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'Contextualising Insurance Contracts: Interactions with Various Fields of Law'

Extended Abstracts Book

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ARE THE "GENERAL CONDITIONS" IN INSURANCE CONTRACTS SUBJECT TO LEGAL CONTROL OVER "STANDARD TERMS AND CONDITIONS"?

Dr. Tuğçe Nimet YAŞAR*

The principle of freedom of contract constitutes a main pillar of the Turkish contract law. In compliance with this principle, the insurance contract is also formed freely by the consent of the parties. However, some provisions regulating insurance contracts in the Turkish Commercial Code[1] (TCC) and the Turkish Insurance Code[2] (IC) deviate from this principle since the insured[3] is regarded as the weak party in an insurance contract.[4]

Art. 11/I IC states that "the main content of insurance contracts is to be arranged in compliance with the general conditions approved by the Undersecretariat of Treasury[5] and applied by all insurance companies[6] in a similar way". The objectives of this provision are the diversification of insurance products and at the same time the protection of the insured by controlling the "general conditions" of the insurance companies.[7] The insurance companies should incorporate the "general conditions" in their insurance contracts.[8] Otherwise, pursuant to Art. 34/II, (f) IC administrative penalty may be levied against these insurance companies, whereas the contract will still be valid.[9]

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[1] TCC numbered 6102, Official Gazette 14 February 2011, n 27846.

[2] IC numbered 5684, Official Gazette 14 June 2007, n 26552.

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

[4] Yeşim M. Atamer and Samim Ünan, 'Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement' [2012] Transparency in Insurance Law 65, 67.

[5] Today this approval is granted by the Ministry of Treasury and Finance (hereinafter referred to as the "Ministry").

[6] For the definition of insurance companies see Art. 2/I, (ö) IC.

[7] See preparatory works of Art. 11 <https://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1364m.htm> accessed 30 May 2021; Mehmet Bahtiyar, 'Sigorta Poliçesi Genel Koşulları' [1997] XIX/2 Batider 89, 94; Ecehan Yeşilova Aras, 'Sigorta Sözleşmelerinde Genel İşlem Şartlarının Kullanılması' [2015] İzmir Barosu Dergisi 447, 449.

[8] Moreover, according to TCC, the insurance companies are obligated to deliver the insurance policy to the insured (Art. 1424/I) and pursuant to Art. 1425/I this insurance policy must include the "general conditions".
The insurance companies also have the right to determine "special conditions" depending on the case (Art. 11/I IC). In the preparatory works, the legislator declares that the "general conditions" are only the main content of the insurance contract. According to the legislator, the possibility is given to the parties to determine "special conditions" that *amend* the "general conditions", are not contrary to mandatory law and the interest of the insured. See preparatory works of Art. 11 <https://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1364m.htm> accessed 30 May 2021. If the parties agree on "special conditions", the policy must also include these "special conditions" (Art. 1425/I TCC).

[9] Yeşilova Aras (n 7) 457.

It is also important to highlight, that the legislator wanted to harmonize Turkish insurance law with the European Union law.[10] However, in the European Union law with the Council Directive 92/49/EEC of 18 June 1992[11] and Council Directive 92/96/EEC of 10 November 1992[12] -which are repealed and instead today the Solvency II Directive[13] is in force-, the member states abandoned the prior approval of policy conditions. For example, in Germany before 1994, the "general conditions" of insurance contracts were approved by the competent authority, however after the above-mentioned Directives the "general conditions" are not approved anymore.

In Turkish law, although under Art. 11/I IC the general rule is that the Ministry approves the contract, there are some explicit provisions in various Turkish Codes, that give the Ministry the power to draft the "general conditions".[14] Hence, in insurance contracts there are in fact two types of "general conditions". The ones that are drafted by the Ministry and the ones "approved" by the Ministry. Regarding the first type of "general conditions", the Ministry has rule-making powers, and the "general conditions" are published in the Official Gazette as communiqués.[15] Concerning the second type, as a rule the insurance companies should draft the "general conditions" and the Ministry should "approve" them later. However, in practice, the Ministry does not merely approve but also drafts them directly.[16] Here, the Ministry is not officially given any rule-making power. Therefore, as a rule, these conditions are not published in the Official Gazette. Instead, these "general conditions" are announced on the website of the Ministry as well as on the website of the Association of the Insurance, Reinsurance and Pension Companies of Turkey (Art. 2/I, (ç) IC) and the insurance companies are notified.[17] In light of these two types of "general conditions" the question arises as to whether these conditions qualify as "standard terms and conditions" (stc) -if included in the insurance

[10] See preparatory works of Art. 11 https://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1364m.htm accessed 30 May 2021; Rayegan Kender, Türkiye'de Hususi Sigorta Hukuku (14th edn, On İki Levha Yayıncılık 2015) 72.
[11] Recital para. 20.
[12] Recital para. 21.
[13] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).
[14] See e.g. Highway Traffic Code Art. 93/I: "General Conditions for Highway Motor Vehicles Compulsory Liability Insurance ... shall be determined by the Ministry to which the Undersecretariat of Treasury is affiliated and shall be published in the Official Gazette".
See also Catastrophe Insurance Code Art. 13/III: "The ... principles for the compulsory earthquake insurance as well as the insurance general conditions shall be determined by the Undersecretariat (of Treasury)".
[15] See e.g. General Conditions for Highway Motor Vehicles Compulsory Liability Insurance, Official Gazette 14.05.2015, No. 29355; General Conditions Regarding Compulsory Earthquake Insurance, Official Gazette 13.05.2011, No. 27933.
[16] Kender (n 10) 72; Yeşilova Aras (n 7) 453-454.
[17] See e.g. announcement pertaining to agricultural insurance: <https://www.tsb.org.tr/tr/duyuru/devlet-destekli-tarim-sigortalari-2021-yili-genel-sartlari-ile-tarife-ve-talimatlari> accessed 30 May 2021.

contract- and hence are subject to legal control as regulated under the Turkish Code of Obligations (TCO).[18]

The stc are non-negotiated contract terms and are pre-formulated unilaterally for several similar contracts which the drafter presents to the other party during contract conclusion (Art. 20/I TCO). If contract terms are considered as stc, these contract terms will be subjected to a legal control by Turkish courts according to the provisions of TCO and the courts will examine the validity of these terms. In general, the most important types of control over the stc are the test of application (Art. 21 TCO), test of interpretation for ambiguous clauses (Art. 23 TCO) and the test of reasonableness of content (Art. 25 TCO).[19] The provisions regulating stc and control are mandatory. As a matter of fact, it has been accepted by most scholars and by the Turkish Court of Cassation that the provisions governing stc are also applicable to commercial contracts.[20]

The "general conditions" in insurance contracts are unilaterally pre-formulated terms, established for an indefinite number of contracts and are also presented by the insurance companies to the insured, who is not able to change them in the course of negotiation. Thus, the "general conditions" could be considered as stc. However, as we examined above, in Turkish law the "general conditions" are not drafted by the insurance company but by the Ministry. Therefore, one might say that the insurance company is not the drafter and therefore the general conditions do not qualify as stc. There are differing views among scholars concerning this question:[21]

In literature on the one hand, it is widely accepted that contract terms, which are not formulated by one of the parties can also be regarded as stc if one of the parties (the user)

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[18] TCO numbered 6098, Official Gazette 04.02.2011, No. 27836.
The "special conditions" are as a rule not approved by the Ministry. These conditions may be individually negotiated by the parties. In this case, the Turkish courts might not submit the "special conditions" to the stc test under TCO. However, if the insurance company establishes one-sided "special conditions" and presents them to the other party, these "special provisions" will be regarded as stc and will be subject to judicial control. Tekin Memiş, Sigorta Sözleşmesi Şartlarının Yargısal Denetimi (On İki Levha Yayıncılık 2016) 39.

[19] Yeşim M. Atamer, 'Yeni Türk Borçlar Kanunu Hükümleri Uyarınca Genel İşlem Koşullarının Denetlenmesi-TKHK m. 6 ve TTK m. 55, f. 1, (f) ile Karşılaştırmalı Olarak' [2012] Türk Hukukunda Genel İşlem Şartları ve Sempozyumu 9, 11; Fikret Eren, Borçlar Hukuku Genel Hükümler (22nd edn, Yetkin Yayınları 2017) 221; Etem Kara, 'Sigorta Genel Şartlarının Hukuki Niteliği' [2020] 10 (19) HKÜHFD 153, 164.

[20] Atamer/Ünan (n 4) 70; Turkish Court of Cassation 17 HD, 03.07.2018, E: 2017/1825, K. 2018/6690; Regional Court of Appeal of Istanbul 16th Civil Chamber, 09.07.2020, E. 2017/4913 K. 2020/1259; İstanbul 1st Commercial Court of First Instance of Istanbul, 22.09.2020, E. 2020/209 K. 2020/365.
For contrary opinion see Kerim Atamer, 'Tacirler Arasındaki Sözleşmelere, Genel İşlem Koşullarıyla İlgili Hükümler (TBK m. 20-25) Uygulanır Mı?' [2017] XXX Ticaret Hukuku ve Yargıtay Kararları Sempozyumu 11, 35; Gökhan Antalya/Doğa Doğancı, 'Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi' [2018] 24 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 823, 837.

[21] Memiş (n 18) 29-34; Yeşilova Aras (n 7) 465.

presents these terms to the counterparty. It is sufficient if a third party had drafted the terms and the user submits these where the counterparty lacks influence.[22] Even if the drafter is a public authority, the provisions regulating stc will apply since Art. 20/IV TCO states that "the provisions regarding stc also apply to contracts -regardless of their characteristics- which are prepared by persons or institutions, that perform their services in accordance with the permits of law or competent authorities". Moreover, it is also expressed that the Ministry is not issuing law rules, but "general conditions". Therefore, the "general conditions" should not be regarded as mandatory rules or regulatory provisions. Additionally, it can never be guaranteed that the Ministry always finds the balance between the interest of the insured and insurance companies in the best possible way and protect the insured adequately.[23] Consequently, according to this view a revision of the "general conditions" by courts should be allowed.[24]

The second view on the other hand argues that "general conditions" are drafted by the Ministry and the insurance companies are obliged to incorporate these "general conditions" into the insurance contracts. These are mandatory rules and therefore the "general conditions" are outside of the TCO's scope.[25]

Nevertheless, it is my opinion that we have to distinguish between the *two* types of "general conditions":

Regarding the first type of "general conditions" the Ministry has rule-making power and directly drafts the conditions. In this case, the law imposes these conditions on the insurance companies. Furthermore, in July 2020 the Turkish Constitutional Court ruled that the "General Conditions for Highway Motor Vehicles Compulsory Liability Insurance" are regulative acts of administration and are regarded as secondary law in comparison to the codes.[26] Since these conditions are administrative acts, the conditions are binding.[27] Therefore, in my opinion these "general terms" that are published in the Official Gazette as communiqués should not be

[22] Atamer (n 19) 15.
[23] For example see Rayegan Kender, 'Karayolları Motorlu Araçlar Zorunlu Mali Sorumluluk (Trafik) Sigorta Genel Şartlarındaki Değişikliklerin Değerlendirilmesi' [2016] XIII/1 YÜHFD 8, 19.
[24] Atamer/Ünan (n 4) 69; Bahtiyar (n 7) 92; Kara (n 19) 168-169; Rıza Ayhan and Hayrettin Çağlar and Mehmet Özdamar, Sigorta Hukuku Ders Kitabı (4th edn, Yetkin Yayınları 2020) 55.
Since in Germany these "general conditions" are drafted by the insurance companies, there is no doubt, that the "general conditions" will be subject to the control over stc. Accordingly, unfair terms of the insurance contract could be held to be invalid by the German courts.
[25] Memiş (n 18) 39-40; Yeşilova Aras (n 7) 458-459 and 461. For a contrary view see Ayhan/Çağlar/Özdamar (n 23) 53.
[26] Turkish Constitutional Court, 17.07.2020, Decision No: 2020/40.
[27] The "general conditions" are of course subject to judicial review as to their conformity to law and superior rules. The persons, whose interests are violated can claim the annulment of the communiqué before the Council of State.

qualified as stc according to TCO.[28] This approach is also in conformity with the constant ruling of the Turkish Court of Cassation. The Turkish Court of Cassation mostly finds that it is impossible to apply the provisions of TCO regulating stc to "General Conditions for Highway Motor Vehicles Compulsory Liability Insurance". The Court declares that since the drafter is the Ministry using the power given by law, the "general conditions" are mandatory.[29]

Whereas concerning the second type of "general conditions", the Ministry has only the power to *approve* the "general conditions". Even though in practice the Ministry drafts the conditions directly, with the incorporation of the conditions to the insurance contract, these conditions will become contract terms.

