure of an insurer have negative impact on the protection of policyholder`s interests and the rights of others including claimants, banks, auditors and even the general public. When bankruptcy proceeding is initiated against insurance company it can generate many legal problems and difficulties based on the specific nature of insurance company activity and corporate structure of insurance organization. Bankruptcy proceeding in case of insurance company is subject to complex rules and timetables and includes some special provisions for insurance companies. This paper aims to discusses key elements of the bankruptcy proceedings of insurance companies, which refer to treatment of insurance claims, bankruptcy administrator, supervisory authorities and transfer of insurance portfolios. Bearing in mind the unique role and importance of insurance companies and particularities of all insurer´s insolvency forms, the author considers the question of whether the regulation of bankruptcy proceedings of the insurance companies deserves special regulation and if it should be regulated by a law that will refer only to bankruptcy of insurance companies.

Keywords: insurance companies, insolvency risk, bankruptcy, creditors, bankruptcy administrator, special bankruptcy proceeding, insurance portfolio