The control of the stc is a continuous process. In order to achieve the maximum level of protection of the insured, the conditions should be controlled after they are drafted. The courts should control these conditions pertaining to the particularities of the case and without having regard to the fact that they have been drafted by the Ministry. In conclusion, the "general conditions" of the first type should be qualified as stc and should be subject to legal control over stc according to TCO.[30]

[28] Although the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts regulates unfair terms in consumer contracts, Art. 1/II of the Directive states that the contractual terms which reflect mandatory statutory or regulatory provisions shall not be subject to the provisions of the Directive.

[29] Court of Cassation, 17th Civil Chamber, 29.01.2020, Decision No. 2020/211; 04.03.2019, Decision No. 2019/2351; 17th Civil Chamber, 27.06.2018, Decision No. 2018/6439; 15.06.2017, Decision No. 2017/6854. The Court also declares that Art. 20/IV TCO cannot be applied because the Ministry does not perform any insurance services.

There are also some decisions of the Regional Court of Appeal that derogate from the decisions of the Court of Cassation. For instance, in one of its decisions Regional Court of Appeal of Ankara approved the decision of the court of first instance, that ruled the "general conditions" are subject to the "test of content" pursuant to Art. 25 TCO (22nd Civil Chamber, 04.12.2018, Decision No. 2018/1896). However, this is not currently the prevailing view of the Court of Cassation.

[30] For contrary opinion see Kara (n 19) 169-170.

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UNFAIR COMPETITION: GENERAL TERMS AND CONDITIONS USED IN INSURANCE AGREEMENTS

Dr. Emek TORAMAN ÇOLGAR*

My presentation aims to discuss whether and under which circumstances general terms and conditions used in insurance agreements cause unfair competition. First, general information will be given about unfair competition by introducing a definition and determining its general principles. Second, the conditions required for unfair competition will be discussed in the context of general terms and conditions. Since the TCC[1] only regulates the consequences of using the general terms and conditions without defining this term, general terms and conditions will be defined according to the TCO[2] and some information will be given about their control. Finally, the legal consequences of unfair competition will be discussed in the context of general terms and conditions and, the question as to whether the sanctions regulated under different parts of the legislation can be cumulatively applied, will be answered.

As it has already been stated, under Turkish Law general terms and conditions are regulated in different parts of the legislation such as the TCO, the Law and the secondary legislation about consumer protection and the TCC. General terms and conditions were first regulated in Turkey by the amendment[3] to the consumer protection code in 2003.[4] The provisions of this code concerning "control of content" are applicable when the contract constitutes a consumer transaction.[5] Thereafter, the TCO which is in force since 2012, has brought more detailed regulations on general terms and conditions. The majority view, which I agree with, suggests that even merchants benefit from the protection of the TCO regarding general terms and

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[1] Turkish Commercial Code numbered 6102. (Official Gazette, 14 February 2011, n 27846).

[2] Turkish Code of Obligation numbered 6098. (Official Gazette, 4 February 2011, n 27836).

[3] See the Amendment Law Regarding Consumer Protection numbered 4822. (Official Gazette, 14 March 2003, n 25048).

[4] The Consumer Protection Code dated 1995 and numbered 4077 was abolished with the Consumer Protection Code numbered 6502 and dated 7 November 2013.

[5] For a detailed explanation about the supervision of the unfair conditions regarding to the former Consumer Protection Code, see, Lale Sirmen, 'Tüketici Sözleşmelerindeki Genel İşlem Şartlarının Denetlenmesi' *Türk Hukukunda Genel İşlem Şartları Sempozyumu* (Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları 2012) 107, 109-133. For the application of Art. 5 of the Consumer Protection Code to the insurance agreements see, Rayegan Kender, *Türkiye'de Hususi Sigorta Hukuku* (15th edn, On İki Levha Yayıncılık 2016) 193-196; for general information see Abdüssamet Yılmaz, 'Dürüstlük Kuralına Aykırı İşlem Şartları Kullanmak Suretiyle Haksız Rekabet Oluşturmak' (LLM Thesis, Galatasaray Üniversitesi 2014) 42, 43.

conditions.[6] This is because merchants might also need protection when there is an imbalance in terms of negotiation power. Similarly, the TCC –unlike Swiss law[7]- regards the use of general terms and conditions as unfair competition, irrespective of the counter party being a consumer or a merchant.[8] In insurance contracts, the party using general terms and conditions will always be a corporation, which is a merchant under Turkish law.[9] However, the counter party can be a consumer as in a health insurance contract; or might be a non-consumer as a lawyer seeking professional insurance or a corporation (i.e. a merchant). In the first case, consumer law will be applicable, while a control based on the TCO is needed in the other two.

The TCC approach to general terms and conditions is solely limited to the unfair competition law aspect. For a use of general terms and conditions to constitute unfair competition, such general terms and conditions should qualify as "unfair terms" under consumer law[10] or fail to pass the control under the TCO.[11] Not every provision failing such test, however, will constitute unfair competition. This paper aims to clarify when use of general terms and conditions

[6] Yeşim Atamer, 'Yeni Türk Borçlar Kanunu Hükümleri Uyarınca Genel İşlem Koşullarının Denetlenmesi- TKHK M. 6 ve TTK M. 55, F. 1, (f) İle Karşılaştırmalı Olarak' *Türk Hukukunda Genel İşlem Şartları Sempozyumu*, (Bankacılık Enstitüsü Yayınları, 2012), 9, 10. For the opposing view see, O. Gökhan Antalya/E. Doğa Doğancı, 'Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi' (2018) 24 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 838 et seq.

[7] See Art. 8 of UWG: "In particular, those who use general terms and conditions are acting unfairly, which, in a manner that violates good faith and to the detriment of consumers, provide for a considerable and unjustified imbalance between the contractual rights and the contractual obligations." Before the amendment the provision could have applied not only to the consumers but all contracting parties. See, Reto A. Heizmann, in Matthias Oesch, Rolf H. Weber, Roger Zäc (eds) *Wettbewerbsrecht II* (2011).

[8] Hüseyin Ülgen/Mehmet Helvacı/Arslan Kaya/Füsun Nomer Ertan, *Ticari İşletme Hukuku* (Vedat Kitapçılık, 2019) 555-558.

[9] According to Art. 3 of the Turkish Insurance Activities Act numbered 5684 (Official Gazette: 14 June 2007, n 26552), the insurer must be a joint stock company and according to Art. 16 of the TCC a joint stock company is deemed a merchant.

[10] See Art. 5 of the Consumer Protection Code and the provisions of the Regulation Regarding the Unfair Conditions in Consumer Agreements.

[11] Control of general terms and conditions by courts has three phases which are incorporation control (application), interpretation control and content control. In the incorporation control, we are trying to find an answer to a very simple question as to whether the general terms and conditions can be deemed as a part of the contract. Because merchants are expected to be prudent and thus should be capable of examining contractual terms, this phase will have a limited scope of application for merchants. If general terms and conditions passes the first phase, the second phase which aims to protect the counter party by interpretation against the drafter will come into play. In the last phase, the judge reviews general terms and conditions and deems them invalid if necessary. For more information about the control see, Yeşim Atamer, *Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi* (2nd edn, Beta Yayıncılık, 2001) 81-234; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (Yetkin Yayınları, 2019) 233-253; Atamer, *Symposium* (n 6) 11-63; Pierre Tercier/Pascal Pischonnaz/H. Murat Develioğlu, *Borçlar Hukuku Genel Hükümler* (2nd edn, On iki Levha Yayıncılık, 2020) N. 943-961a. Yasin Alperen Karaşahin, 'Genel İşlem Şartlarının Denetlenmesi Açısından Türk Ticaret Kanunu'nun 55. Maddesinin İşlevleri' *Türk Ticaret Kanunu'nun 5. Yıl Sempozyumu* (Türkiye Adalet Akademisi, 2018) 173, 176-178. See, Tekin Memiş, *Sigorta Sözleşmesi Şartlarının Yargısal Denetimi* (On İki Levha Yayıncılık, 2016) 119-215 for the control of general terms and conditions used in insurance agreements, especially p. 192-197, 211-215.

constitutes unfair competition. It is worth discussing briefly whether there is a need to regulate the same issue under multiple codes. In German law, for example, we come across certain Federal Court decisions declaring that the use of general terms and conditions might result in unfair competition despite the matter being regulated only in BGB (German Civil Code).[12] In Swiss law, where the issue is regulated only in unfair competition law, scholars agree that violation of the rule of unfair competition law about general terms and conditions causes the invalidity of the relevant contractual provision.[13] The contract law approach focuses on the protection of the party not using general terms and conditions. Unfair competition law on the other hand aims to ensure fair competition.[14] Therefore, it is possible for general terms and conditions, that should be held invalid, to constitute unfair competition as the counter party might have performed the contract without disputing the validity of such general terms and conditions. Thus, according to the author's view, it is logical that different codes have provisions on the same issue given a larger group of stakeholders can have an interest in bringing a lawsuit against them.

The provisions regarding unfair competition in the TCC are mostly inspired by the Swiss Unfair Competition Law with some minor differences. After giving a general definition of unfair competition under Art. 54, Art. 55 provides examples of most common types of unfair competition. As it is clearly stated in Art. 54[15] of the TCC, the central concept in unfair competition law is the infringement of the principle of good faith and the aim of this provision is to protect not only the competitors but all parties involved. According to Art. 55/1 paragraph (f),[16] use of general terms and conditions can be regarded as against good faith provided that, to the detriment of a contracting party, the general terms and conditions, misleadingly,[17] *1.*

[12] However, the Art. § 3a of the German Unfair Competition Law could be applicable: "Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors."

[13] Thomas Probst, Art. 8 UWG: Peter Jung/Philippe Spitz (eds), *Stämpflis Handkommentar, Bundesgesetzgegen den unlauteren Wettbewerb (UWG)*, Bern 2016, N. 291.

[14] Probst, N. 5.

[15] "The purpose of this section on unfair competition is to ensure fair and undistorted competition in the interest of all concerned. Any behavior or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and unlawful."

[16] "*Shall be deemed to have committed an act of unfair competition, anyone who, in particular, makes use of general terms and conditions that, to the detriment of a contracting party, misleadingly, 1. depart significantly from the statutory provisions that apply either directly or by analogy, or 2. prescribe a distribution of rights and obligations in serious contradiction with the nature of the contract*".

[17] Despite the article, Turkish doctrine claims that, for general terms and conditions to be accepted as against good faith, it is not mandatory that general terms and conditions are misleading. See, Füsun Nomer Ertan, *Haksız*

deviate considerably from applicable default rules, 2. prescribe a distribution of rights and obligations in serious contradiction with the nature of the contract.[18] Therefore, according to Art. 55/1, paragraph f, there are three conditions for there to be unfair competition: i) The contract must contain general terms and conditions,[19] ii) the general terms and conditions must be against the principle of good faith and fair dealing, iii) the use of general terms and conditions must result in unfair competition.[20]

The question of when a set of general terms and conditions results in imbalance should be answered based on the existing legal framework. Accordingly, the following questions should be asked:[21] i) which rules would have been applicable if not for general terms and conditions and ii) is there a significant deviation from these rules? There is no doubt that all rules applicable directly or by analogy including those in secondary legislation should be considered, whether they are of mandatory nature or default rules.[22] In addition to that, some Turkish and Swiss scholars argue that the legal framework includes case law as well as the custom.[23] As explicitly stated in the provision, only significant deviation[24] from those rules will be considered against good faith. If there exists a regulation that ensures contractual fairness, Art. 55/1 paragraph (f) (1) will be applicable. If, however, no rule is applicable even by analogy, the judge is required to strike a contractual balance as if they are the lawmaker. The judge should take into account the purpose of the contract when doing so.[25] Again, the deviation will result in unfair competition only if it is "significant". In this regard the contract should be considered as a whole.[26] Even if the insurance company is given an advantage by the general terms and conditions, this could still not be amounted to unfair competition if the counter party is also

Rekabet Hukuku (On İki Levha 2016) 846, 847; Sevilay Uzunallı, 'Genel İşlem Şartlarının Haksız Rekabet Hükümleriyle Denetlenmesi' (2013) 71, İÜHFM, 383, 409-410; Yılmaz (n 5) 88.

[18] These criteria could be used to define when the use of general terms and conditions cause imbalance between the parties. See, Atamer, *Symposium* (n 6) 44-47.

[19] Since Art. 55 of the TCC only regulates the consequences of the usage of general terms and conditions without providing its definition, the answer of what general terms and conditions should be found in the TCO. According to Art. 20 of TCO, "*Standard terms and conditions are contract terms, preformulated unilaterally for several similar contracts which the drafter presents to the other party during contract conclusion*." 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 counter party by the drafter / not be negotiated, d) intended for use in multiple contracts.

[20] For a detailed discussion see, Yılmaz (n 5) 60-90.

[21] Atamer, *Symposium* (n 6) 44.

[22] Atamer, *Symposium* (n 6) 44, 45; Uzunallı (n 17) 407.

[23] Nomer Ertan (n 17) 855, 856.

[24] For significant deviation see Nomer Ertan (n 17) 858.

[25] Nomer Ertan (n 17) 859, 860.

[26] Nomer Ertan (n 17) 853; Sevilay Uzunallı, 'Genel İşlem Şartlarının Haksız Rekabet Hükümleriyle Denetlenmesi' (2013), 71, İÜHFM, 383, 407. Compare Art. 5/6 of the Consumer Protection Code.

given an advantage in return.[27] However, the provisions regarding the primary obligations of the parties (i.e. the price) are not subject to review as they are determined within the free market economy.[28]

Unfairness can also appear because of the violation of the transparency requirement or the inclusion of unusual and surprising terms. According to Art. 1425 of the TCC, "*The insurance policy shall set out the respective rights of the parties, provisions relating to default,*[29] *general conditions, and special conditions, if any, shall be drafted in a plain and intelligible manner*."[30] A similar provision can also be found under Art. 11 of the Turkish Insurance Activities Act.[31] According to that provision, the insurer is obliged to define clearly what is covered by the insurance and mention what is not covered. Furthermore Art. 11 paragraph (5) states that, the insurer should refrain from using foreign words.

As a rule, unusual and surprising terms will fail the first phase of the control and will be deemed *unwritten*, thus invalid.[32] However, use of general terms and conditions that would be deemed invalid could result in unfair competition.[33] For instance, in a Swiss Federal Court judgment, the court had to decide about a term in a car rental agreement suggesting that accidents resulting from the lessee's slight negligence would not be covered. According to the court, the insurance policy was unexpected and thus, could not be deemed as valid.[34]

In Turkey, the General Directorate of Insurance of the Ministry of Treasury and Finance (Ministry) has the authority to approve certain general terms and conditions to be included in insurance contracts.[35] There is a debate as to whether these terms should be under the control

[27] Atamer, *Symposium* (n 6) 52.
[28] Atamer, *Symposium* (n 6) 56, 57.
[29] See also Art. 1431/2 which provides obligation to write the default in paying the premium other than the first one. For the comparison of the Art.s 1425 and 1431/2 see, Samim Ünan, *Türk Ticaret Kanunu Şerhi, Altıncı Kitap, Cilt 1 Genel Hükümler (Madde 1401-1452)* (On İki Levha Yayıncılık, 2016) 251.
[30] Compare EU Directive Art. 5, PEICL Art. 1:203. For a detailed information about PEICL Art. 1:203 see, Jürgen Basedow/John Birds/Malcolm Clarke/Herman Cousy/Helmut Heiss/D. Leander Loacker, *Principles of European Insurance Contract Law (PEICL)* (Verlag Dr. Otto Schmidt, 2014) 84-87.
[31] See Yeşim Atamer/Samim Ünan, 'Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement, Seminar Transparency in Insurance Law' in Samim Ünan/Manfred Wandt (eds) *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği - Deustcher Verein für Versicherungwissens Chaft 2012) 65, 77-79 for comprehensive information regarding the relationship between Art. 11 and control of general terms and conditions.
[32] Atamer *Symposium* (n 6) 29, 30.
[33] Karaşahin (n 11) 186.
[34] BGE 119 II 443. For analyses of similar decisions see, Atamer, *Symposium* (n 6) 35-37.
[35] Even though the Art. 11 gives the authority to approve the general conditions to the General Directorate, in practice general terms and conditions are set out by the Directorate. See. Kender, (n 5) 72; Emine Ebru Erkan,

of the courts since these terms are also pre-written by a single party and not negotiated individually.[36] In this context, the question arises whether the general standards defined by the Ministry can be deemed as mandatory.[37] The answer is important since, in the recital of the Directive it is stated that mandatory provisions are excluded from such control. There is no consensus in the Turkish doctrine as to whether these provisions are also subject to the control of general terms and conditions.[38] Notwithstanding the details of this debate it should be accepted that, since these terms must be included in the contracts concluded by all insurance companies concerned, their inclusion does 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, paragraph (e)].[39]

After accepting that the use of standard terms drafted by the Ministry cannot cause of unfair competition, now it should be discussed how can the use of general terms and conditions by way of special provisions[40] may cause unfair competition. According to the doctrine, clients do not really pay attention to general terms and conditions when choosing an insurance company. In other words, using better or worse general terms and conditions does not affect the choice of the clients.[41] However, the use of general terms and conditions that would fail to pass the tests could result in unfair competition; since the insurance company might have benefited from such

'Genel İşlem Koşulu Denetimi' (LLM Thesis, İstanbul Bilgi Üniversitesi 2016) 33. See, Mehmet Bahtiyar, 'Sigorta Poliçesi Genel Koşulları' (1997) 19 BATİDER, 89, 94, 95 for the reasons to give this authority to the Directorate. For a critic of the said practice through perspective of contractual freedom, see, Atamer/Ünan (n 31) 67.

[36] See, Memiş, *Denetim* (n 12) 18-20 for the differences between general terms and conditions and the general conditions set out by the Directorate. The author distinguishes between the insurance agreements depending on the parties and only accepts the general conditions as general terms and conditions provided that the agreement is deemed as a private law agreement. See, Tekin Memiş, 'Sigorta Sözleşmelerinde Kullanılan Genel Şartların Yargısal Denetimi' (2005) 56 Reasürör 4, 5; for an opinion stating that general conditions in the insurance agreements can also be deemed as general terms and conditions see, Ayhan Bakır, 'Türk Haksız Rekabet Hukukunda Dürüstlük Kuralına Aykırı Genel İşlem Şartı Kullanımı ve Yaptırımı' (LLM Thesis, On Dokuz Mayıs Üniversitesi 2016) 15, 16.

[37] Since these general conditions should be deemed as standard form contracts, they cannot not be accepted as mandatory provisions. See, Atamer/Ünan (n 31) 69.

[38] Court of Cassation decided regarding the yacht insurance contract that even the general terms of the agreement can be deemed as general terms and conditions and should be under the control of the courts. See, Court of Cassation, 11th Civil Chamber, 14.4.1995, 1995-1993/3369. For an opinion accepting the authority to control the general conditions in insurance contracts under general terms and conditions tests see, Erkan (n 35) 32.

[39] For a detailed explanation about Art. 55/1, paragraph e, see, Işık Önay/Emek Toraman Çolgar, 'A Legal Perspective on Uber's Activities in Turkey' in Zeynep Ayata/ Işık Önay (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies: A Case Study of Uber* (Springer 2020) 196-220.

[40] Special provisions in the insurance agreements should be under the control of the court. See, Melda Taşkın, 'Krediye Bağlı Hayat Sigortası Sözleşmesi' (PhD Thesis, İstanbul University 2019) 73. See also, p. 62-77 for general information about the control.

[41] Atamer, *Symposium* (n 6) 68-70.

general terms and conditions because the counter party had not raised their invalidity and the general terms and conditions were thus applied. Let's take as an example the general terms and conditions excluding accidents where the insured has a slight negligence from the coverage in a motor vehicle insurance agreement. In such a case, the insurance company might have benefited –relative to its competitors- from such general terms and conditions by refusing to make payment after such an accident took place. Some other examples used by certain insurance companies as special provisions should be examined:[42] i) "*Excavators are covered only when they are not excavating*" (Special provision inserted in "Machinery breakdown" insurance). Since the scope of coverage might be judged to be extremely narrowed this provision must be deemed against good faith. ii) "*The insurer is the sole party entitled to match any and all premiums or amounts to be paid, with any and all amounts paid within the scope of this policy*". In the second example, because of the discretionary power of the insurer, this provision must be deemed against good faith. Again, a provision such as "*Proof satisfactory to the insurer*" gives the user of the general terms and conditions, the discretionary power to decide whether satisfactory proof is brought, therefore it is against good faith. We can also benefit from the grey list of the Directive and Principles of European Insurance Contract Law (PEICL) for determining the unfair provisions. In principle, terms capable of misleading the contractual partner of the insurer, hidden terms, terms allowing disproportionate penalties for breach by the policy holder and terms that give disproportionate discretionary power to the insurer can be deemed as unfair and hence can constitute unfair competition.[43]

Lastly, the legal consequences of unfair competition should be discussed. According to Art. 25 of the TCO, general terms and conditions will be invalid if they are against the counter party's interests or aggravates the counter party's position in a way that contradicts the principle of good faith. However, the use of a term that will be deemed invalid by the court in case of a court review could also result in unfair competition. In fact, knowing the counter party will not try to enforce the TCO provisions, in practice many such provisions are included purposely. Thus, the policy holder and the insured could –in addition to raising invalidity under the TCO- claim declaratory judgment on unfair competition, prevention, removal, and damages (fault and loss required for this claim). These claims could be raised by the counter party as well as competitors, professional organizations, and customers.

[42] For more examples see, Atamer/Ünan (n 31) 81-83.
[43] For more examples, see Erkan (n 35) 56-58; 144-149.

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CREDIT RELATED INSURANCE UNDER CONSUMER PROTECTION LAW

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Consumer Protection Law ("CPL") is critical for insurance since the insurance contracts are stipulated among consumer transactions. Therefore, insurance contracts fall within the scope of the CPL if one of the contracting parties is a consumer. Insurance contracts are regulated under some of the provisions of the CPL and the provision concerning credit related insurance is one of them. However, CPL is not the only legislation under Turkish law applicable to credit related insurance for consumer credits. In addition to CPL, there are also "Bylaw Regarding the Implementation of Individual Credit Related Insurance", "Bylaw on Consumer Loan Contracts", "By-law on Distance Contracts Regarding Financial Services" and "By-law on Housing Finance Contracts". The presentation will be limited with the context of Consumer Protection Law.

Credit institutions request a security from the consumers in order to grant credits.[1] The first type of security is pledge or mortgage. Credit institutions grant credits to consumers to buy a house or motor vehicle and they request a mortgage on the house they finance or a vehicle pledge on the vehicle in return.[2]

Another type of security is insurance, which is called "credit related 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.[3] In Turkey this type of insurance is very common and usually a life insurance policy is issued where the credit institution is the beneficiary.[4] CPL Article 29[5]

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

[2] Ünan, *Sigorta Tüketici* (n 1) 62.

[3] Ünan, *Sigorta Tüketici* (n 1) 62.

[4] Meltem Deniz Güner-Özbek, *Insurance Law in Turkey* (Wolters Kluwer 2016) 35.

[5] 'Having insurance issued

ARTICLE 29- (1) Insurance regarding a credit shall not be issued without explicit request of the consumer either in writing or through a durable data storage device. If the consumer wants to have insurance issued, the creditor shall be obliged to accept the guarantee provided by the insurance company that the consumer preferred. This insurance should comply with the subject matter of the credit, the debt amount remaining in the fixed sum insurance and its term.'

regulates credit related insurance. CPL provides exactly the same provision for mortgage in Article 38.[6] Therefore, what is said about Article 29 is also valid for Article 38.

First of all, it should be pointed out that credit related insurance is taken out in two methods. In the first method, the credit institution concludes a contract with the insurer, where the interest of the credit institution is covered. The law does not require a request for such an insurance since the credit institution is not a consumer. Therefore, this rarely used type of insurance falls beyond the scope of Article 29.[7]

In the second method of concluding a credit related insurance contract, the consumer draws up a loan and takes out insurance to cover this loan; where the credit institution acts as an insurance agent and the other contracting party is the borrower; who is also the consumer. This type of credit-related insurance falls within the scope of CPL. In this second method, the consumer is the policyholder and this is possible in two ways. First, the consumer can authorize someone, for example the credit institution, to represent himself or herself, and secondly, the consumer himself or herself can conclude this contract.

According to CPL Article 29 and 38, the explicit request is required for the insurance contracts that the consumer is going to conclude.[8] Yet no contract can be concluded without the assent of the parties. Here, the legislator aims to point at the credit contracts, where the consumer is compelled to take out credit related insurance.[9] The consequences of such a clause shall be examined. Article 29 is a mandatory rule of law and according to Turkish Code of Obligations Article 27, contracting parties shall not derogate from mandatory rules of law by agreement. Bearing in mind that contracts that are against the mandatory rules of law are void, the question as to whether such a clause shall be deemed as void should be asked. We believe that deeming the relevant clause void is not an appropriate solution.[10]

On the other hand, the legislator states that the consumer shall request such insurance explicitly. Accordingly, the question arises as to whether approving such a clause can replace an express request or not. Different possibilities need to be reviewed. There may be a clause

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[6] 'Having insurance issued
ARTICLE 38- (1) Insurance regarding a loan shall not be made without the explicit request of the consumer either in writing or through a durable data storage vehicle. If the consumer wants to have an insurance issued, the guarantee obtained from the insurance company the consumer chooses should be accepted by the housing finance institution. This insurance should comply with the subject matter of the credit, the debt amount remaining in the fixed sum insurance and its term.'

[7] Melda Taşkın, *Krediye Bağlı Hayat Sigortası Sözleşmesi* (On İki Levha Yayıncılık 2019) 60.

[8] Ünan, *Sigorta Tüketici* (n 1) 65.

[9] Ünan, *Sigorta Tüketici* (n 1) 66.

[10] For further discussion see Taşkın (n 7) 71-72.

obliging the consumer to take out credit related insurance in the credit contract, which is lengthy and comprehensive. We believe that signing a credit contract containing such a clause, shall not constitute an explicit request of the consumer.

Also, in accordance with Turkish Commercial Code, such insurance is subject to the written approval of the insured, i.e. the person whose life is being insured.[11] If this approval is obtained, one may argue that the condition of explicit request stipulated in Article 29 will also be fulfilled.[12] Therefore, the first sentence of Article 29 actually becomes unnecessary for credit-related life insurance.[13]

The legislator is stipulating conditions and making it more difficult for such an insurance to be concluded, even though such insurance is in the advantage of both the credit institution and the consumer and his/her heirs.[14] In fact, the legislator has two purposes when stipulating such a provision. First of all, the legislator is interested in the person who is going to pay the premium for such an insurance contract.[15] Article 4/3[16] of CPL stipulates that the credit institution shall incur the insurance premium both in circumstance of the consumer concluding the contract directly by himself/herself as well as in the circumstance of the credit institution concluding such an insurance contract on behalf of the consumer, and this constitutes a proper solution.[17]

The concept of "credit institution" substantially refers to the banks.[18] 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.[19] Having two different titles yields

[11] According to Turkish Commercial Code Article 1490, such credit related life insurance is subject to the written approval of the insured, in case the sum insured exceeds the funeral expenses. In most of the cases the sum insured actually exceeds funeral expenses.
[12] Taşkın (n 7) 64.
[13] Ünan, *Sigorta Tüketici* (n 1) 66; Cüneyt Süzel, 'Bireysel Kredilerle Bağlantılı Kurulan Sigorta Sözleşmeleri Mevzuatının Değerlendirilmesi', in Samim Ünan (ed), *Sigorta Hukukunun Bazı Güncel Sorunları* (On İki Levha Yayıncılık 2017) 111; Taşkın (n 7) 63.
[14] Ünan, *Sigorta Tüketici* (n 1) 62-63; Ünan, *Şerh* (n 1) 214.
[15] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215; Taşkın (n 7) 61.
[16] 'Article 4 - Basic Principles
(3) An additional fee shall not be claimed from the consumer for the acts which the consumer rightly expects within the scope of the good or service presented to the consumer and that are among the legal obligations of the party drafting the contract, and for the expenses made by the party drafting the contract in line with its own benefits. All types of fees, commissions and expenses that will be claimed from the consumer, other than interest, and the principles and procedures related to such for goods or services provided to the consumer by banks, financial institutions offering consumer credits or issuing cards, shall be regulated by the Banking Regulation and Supervision Agency, by receiving the opinion of the Ministry, in line with the spirit of this Law and in a manner that protects the consumer.'
[17] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215.
[18] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215.
[19] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215-216.

the bank two different types of revenue.[20] This is the second reason why the legislator seeks to protect the consumer and provides the following obligations.[21] The legislator seeks to prevent the bank from making additional profit as the insurance agent by requiring the consumer to take out such insurance. This seems as a valid justification; however, in the procedure of granting credits the most convenient and the cheapest method of security is insurance.[22] Therefore we believe that credit related insurance shall not make things hard for people.[23] Instead, compulsory insurance securing the credit would have constituted a more appropriate solution.[24]

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 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. CPL covers insurance contracts where the contracting party is a consumer; whereas this rule under Insurance Activities Act is in force since 2007 and it is applied to all types of insurance contracts even if the contracting party is or is not a consumer.[25] Therefore, there actually was no need for such a provision under CPL.[26]

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 etc. at his/her discretion.[27] Besides, the insurer is obliged to inform the policyholder. If the insurer does not fulfill this disclosure requirement, the insurer shall be held liable for the damage caused.

Consequently, the credit institution may require the consumer to take out credit-related insurance as a security for the loan agreement. It is out of the question to prohibit to take out such insurance, since the bank undoubtedly needs a security. Still, Article 29 and 39 shall be

[20] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215-216.
[21] Ünan, *Sigorta Tüketici* (n 1) 64; Ünan, *Şerh* (n 1) 215-216.
[22] Ünan, *Sigorta Tüketici* (n 1) 62.
[23] Ünan, *Sigorta Tüketici* (n 1) 62.
[24] Ünan, *Sigorta Tüketici* (n 1) 63.
[25] For further explanation see Ünan, *Sigorta Tüketici* (n 1) 69; Süzel (n 13) 104.
[26] Ünan, *Sigorta Tüketici* (n 1) 67; Ünan, *Şerh* (n 1) 219.
[27] Ünan, *Sigorta Tüketici* (n 1) 68; Ünan, *Şerh* (n 1) 220.

interpreted within the framework of principle of good faith. In this way the boundaries can be drawn safely. The legislator aims to achieve that consumers cannot be obliged take out credit-related insurance where the bank is acting as an insurance intermediary.[28]

Article 29 and 38 of CPL may be called as a reaction provision, which is against the practice of credit institutions to set credit-related insurance as a pre-requisite of the credit.[29] However, this provision goes beyond the legislator's aim. Credit-related insurance is much cheaper, more reliable and effective method as a security than other collateral methods used in practice.[30] The use of credit-related insurance shall be generalized, rather than its use being made more difficult.

[28] Taşkın (n 7) 62.
[29] Ünan, *Sigorta Tüketici* (n 1) 62; Taşkın (n 7) 64.
[30] Ünan, *Sigorta Tüketici* (n 1) 69; Ünan, *Şerh* (n 1) 238; Taşkın (n 7) 65.

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A CRITICAL EXAMPLE OF THE *A PRIORI* DETERMINATION OF THE WEAKER PARTY IN CONTRACT: INSURANCE CONTRACTS

Dr. Kemal ATASOY*

Protection of the weaker party is one of the main objectives of the social dimension of contract law. The aim of weaker party protection on consumer law is generally accepted in other branches of contract law as a general principle.[1]Insurance contract is one of the exceptions of the subject of weaker party in contract law. Concerning *a priori* determination of the weaker party and its critique in insurance contracts, the main focus must be on the insurer's obligation to inform and policyholder's duty to inform.

The prevailing opinion with regards to insurance contracts is that the policyholder is typically the weaker party.[2] The policyholder should be protected against the insurer, who has specific and technical knowledge about insurance which can be defined as a legal and abstract product within the Turkish Code on Consumer Protection (CCP). Hence, insurance contract is also defined as consumer transaction. When we look at the Turkish Commercial Code (TCC) consumers as policyholders are broader than the notion of consumer in CCP. This outcome is based on several articles of TCC [3] because they are typical legal measures to protect policyholder as weaker party and do not express any difference between consumer or non-consumer policyholders. The mention of consumer in TCC[4] shows the need of regulation that does not conclude any difference between consumers and merchants about the insurer's obligation to inform.[5]

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[1] Helmut Heiss, 'Insurance Contract Law Between Business Law and Consumer Protection', in Karen B. Brown/David V. Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/ Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé* (Springer 2012) 335, 344.

[2] Ioannis Rokas, Principles of European Insurance Contract Law (PEICL) as a Settled and Balanced System of Policyholder Protection' (2013) Eur Ins L Rev 37, Kübra Yetiş Şamlı, 'Sigortacının Aydınlatma Yükümlülüğünü Düzenleyen TTK m. 1423 Hükmüne İlişkin Bazı Değerlendirmeler' *Prof. Dr. Cevdet Yavuz'a Armağan* (Beta 2016) 2977, 2978.

[3] TCC art. 1423 (insurer's obligation to inform), art. 1425 (unfair terms), art. 1414 (increasing the premium to the detriment of policyholder). For further information; İrem Aral Eldeleklioğlu, '6102 Sayılı Türk Ticaret Kanunu ve Sigortacılık Mevzuatı Uyarınca Sigortacının Aydınlatma Yükümlülüğü' (2012) 18 MÜHFHAD 383, 388, Evrim Akgün, '6502 Sayılı Tüketicinin Korunması Hakkında Kanun'un Sigorta Sözleşmelerine Etkisi Üzerine Bir İnceleme' in Ayşe Nuhoğlu (ed), Prof. Dr. Feridun Yenisey'e Armağan, (Beta 2014) 2721, 2724.

[4] TCC art. 1423/ 3

[5] There are plenty of examples in EU law that demonstrate broader protection of the 'policyholder' not only 'consumers' and protection for policyholders that carry on a business. For further information ECJ Case 205/84 04.12.1986 Commission v. Germany, Life Insurance Consideration Directive 2002/83/EC art. 36

Obviously, classic concept of merchant need to be reconsidered in terms of weaker party. The policyholder, as a merchant, needs legal protection in the field of insurance, even if the subject of the insurance contract is within his/her professional or commercial scope.[6] Thus, being a merchant does not automatically mean becoming strong party who does not need any legal protection because of the duty to be prudent in commercial law. The perception of a merchant's economic power against the other party in *a priori* determination of weaker party does not guarantee the fair resolution in the case of insurance contracts.[7] The subject of insurance contracts demands a special knowledge for a clear vision of possible legal consequences that could even occur to the detriment of merchant policyholders.[8] Hereby, the notion of weaker party is expanded.

Another crucial issue about the policyholder's weakness is the information asymmetry between parties. Protecting the weaker party requires the stronger party's obligation to inform. However, insurance contracts differentiate from other classic examples because information asymmetry can be reciprocal. Thus, both parties have to inform the counterparty about relevant issues at particular stages of the contract.[9]

The insurer's obligation includes informing the policyholder about the contract's characteristics and sharing technical knowledge about insurance at the different stages of the contract. This obligation is typically a legal measure for protecting the weaker party.[10] Nevertheless, information asymmetry occurs against the insurer when the policyholder has more knowledge about risk identification and environmental factors of loss.[11] Policyholder's duty to inform is introduced in order to determine the scope of the insurer's risk liability and ensure the fairness of the contract.[12] In addition, policyholder's duty to inform has an aim to prevent insurance fraud. Thus, on the subject of information asymmetry, the prediction of the policyholder's weakness is indefinite about all facts of the contract. According to the Insurance

[6] Heiss (n 1) 345, Yetiş Şamlı (n 2) 2979
[7] Kemal Atasoy, *Sözleşme Özgürlüğünün Kamu Düzenine Aykırılık Sınırı* (On İki Levha Yayınları 2020) 270, Heiss (n 1) 336.
[8] Samim Ünan, *Türk Ticaret Kanunu Şerhi Altıncı Kitap Sigorta Hukuku* (On İki Levha Publishing 2016) 188.
[9] J. Han Wansink/Niels Frenk, 'Some Reflections on Consumer Protection and The Requirement of Anticipating Behaviour of a Prudent Insurer', (2012) 5 Erasmus Law Review 97, 98.
[10] Consumerism's influence is expanding in insurance contract law. Heiss (n 1) 353, Aral Eldeleklioğlu (n 3) 399.
[11] Marcel Fontaine, 'La Protection De La Partie Faible Dans Les Rapports Contractuels: Rapport Synthèse' in Jacques Ghestin/Marcel Fontaine (eds), *La Protection de la Partie Faible dans les Rapports Contractuels* (L.G.D.J. 1996) 615, 617-618, Atasoy (n 7) 275.
[12] Merih Kemal Omağ, 'Sigortacı Açısından Sigorta Sözleşmesinin Hükümleri', Prof. Dr. Fahiman Tekil'in Anısına Armağan (Beta 2003) 25, 27. 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.

Arbitration Commission (IAC)'s decision,[13] both parties should be prudent depending on their own personal situation in contractual relationships. This outcome is based on the policyholder's 'duty to be prudent' and there is really not any aspect of information asymmetry against policyholder. In another decision of the Commission, insurer shall pay the cover and his/her claims depending on his/her own fault shall not be raised as a prudent merchant.[14] On this matter, the notion of weaker party becomes vague. There should not be a single rule that ensures a one-sided-protection for the weaker party in all cases.

The expansion and vagueness of the notion of the weaker party make it difficult to answer these following questions: which criteria should be taken into account for determination of the weaker party in a contract or could the weaker party be *a priori* determined or not? Firstly, the economic needs and situation of the parties are more important than their personal characteristics to determine the weaker party, especially when the merchant assures the merchandises related to his profession.[15] If subject of contract could be so intangible, it would restrict merchant's substantive freedom of contract.[16] Semi-mandatory provisions,[17] that expands in insurance contract law, also protect merchant-policyholders.[18] Thus, it must be considered whether merchant/policyholder benefits from the consumer protection in each case. The possible solution may be deciding whether a large risk[19] exists in each case**.** Unfortunately, there is not any rule including large risks under Turkish law. On the other hand, in Directive 2009/138/EC[20] and German law,[21] the notion of large risk is defined. Large risks are the

[13] In the case there's workplace insurance and the conflict is about insurer's cover for accidents in workplace. The Commission said that "policyholder owns a business that is an auto body shop. Thus, he should consider that renewal of policy doesn't change the scope of guarantee in contract" Decision N. 2018/29290, 15.05.2018

[14] In life insurance, insurer gave questionnaires/ forms to policyholder to establish premium and covered risk. But in this case, one of form is not signed by policyholder and the commission said that leaving yes-no questions blank doesn't mean the breach of policyholder's duty to inform, because policy and forms were on the same document, which is against TCC art.1423, and it does not fit the insurance method. Decision N. 2012/978, 29.08.2012.

[15] Atasoy (n 7) 274.

[16] Especially it is possible for small and medium-sized enterprises. Marco B. M. Loos/Ilse Samoy, 'The Position of Small and Medium-Sized Enterprises in European Contract Law: An Introduction' in M. B. Loos, I. Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, (Intersentia Publishing 2014) 1, 4, Ünan (n 8) 5.

[17] For instance, TCC art. 1452 para. 3 and PIECL 1:103 para. 2.

[18] Heiss (n 1) 348, Rokas (n 2) 40.

[19] If risk is related with policyholder's profession or commercial activity, are defined as legal risks. Other specified risks are fire and natural forces, general liability, motor vehicle liability-depending on conditions that are a balance-sheet total, a net turnover, an average number of employees exceed specific limit. Large risk is usually concerned about big enterprises or even maybe middle-size enterprises. For further information, Rokas (n 2) 38-39, Heiss (n 1) 337.

[20] *European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L335/1.* Art. 13 para. 27.

[21] Versicherungsvertragsgesetz (VVG) art. 210

exemption of semi-mandatory provisions[22] and reflect the broader approach to 'consumer insurance'.

Secondly, the assumption that the weaker party is always the same side of the contract facilities *a priori* determination of weaker party but it must be reviewed in the light of the policyholder's duty to inform. Calculating premiums and determining the scope of insurer's risk liability depend on the policyholder's knowledge.[23] This is a good example of changing power balance between parties in different stages of the contract.[24] Shifting the power of information is not the result of the protection of weaker party but the *sui generis* characteristic of insurance contracts.[25] There are two different tendencies about the party that should be protected. This contradiction makes modern insurance codes incoherent.[26] In a classical insurance law approach, the insurer should be protected against an unjust enrichment by means of insurance.[27] This approach keens on policyholder's knowledge and shows the information asymmetry against insurers,[28] thus the insurer can be accepted to be the weaker party.[29] In a consumer law approach, the insurer is the professional party in the contract. Therefore, he/she has to be diligent on determining risks and acquiring the relevant information about it. Thus, the insurer's obligation to inform involves the obligation to give advice to the policyholder.[30] If the policyholder breaches the pre-contractual duty to disclosure, the contract will still be valid. When the risk occurs, there is a possibility that the insurer shall pay the cover proportionally.[31] In this scenario, the insurer lacks legal protection, except the policyholder's fraud.[32] These different characters of the insurance contract law complicate *a priori* determination of a weaker party.

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[22] (PEICL 1:103, para. 3)
[23] Heiss (n 1) 351
[24] Ibid, 351.
[25] Haydar Arseven, *Sigorta Hukuku: Ana Prensipler, Genel Hükümler* (2nd edn, Beta Yayınları 1991) 127, Yetiş Şamlı (n 2) 2980.
[26] Herman Cousy, 'About Sanctions and the Hybrid Nature of Modern Insurance Contract Law' (2012) 5 Erasmus L Rev 123, Heiss (n 1) 347.
[27] It depends on the transfer of risk form party that has information of risk to the party that know anything about the risk. Wansink/Frenk (n 9) 97, Cousy (n 26) 124.
[28] Ibid 131.
[29] Before the contract policyholder should disclose all relevant information about risk without expecting positive action from insurer. For instance, TCC md. 1435 demands that policyholder should consider important information that must be given even if it's not in questionnaire. About questionnaire method and own-initiative method; Olavi-Juri Luik, 'Do the Principles of European Insurance Contract Law Go Too Far in Protecting the Policyholder' (2011) 18 Juridica Int'l 7, 74, Heiss (n 1) 352. In Turkish law, it is criticized that questionnaire method is not accepted at the first place when one peruses the liability of breach of obligation to inform. Ünan (n 8) 424-425.
[30] Insurer must take positive actions. For instance, according to VVG art. 6-7, PEICL art. 2: 203 (warning about the commencement of cover) For further information; Heiss (n 1) 351-352, Wansink/ Frenk (n 9) 98-99. In Turkish law; Ünan (n 8) 227, Aral Eldeleklioğlu (n 3) 389.
[31] (PEICL art. 2:102 para. 5)
[32] Wansink/ Frenk (n 9) 101, Heiss (n 1) 347, Ünan (n 8) 405.

The complexity of determining weaker party arises in the requirement of 'utmost good faith'. According to the classical insurance law, policyholder and insured must have utmost good faith to ensure the insurers' legal protection.[33] On the contrary of insurers' extreme protection in English Law,[34] Consumer Insurance (Disclosure and Representation) Act 2012 and Insurance Act 2015 are two different codes on the subject of the protection of the weaker party. The latter still requires utmost good faith in non-consumer insurance contracts.[35] In the Turkish Court of Cassation's decisions, the principle of reciprocal good faith is established.[36] According to one of them,[37] the insurer's obligation to inform involves the scope of guarantee as well as the situations that are out of coverage and that the policyholder's duty to inform includes true and full information and notifying the insurer of the occurrence of insured risk. These bilateral obligations come from the principle of reciprocal good faith. In another decision[38] the court has ruled that parties shall have reciprocal good faith in all stages of contract. Accordingly, both of the parties shall behave on behalf of the counter-party's interest and take all precautionary measures.[39] The prudent insurer has to analyze the risk correctly and make investigations precisely while the policy is formed. On the other hand, the risk having occurred four times in six years, the policyholder has a duty to be prudent and take precautionary measures.

Another example of this complexity is 'moral hazard'. The policyholder's precontractual duty to inform involves crucial elements of moral hazard such as the policyholder's damages in previous contracts, concurrent or denied insurance applications.[40] These are relevant to the insurer's decision to conclude the contract with the agreed content.[41] Insurers have to be protected against the risk of the policyholder's unrealistic, unlawful claims. The policyholder should avoid deliberate conducts that could give rise to the risk.[42] The degree

[33] Angelo Borselli, 'Cognosceat Emptor: On the Insurer's Duty to Inform the Prospective Policyholder in Europe' (2012) Ins L Rev 55, Heiss (n 1) 351.
[34] For instance Horne v. Poland (1922). In this ancient and extra-protective decision, the court said that changing name is an information which is crucial for insurer because policyholder may be not as diligent as British people. Heiss (n 1) 345.
[35] Ünan (n 8) 406.
[36] In 1959, insurers' good faith was a requirement of obligation to inform in an insurance law code. Also, insurance contract depends on reciprocal confidence and good faith between parties according to Turkish scholars. Yetiş Şamlı (n 2) 2981, Omağ (n 12) 26.
[37] 11th Civil Chamber of the Court of Cassation, Case no. 2016/ 14860, Decision no. 2017/649 Date 14.02.2017
[38] 17th Civil Chamber of the Court of Cassation Case no. 2018/442, Decision no. 2018/ 8109, Date 24.09.2018
[39] In the case, covered risk was fire and natural force in a factory. Court said that insurer must be prudent, thus he must look around factory, as well as policyholder, who must take precautionary measures and must be aware that he is the one who should protect his own merchandises.
[40] Cousy (n 26) 126, Ünan (n 8) 451.
[41] VVG art. 19
[42] Cousy (n 26) 127, Ünan (n 8) 414-415.

of the policyholder's fault is usually hard to detect. Hence determining the weaker party at first sight is usually hard for insurance contracts.

In conclusion, semi-mandatory provisions that protect the weaker party are extensive in TCC. However, in order to equilibrate the economic balance of the contract, bringing a set of rules according to the characteristics of the contract will be more effective than strict, *a priori* determined rules in terms of protecting weaker party.[43] Thus, referring the policyholder, who has no professional or commercial objectives in a contract, as the weaker party is questionable. It will be contrary to insurance contracts' characteristics and obstruct the protection of the professionals, who have no deep knowledge about insurance, in a free market. In my opinion, large risks should be the criteria for the distinction between policyholders who need legal protection and those do not. It provides protection against dangers that may threat the insurer's economic future. Large risks should be outside the scope of semi-mandatory provisions.[44] As an exception of semi-mandatory provisions, this criterion has several conditions. One of them is the existence of a specific risk[45] and an economic fact that could jeopardize the insurer's economic future related to the occurrence of risk. Another condition is the policyholder's financial power that could complicate the protection of the weaker party in the contract.[46] We are of the opinion that the freedom of contract will be preserved correctly when large risk becomes a legal concept in Turkish law.

[43] Fernando Gomez/Mireia Artigot, Private Autonomy, Weak Parties and Private Law: Views from Law and Economics' in Vogenauer S, Weatherhill S. (eds), *General Principles of Law European and Comparative Perspectives* (Hart Publishing 2007) 307, 323-324, Atasoy (n 7) 276.
[44] Heiss (n 1) 348, Rokas (n 2) 41.
[45] Certain types of insurance, for instance railway rolling stock, aircraft, ships, goods in transit, aircraft liability, credit or suretyship insurance.
[46] Ünan, 197.

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THE INCREASING CARGO THEFT PROBLEM: AN ANALYSIS OF CARGO CRIMES AND COMMENTS FROM THE PERSPECTIVE OF INSURANCE LAW WITH LOSS PREVENTION METHODS

Dr. Metin Uğur AYTEKİN*

1. Introduction

Cargo crimes are increasingly threatening the society as they interrupt the international cargo transportation activity which affect the global economies and society adversely due to the costs and loss caused by cargo crimes. These ultimately affect the insurance industry and consumers are the ones who bear the increase in overall prices of the goods.

There are different modes of transport for the cargo transfers which are mainly road, rail, air and sea. Each of these modalities have vulnerabilities to cargo crimes and they are mostly affiliated with different types of cargo crimes depending on their characteristics. Main cargo crimes could be committed in the form of direct thefts, burglaries, hijacks and piracy, fictitious thefts as well as cyber fraud.[1]

2. Trends and Statistical Information

Based on the data of 2020, there has been an overwhelming increase in the targeting of cargo trucks for theft in comparison to all other modes of transport and the food and beverage industry has been the most frequent victim of theft incidents.[2] Especially in Europe, in the previous years lack of secure parking areas was the major factor rendering the cargo trucks vulnerable to cargo crimes.[3] However, with the global pandemic conditions in 2020 (especially in the first three quarters of 2020) there was an increasing number of theft incidents from warehouse locations[4].

These trends include new threats in relation to the distribution of the COVID-19 vaccine, congestion at ports and warehouses due to the continual rise in e-commerce and storage

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[1] Safety4Sea, *Trends and Countermeasures of a Billion-Dollar Problem* <https://safety4sea.com/cm-cargo-theft-trends-and-countermeasures-of-a-billion-dollar-problem/> accessed 30 May 2021

[2] BSI and TT Club Cargo Theft Report 2021 <https://www.ttclub.com/-/media/files/tt-club/bsi-tt-club-cargo-theft-report/2021-02-23---bsi-and-tt-club-cargo-theft-report-2021.pdf> accessed 30 May 2021 (Cargo Theft Report 2021)

[3] BSI & TT Club Cargo Theft Report 2020, <https://www.ttclub.com/-/media/files/tt-club/bsi-tt-club-cargo-theft-report/bsi-and-tt-club-cargo-theft-report-2020.pdf> accessed 30 May 2021 (Cargo Theft Report 2020)

[4] Cargo Theft Report 2021 (n 2)

constraints, and the emerging after-effects of the COVID-19 outbreak will increase the opportunities for cargo crime to occur.[5]

3. Some Characteristics of Cargo Crime Incidents

In recent years weekends have remained to be the times when a higher rate of theft has taken place compared to the weekdays as more shipments have been left unattended on weekends. Increasing use of electronic trading platforms is also a factor that takes part more and more in the methods that cause recent cargo theft incidents. Another important characteristic of the recent cargo theft incidents is the COVID-19 pandemic which left the thieves with more opportunities as the shipments of expensive pharmaceuticals and medical supplies increased.[6]

4. Gap Analysis

There are some deficiencies that cause the cargo crimes to increase and make them more difficult to handle. Below, such deficiencies will be elaborated upon.

4.1. Physical Deficiencies

As the quality of warehousing does not meet the needs, secure parking for trucks is insufficient in some cargo transfer areas. Also, there is active banditry in some areas and intermediate storage facilities are not protected well. These physical issues cause vulnerability towards cargo theft.[7] The lack of secure parking for cargo trucks is one of the main reasons in Europe that causes such vulnerability for cargo theft incidents.[8]

4.2. Legal Identification Problem

In some "fictitious pickups", law enforcement is unlikely to get involved, viewing it as a civil matter since the cargo is handed over to the carrier willingly. In terms of "hostage loads" where a driver holds a load while demanding payment, it sometimes stems from a business dispute and the criminal law enforcement does not intervene into the dispute since it is not deemed to be within the scope of criminal law.[9]

4.3. Lack of Feasibility Assessment in Enacting Laws

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[5] ibid
[6] ibid
[7] *Cargo Theft* <https://www.zurich.co.nz/brokers/tools-and-insights/marine-insights/insights-and-articles/cargo-theft.html> accessed 30 May 2021 (Zurich Cargo Theft)
[8] BSI & TT Club Cargo Theft Annual Report 2018 <https://www.bsigroup.com/globalassets/localfiles/en-us/screen-reports/2019/bsi-scs-tt-club-cargo-theft-annual-report-2018.pdf> accessed 30 May 2021 (Cargo Theft Report 2018)
[9] James Menzies, "COVID-19 Affecting Cargo Theft Trends" (Today's Trucking, 12 November 2020) <https://www.truckinginfo.com/10130288/covid-19-affecting-cargo-theft-trends> accessed 30 May 2021

Heavy regulations are potential reasons to exacerbate the vulnerabilities that the physical deficiencies cause. Enacting laws despite the lack of sufficient feasibility assessment brings rules that force compulsory break or regulations for maximum driving hours for truck drivers and mandates them to park in unsecure locations especially in Europe and North America.[10]

4.4. Technological Disruption

Technological developments cause deficiencies since criminals with technological expertise exploit online freight exchange websites to access information and the ease of access and user-friendliness of cargo tracking facilities represents a new potential security threat to shippers for products with high market demand. Moreover, due to the expansion of online selling platforms disposing of stolen goods is easier.[11]

4.5. Legal Vacuum against Piracy and Robbery

Especially in the shipping industry, there are still "lawless" areas at sea which create a convenience for piracy and robbery and prevent effective law enforcement. It is quite difficult to take a perpetrator in custody in African waters and try them in a court. Because, most of the time there are barriers to bring the perpetrators before the law enforcement in the country on whose waters the piracy has taken place. Bringing such criminals to European courts is also not an effective solution since often European law does not allow sufficient time for the custody process from capturing the perpetrator and bringing them in front of a court of a European country.[12]

5. Bridging the Gap: Loss Prevention

Bearing in mind the abovementioned deficiencies that cause a gap in handling cargo crimes, certain methods could be presented to bridge the gap for loss prevention purposes. Below such methods shall be examined.

5.1. Logistics

Increasing secure parking places is a must and it is evident that using known logistics providers in international carriage of goods serves the purpose. [13] Besides, shippers,

[10] Cargo Theft Report 2021 (n 2)
[11] Zurich Cargo Theft (n 7)
[12] Antonio Maria Costa "Piracy Must be Defeated in Courts, Ports and Banks, not Just at Sea" <https://www.unodc.org/unodc/en/frontpage/what-to-do-about-piracy-.html> accessed 30 May 2021
[13] Zurich Cargo Theft (n 7)

logistics/transportation companies need to conduct due diligence when selecting their agents and staff.[14]

Checking the carriage routes in advance and identifying alternatives, installing tracking devices on the carriage equipment or vehicles and having a plan to prevent or minimize loss are important[15] measures.

5.2. Information Management

Law enforcement must be improved through transnational coordination and cooperation between countries both in global and regional concepts. Also, digital transformation is required as within ten years across every element of the insurance value chain the work is projected to be less labor intensive while digital advances in claim handling will be seen.[16] Such a digital advancement is expected to provide more accuracy and efficiency in claims handling.

5.3. Reverse Mentoring

Most of the time the best source of information is the "people" who participate in the operation of a carriage. Management is the principal body that is responsible of making decisions in a company, but the observations, experience, and feedback of the people in the field are very important and deserve to be heard[17] as well.

5.4. Cyber Risk Management

With the digitalization, cyber security gained importance in terms of seaworthiness of a ship and there are certain industry standards introduced recently regarding "cyber risk management".[18]

Methodology and approach in cyber risk management must be shaped to identify threats and vulnerabilities, assess risk exposure, develop protection and detection measures, establish response plans, respond to and recover from incidents.

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[14] International Union of Marine Insurance, *Cargo Theft Prevention Position Paper* <https://iumi.com/opinions/position-papers> accessed 29 May 2021

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[16] Alexander Erk and others, "Insurance Productivity 2030: Reimagining the Insurer for the Future" (McKinsey & Company, 8 October 2020) <https://www.mckinsey.com/industries/financial-services/our-insights/insurance-productivity-2030-reimagining-the-insurer-for-the-future> accessed 28 May 2021

[17] *IMO Guidelines On Maritime Cyber Risk Management* (IMO, 5 July 2017) <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/MSC-FAL.1-Circ.3%20-%20Guidelines%20On%20Maritime%20Cyber%20Risk%20Management%20(Secretariat).pdf> accessed 28 May 2021

[18] ibid

5.5. Marine Cargo Insurance Policies

Marine cargo insurance policies that include cover for theft and protect the goods until the arrival at the destination wherein a seller's contingency/seller's interest clause exists for the specific carriage must be promoted. In fact, all risks of loss and damage is only covered under the Institute Cargo Clauses A except for certain exclusions as stated under its relevant clauses while Institute Cargo Clauses B and C do not cover the risks regarding pirates, thieves and non-delivery.[19]

6. Conclusion

Introducing risk management measures would help manage the risks related with the global cargo movement in different modalities. Such measures must be employed to facilitate the safe and secure flow of goods within the global supply chain and increase the safety of people working in the transport sector with the ultimate goal of efficiency of the insurance industry. Any deficiency in the supply chain and insurance will impact the pricing of the goods. Therefore, loss prevention's success is a must for the benefit of the consumers.

[19] For further information see Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017) 189-191.

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A STAND-ALONE INSURANCE PRODUCT FOR RESCUE OPERATIONS?

Dr. Sinem OĞİŞ [*]

1. Introduction: Application of delay insurance for rescue operations

Critiques have echoed over the years within the political spectrum about the governance of immigration. For instance, in 2019, the Dutch-flagged Sea-Watch 3 has been stuck in the Mediterranean.[1] 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.[2] In such cases, when the shipmaster deviates from the route for search and rescue (SAR) operations, the shipowner needs to bear some costs which insurers do not provide coverage for. In legal theory, the shipowner could be freed from the coverage by having an insurance. However, currently there is currently no such insurance that is applicable for such cases.

At first stage of this work, the author was analysing the application of political risk insurance for rescue operations. Political risk insurance (PRI) covers: "(i) political risk activities similar to that of the public insurers, such as coverage for investments in developing countries against expropriation, political violence, and such other risks; and (ii) developing country non-payment insurance covering contract frustration and default by governments."[3]

As it can be seen PRI is given to the investors and financial institutions which possibly incur financial loss due to political incidents, therefore, the insured person, who is the shipowner in this case, does not fall under this category. Thus, it is concluded under this article that such losses can fall better under the delay insurance coverage.

To illustrate this finding, an example could be given where the ship X deviates from its route for a SAR operation. In this case, such cost could be covered by delay insurance, unless it is covered by the government where the nearest and safest port is located. By doing so, the shipowner who had experienced a large financial loss, due to delay and cost of SAR, could

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[1] https://www.thelocal.it/20190628/italy-allows-two-migrants-off-the-sea-watch-3/ (last accessed on 29.03.2021).

[2] https://www.theguardian.com/world/2019/jul/05/captain-who-rescued-42-migrants-id-do-it-again-despite-jail-threat (last accessed on 29.03.2021).

[3] *Miga* 55.

protect himself against many of the said risks. Providing this insurance allows also shipmaster's ability to operate smoothly for the rescue operations.

In fact, currently some P&I companies provide delay insurance cover to protect revenue stream from the costs of vessel delay beyond control. Generally, many different risk triggers onshore and onboard and shipowners, operators or anyone with an interest in a vessel who are looking to protect their business from the financial consequences of delay, takes out such an insurance. Even though, at first it might seem as such insurance coverage already exists and can be applicable for SAR, there is no such P&I coverage to cover all the losses that might incur. Especially when the vessel deviates from its route for a rescue operation, damage might happen to the vessel is not covered by P&I or the P&I clubs do not generally provide cover for lost hire or freight that could arise from such deviation. On the other hand, the hull and machinery (H&M) policies, also provide for physical loss or damage insurance for the hull and its propulsion of the ship. However, the coverage of such insurance for rescue operations would be limited as well. Therefore, the cover should be a specialised, stand-alone product not linked to P&I, H&M, or any other policy and responds to a comprehensive list of insured perils that might result during the rescue operations. In fact, no comprehensive framework for handling immigration at sea has been developed so far.

The cover for the net expenses can be incurred as a direct consequence of the deviation to rescue and disembark the immigrants. The incurred costs can be related to the period of time up to which the ship returns to the position no less favourable than the situation where the deviation had not occurred. For example, for the case of stowaways, certain P&I clubs have a coverage for the net loss to the members in respect of fuel, insurance, wages, stores and provisions incurred for such purpose. A similar approach could be adopted for the stand-alone insurance product for rescue operations.

2. Obligation to Render Assistance at Sea

Shipmaster has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is in fact also a longstanding tradition and is essential to preserve the integrity of maritime.[4] This duty to render assistance at sea has been regulated under many international treaties.

a. The International Code of Safety for High-Speed Craft (HSC Code)

[4] See *Coppens; Somers* 378.

The provisions of the HSC are considered to be generally declaratory of established principles of international law and they cover rules relating to the duty to render assistance on the high seas.

b. The United Nations Convention on the Law of the Sea (UNCLOS)

Article 98 of the UNCLOS refers to the duty to render assistance at sea and establishes the requirement for the States to proceed with the rescue operations for the persons that are in distress.[5]

c. The International Convention for the Safety of Life at Sea (SOLAS)

Likewise, under SOLAS, Chapter V, Regulation 33 it states that the master is bound to proceed with all speed to the assistance of persons or ships in distress.[6]

d. The International Convention on Maritime Search and Rescue (SAR)

SAR Convention, obliges State parties to ensure that assistance be provided to any person in distress at sea and also provide for their initial medical or other needs, and deliver them to a place of safety.

e. The International Convention on Salvage (ICS)

ICS similarly obliges masters to render assistance (life salvage) to any person in danger of being lost at sea, unless doing so would seriously endanger the ship or persons thereon.[7]

3. Why is such insurance needed?

If one assumes that a ship is proceeding from port A to C, but has to deviate to unscheduled port B to rescue and save life at sea, shipowner will incur unexpected port costs and other expenses compared to the original intended voyage.[8] Some costs indeed might be covered by the P&I. The P&I would cover the net additional running costs for the time spent travelling

[5] "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose."

[6] In such situations, deviation is permitted and insurers cover will not necessarily be prejudiced and may even allow the member to recover the expenses associated with such deviation. Recoverable expenses cover for deviation will only usually include the net expenses incurred during or directly resulting from such deviation. These usually include: bunkers; stores and provisions; wages; additional insurance; agency fees; local pilot and transportation costs; and port charges. However, the cover provided does not extend to lost hire or freight.

[7] The terms of the ICS are incorporated into English law through the Merchant Shipping Act 1995, which makes a master's failure to render such assistance a criminal offence.

[8] See the case of Tampa in *Bailliet* 742.

from point A to B, as well as from point B to C. While the P&I will cover these additional running costs, it will not pay for any loss of profit or loss of income incurred if, for example, the ship is placed off hire.

In conclusion, providing a detailed coverage under the delay insurance but as a stand-alone product is needed. Even though, the analysis above is covering mainly the merchant vessel, such scheme may also be applicable for the NGO vessels as the incapacity of developing an answer to migration matters is putting the immigrants most fundamental human rights -mainly the right to life- at risk.

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EFFECT OF FRAUD IN THE CONCLUSION OF THE INSURANCE CONTRACT

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The parties to an insurance contract depend to a large extent on the information provided by their contract partner. Due to the importance of the accuracy of the information provided by each party, Turkish Commercial Code ("TCC")[1] contains specific provisions regarding the parties' pre-contractual duties of information. However, intentional breach of a pre-contractual duty of information by one of the parties may also fulfil the conditions of fraud under the Turkish Code of Obligations ("TCO").[2] In case a life event fulfils the conditions of application of different norms, we are faced with the problem of concurrence of norms.[3] The question is then to determine, through interpretation of the relevant norms,[4] whether these norms will be applied alternatively, at the choice of the injured party, or one of them will override the other to be applied exclusively.[5]

As far as the intentional breach of the pre-contractual duty of information by the policyholder is concerned[6], when we apply the grammatical method of interpretation[7], we observe that the TCC does not contain any indications as to whether the rules regarding insurance contract are

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[1] Turkish Commercial Code n 6102, Official Gazette 14 February 2011 n 27846.

[2] Turkish Code of Obligations n 6098, Official Gazette 4 Februrary 2011 n 27836.

[3] Ernst A Kramer, *Juristische Methodenlehre* (6. Edition, Stämpfli Verlag AG 2019) 125; Yves Mauchle, 'Normenkonkurrenzen im Obligationenrecht – zugleich ein Beitrag zum Verhältnis von Irrtumsanfechtung und Sachmängelhaftung' (2012) Aktuelle juristische Praxis 933, 934.

[4] The four classical canons of legal interpretation are grammatical, historical, systematic and teleological methods of interpretation; Heinrich Honsell and Theo Mayer-Maly, *Rechtswissenschaft: Die Grundlagen des Rechts* (7. Edition, Stämpfli Verlag AG 2017) 124-126; Kramer (n 3) 66ff; Susan Emmenegger and Axel Tschentscher, 'Einleitung, Art. 1-9 ZGB, Art. 1 / IV. Auslegung' in Heinz Hausheer, Hans Peter Walter (eds), *BK - Berner Kommentar Band/Nr. I/1* (Stämpfli Verlag AG 2012) 222-223. For the application of the classical methods of interpretation to the Swiss insurance law, see Andrea Patricia Stäubli, *Die Regelung über die vorvertragliche Anzeigepflicht des Versicherungsnehmers nach Art. 4 ff. VVG und ihr Verhältnis zum allgemeinen Zivilrecht* (Versicherung in Wissenschaft und Praxis Band 13, Dike Verlag 2019) 332ff.

[5] For information on comparative law regarding the policyholder's pre-contractual duty of information, see Kees Engel and Marc Hendrikse, 'Pre-Contractual Fraud in Insurance Contract Law' (2014) 6 European Journal of Commercial Contract Law 33, 38.

[6] For general information on the relevant provisions of the TCC, see Samim Ünan, *Türk Ticaret Kanunu Şerhi Altıncı Kitap: Sigorta Hukuku Cilt I Genel Hükümler* (On İki Levha 2016) 402ff; Emine Yazıcıoğlu and Zehra Şeker Öğüz, *Sigorta Hukuku* (On İki Levha 2019) 129ff; Kemal Şenocak, 'Sorumluluk Sigortalarında Sözleşme Öncesi İhbar Külfeti', in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları, Sorumluluk Sigortaları Sempozyumu 1–2 Aralık 2017 İstanbul / Sigorta Hukukunda Güncel Sorunlar Sempozyumu 2–3 Şubat 2018 Bursa* (On İki Levha 2018) 181ff; Zehra Şeker Öğüz, 'Sözleşme Öncesi İhbar Görevi', in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları, Sorumluluk Sigortaları Sempozyumu 1–2 Aralık 2017 İstanbul / Sigorta Hukukunda Güncel Sorunlar Sempozyumu 2–3 Şubat 2018 Bursa* (On İki Levha 2018) 155ff; Aslıhan Erbaş Açıkel, 'Sigorta Ettirenin Sözleşme Öncesi Beyan Yükümlülüğünün İhlali Halinde Sigortacının Sahip Olduğu Haklarla İlgili Bazı Sorunlar', (2019) 35 Banka ve Ticaret Hukuku Dergisi 131, 133ff.

[7] On this method, see Honsell and Mayer-Maly (n 4) 124; Kramer (n 3) 67ff.

of exclusive application or not. Article 1451 of the TCC, requiring the application of the provisions of the TCO to the insurance contracts in the absence of applicable provisions under the TCC is drafted in a too general way to provide a solution for the problem at hand. In application of the historical method of interpretation,[8] we detect that the former TCC used to contain a provision clarifying the applicability of the provisions of the TCO regarding fraud in the marine insurance contracts[9], but this provision was abolished by the new code.[10] However, since this provision was abolished together with all the provisions on marine insurance contracts under the former TCC,[11] abolishment of the reference to fraud does not give us any indications as to the intention of the lawmaker regarding the applicability of the TCO in the field of fraud. In application of the systematic method of interpretation,[12] the question is whether the rules specific to insurance contracts regarding intentional breach constitute *lex specialis* with regards to the regulation of fraud under the TCO, enabling the potential application of the maxim *lex specialis derogat legi generali*.[13] This position can be adopted only if it can be said that an intentional breach under the TCC also always constitutes a fraud under the TCO.[14] As for the wrongful act and the element of causation, the conditions of an intentional breach of pre-contractual duty seem identical to the conditions of the TCO regarding fraud.[15] However, whether the concept of "intention" under the TCO is also necessarily a "fraud" under the TCO, requiring not only knowingly withholding information, but also doing so with the intention to deceive the contract partner,[16] is open to interpretation.[17] Even in case we admit that the

[8] Honsell and Mayer-Maly (n 4) 125-126; Kramer (n 3) 135ff.
[9] For the grounds of the law, see <https://www.lexpera.com.tr/>, accessed 25 May 2021.
[10] The former Article 1370 was inspired by the § 22 of the German Law on Insurance Contract (*Versicherungsvertragsgesetz*); for the application of this provision in German law, see Christoph Müller-Frank, 'VVG § 22' in Theo Langheid and Manfred Wandt (eds), *Münchener Kommentar zum Versicherungsvertragsgesetz: VVG Band 1: §§ 1-99* (2. Edition, C.H.Beck 2016). While the provision was in force, some scholars argued that the fact that the Turkish lawmaker made this reference only for marine insurance contracts was not a conscient choice and the rule was applicable to the other types of insurance as well; see Mehmet Somer, 'Türk Ticaret Kanunu'nun Düzenlemesi Karşısında Sigorta Sözleşmesinin Kuruluşunda Hile Hükümlerinin Uygulanabilirliği', *Prof. Dr. Nuri Çelik'in Anısına Armağan* (Beta 2001) 757-759.
[11] See para 214 of the general grounds of the law (n 9).
[12] Honsell and Mayer-Maly (n 4) 124-125; Kramer (n 3) 99ff.
[13] This maxim aims at the resolution of the contradictions of the law system and therefore relates to the systematic method of interpretation, Honsell and Mayer-Maly (n 4) 124; Kramer (n 3) 125. For the historical evolution of the maxim, see Jean-Louis Halperin, 'Lex Posterior Derogat Priori, Lex Specialis Derogat Generali Jalons pour une Histoire des Conflicts de Normes Centree sur ces Deux Solutions Concurrentes' (2012) 80 Tijdschrift voor Rechtsgeschiedenis 353.
[14] For the concept of *lex specialis* and its difference from the case of intersecting norms, see Kramer (n 3) 126ff; Mauchle (n 3) 936; Tahir Çağa, 'Özel Hüküm Genel Hükmü Daima Bertaraf Eder mi?', (1991) 3 Türkiye Barolar Birliği Dergisi 366, 369-370; for different points of view on the subject, see Stäubli (n 4) 246ff.
[15] See, however, Erbaş Açıkel (n 6) 160-161, arguing that the element of causation is not identical.
[16] Zekeriya Kurşat, *Borçlar Hukuku Alanında Hile Kavramı* (Kazancı 2003) 25-26.
[17] See Erbaş Açıkel (n 6) 159-160, arguing that an intentional breach is not always fraudulent and therefore, the element of intention in the insurance-specific rules does not overlap with the concept of fraud.

concepts of intention and fraud are identical and thus, conclude that the TCC's regulation is indeed *lex specialis* with regards to TCO, the application of the maxim *lex specialis derogat lex generali* is not automatic[18] and must be confirmed by a teleological interpretation. In this regard, based on the fact that the special norm aims at the protection of the insurer and the insurance market,[19] it can be argued that the objective of the special norm can be better served if the insurer is given the option to alternatively rely on the provisions of the TCO regarding fraud, because in this case there will be a stronger incentive for the policyholder to fulfil their duties honestly.[20] One may eventually object that the TCO's rules also aim at the protection of the policyholder, as expressed by the grounds of the law, which states that some of the rules regarding the policyholder's breach of duty were drafted with a "social purpose". However, whether such social logic and the need to protect the weaker party also apply to fraudulent policyholders is open to interpretation,[21] especially in consideration of the fact that the insurance contract is famously based on utmost good faith. In addition, the TCC targets mainly the protection of the respective economic interests of the parties, whereas the right to avoid the contract for fraud under the TCO focuses on the freedom of will and the relationship of trust between the parties. The fact that the interests protected by the rules regarding insurance contracts and by the provisions regarding fraud are not the same also shows that the insurance-specific rules do not replace the provisions regarding fraud. It must be added that, exclusive application of a special norm can still be justified in cases where the special norm is less advantageous for the right holder, in order not to endanger its application.[22] However, a comparison between the respective conditions and consequences of the provisions of the TCC and those of TCO does not enable one to come to this conclusion. Applicability of the provisions regarding fraud does not endanger the application of the insurance-specific rules under TCC, it only increases the options of the insurer.

[18] Kramer (n 3) 127; Mauchle (n 3) 940; Çağa (n 14) 373; Erbaş Açıkel (n 6) 156. For the concept of teleological interpretation, see Honsell and Mayer-Maly (n 4) 125-126; Kramer (n 3) 171ff.

[19] The information given by the policyholder enables the insurer to calculate the premium, to determine the exclusions and the duties of the policyholder, Ünan (n 6) 407-408; Somer (n 10) 746; it also ensures the stability of insurance market, Stäubli (n 4) 340.

[20] See Stäubli (n 4) 341, defending this position in Swiss law.

[21] See Somer (n 10) 758, arguing that the fraudulent policyholder shall not be under the protection of the rules regarding the insurance contract; see also Stäubli (n 4) 346, defending the same argument in the context of historical interpretation of Swiss insurance law. The author claims that although the historical evolution of the Swiss law reveals the will of the lawmaker to soften the effects that the non-disclosure of information may have on the policyholder, fraudulent policyholder is not worthy of such protection and thus, the evolution of law cannot be interpreted in their favor.

[22] Kramer (n 3) 128; Mauchle (n 3) 939-940, 945; Stäubli (n 4) 254-255. For detailed explanations on this subject, see Stäubli (n 4) 337-340.

As far as the intentional breach of pre-contractual duty of information by the insurer is concerned,[23] core rules can be found in the TCC (Article 1423) and the Regulation on the Duty of Information in Insurance Contracts.[24] The lawmaker does not regulate the case of "intentional" breach in a specific way, and states that in case of breach, the policyholder is entitled to "object" to the contract,[25] terminate the contract *ex nunc* and request compensation of damages if the insurer was at fault. These rights do not necessarily put the policyholder in the position where they would be if they could avoid the contract retroactively based on fraud, which demonstrates the interest of relying on the provisions of the TCO.

In case the conditions of the rules regarding insurance contracts and those of fraud are simultaneously fulfilled, once again, we are faced with the problem of concurrence of norms. This time the relevant norms shall be interpreted with an aim to detect the scope of the policyholder's rights.[26] In the absence of any reference to the provisions of TCO regarding fraud, grammatical interpretation of the insurance-specific rules does not give us any result. As for the historical method of interpretation, it must be noted that the provision of the current TCC regarding the insurer's pre-contractual duty of information did not exist under the former code. The scholars argue that the objective of the lawmaker while introducing this new provision was to provide a better protection to the policyholder.[27] The grounds of the law confirm this interpretation by stating that the provision codifies the insurer's already existing duty of information, arising from the principle of good faith and thereby secures the policyholder' protection. As a result, it can be argued that a provision which pretends to secure the position of the policyholder cannot be interpreted as restricting the rights that the policyholder could use in the absence of this provision by relying merely on the principle of good faith, including the right to avoid the contract for fraudulent behavior. In application of the systematic method of interpretation, we can observe that the rules regarding the insurer's duty of information do not make any references to intentional breach and do not provide special consequences for such degree of fault. Consequently, the insurance-specific rules necessarily

[23] For general information, see Ünan (n 6) 186ff; Yazıcıoğlu and Şeker Öğüz (n 6) 103ff; Emine Yazıcıoğlu, 'Sigortacının Bilgilendirme (Aydınlatma) Yükümlülüğü', in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları, Sorumluluk Sigortaları Sempozyumu 1–2 Aralık 2017 İstanbul / Sigorta Hukukunda Güncel Sorunlar Sempozyumu 2–3 Şubat 2018 Bursa* (On İki Levha 2018) 391ff; Kübra Yetiş Şamlı, '*Sigortacının Aydınlatma Yükümlülüğünü Düzenleyen TTK m. 1423 Hükmüne İlişkin Bazı Değerlendirmeler', (2016) 22/3* Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 2977, 2978ff.
[24] Official Gazette 14 February 2020 n 31039.
[25] On different views on the meaning of the term "objection" used by the lawmaker, see Yetiş Şamlı (n 23) 2992ff.
[26] See Ünan (n 6) 216, arguing that as long as the insurance-specific rule does not rely on the intention to set aside the application of general rules, alternative application must be admitted.
[27] Yetiş Şamlı (n 23) 2999.

differ from the provisions on fraud with regards to the element of fault. Since a life event which fulfils the conditions of the rules regarding insurance contracts does not necessarily fulfil the conditions of the TCO regarding fraud, the insurance-specific regulation does not constitute *lex specialis*. Under the teleological method of interpretation, we can make similar observations to those we made for the policyholder's duties. By enabling the policyholder to rely alternatively on the provisions of the TCO regarding fraud, the law system can create a stronger pressure on the insurer to fulfil their duties properly. In addition, in this configuration, extension of the options of the injured party is all the more important that the injured party is the policyholder, normally the weaker party in the contract. As a result, the objectives of the pre-contractual duty of information can be better achieved if the policyholder is given the option to invoke the fraud of the insurer.[28]

In conclusion, the interpretation of the relevant norms demonstrates that the current insurance-specific rules regarding the parties' pre-contractual duties of information do not override the provisions regarding fraud, which remain applicable. However, the best solution to this issue would be to address the impact of fraud in the conclusion of the insurance contracts with more elaborate and truly special norms, based on the cost-benefit considerations specific to this kind of relationship.[29]

[28] Although the Turkish doctrine rarely mentions the question of the insurer's fraud, see Somer (n 10) 760, arguing that there is no reason to set aside the application of the TCO's provisions regarding fraud in case the insurer fraudulently breaches their pre-contractual duty of information.

[29] See Engel and Hendrikse (n 5) 38, for a similar position regarding the policyholder's pre-contractual duty of information.

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PRECAUTIONARY LAW: AN INNOVATIVE APPROACH TOWARDS PRE-DAMAGE RESPONSIBILITY IN PUBLIC INTERNATIONAL LAW

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The precautionary approach has been preferred by people as a way of thinking and behaving that develops civilization. This method, which has a deep background and strong grounds, was accepted as a principle (*Vorsorgeprinzip*) within the scope of the first environmental program of the Federal Government of Germany in September 1971 in the normative sense.[1] The concept was introduced into English literature in 1988 by Konrad von Moltke as the "precautionary principle".[2] In Bergen Conference on Sustainable Development, the basic mechanism has been expressed as follows: Being roughly justified promptly, bearing in mind the consequences of being too wrong; is better than perfect righteousness when it's too late.

The question of how to apply the precautionary principle or the approach has created differences between Continental Europe, United States, and Great Britain. Even if the relation of prohibited activities within the scope of regulation with significant damages is uncertain, it is a problem that the judicial supremacy is concerned with whether the activity is prohibited under the legislation.[3] In the 19th century in both Great Britain and the United States, this problem in health and safety has emerged with the nuisance/police dilemma.[4] The nuisance-based approach developed in Great Britain, which prioritized judicial supremacy, envisaged a system in which the judicial authorities would have the last word in environmental and public health risks.[5] It also proposes a dispute-based system for the domestic legal regime. On the other hand, the police approach suggested a system that prioritized the regulatory decisions of administrative authorities.[6] While the regulation approach prohibits the violation of certain

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[1] Helmut Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field* (Wissenschaftszentrum Berlin für Sozialforschung, 1995) 5.

[2] Sonja Boehmer Christiansen, 'Chapter 2: The Precautionary Principle in Germany: Enabling Government' in Tim O'Riordan, Cameron, James (eds) *Interpreting the Precautionary Principle* (Earthscan Publications Ltd, 1994) 31.

[3] Noga Morag-Levine, 'The History of Precaution' (2014) 62 The American Journal of Comperative Law 1095, 1099.

[4] Ibid.

[5] Ibid.

[6] Ibid.

norms independently of damage and creates a serious cost, proof of damage poses a problem in terms of the judicial-oriented approach.

Our study focuses on eliminating the disadvantages of judicial and regulatory approaches in the field of public international law. The precautionary principle is expressed in Article 15 of the Rio Declaration as taking effective measures in case of scientific uncertainty. In the context of its relevance to the subject, the damage condition was not expressed in the 2001 Draft Articles for the International Responsibilities of the States. Accordingly, the responsibility requires the state to violate an international obligation and that this violation is attributable to the state. Thus, there is a theoretical possibility of the pre-damage responsibility of states. Various classifications of states' responsibility have been discussed in the doctrine. One of these classifications is between *jus cogens* violation of the imperative rules of international law and other violations. However, when a state violates a rule, it rationally falls under the responsibility of *restitutio in intergrum* or compensation. *Jus cogens* attaches special importance to certain particular violations and stipulates a *penalty* mechanism for states to enforce these violations. We cannot reconcile this classification with the foundation and history of international law. This study proposes a distinction towards a pre-damage / post-damage responsibility regime because we can objectively determine whether responsibility is before or after damage. Here, the pre-damage responsibility regime is named as *precautionary law*, indicating a systematic procedure from the wishful thinking axis of the precautionary principle that has the feature of soft law.

The Mox Plant Case

The necessity of establishing a pre-damage responsibility regime stems from the ineffective implementation of the precautionary principle. The Mox Plant Case is a prominent example of this necessity. The facility authorized by the United Kingdom to build in the city of Sellafield leaves its nuclear waste to the Irish Sea, one of the marginal seas separated from the Atlantic Ocean. Although the MOX (mixed-oxide) fuel produced by this facility, 112 miles from the Irish coast, reduces the need for natural uranium in nuclear power plants, high amounts of nuclear waste arise when separating plutonium from spent fuel rods. Ireland has drawn attention to the density of tourism, population and the region, which covers the entire fishing area.[7] According to the STOA (Scientific and Technological Options Assessment) Report submitted to the European Parliament in August 2001, the Irish Sea is the most radioactively

[7] Request for provisional measures and statement of case submitted on behalf of Ireland (9 November 2001) 5.

polluted.[8] The report also stated that there is a *danger* –not damage- far beyond the release in Chernobyl.[9] It has also been argued that a necessary and sufficient environmental impact assessment was not carried out in the authorization process.[10] The International Tribunal for the Law of the Sea decided that it had jurisdiction over the requests for provisional measures in 2001. Its judgment was to exchange information, monitor its risks and effects, and increase cooperation.[11] The plant is entirely expected to be decommissioned by 2120.[12] This case shows that we need to reconsider our nuisance-based approach to environmental risks. For this reason, it is necessary to theorize the problems.

Risk Attribution

Our judgment sample is that a state has a request for measures, although there is no proven damage. However, it seems unreasonable and unlikely to suspend billions of Euro worth investments due to unproven damage. Considering that "attribution" is the key to the responsibility of states, the issue we address here is that there is no attributable *environmental* damage while there is a risk of environmental damage. At this point, the study proposes the term *risk attribution* for the pre-damage responsibility of states. Risk is the variation in the possible outcomes that exist over a specified period in a given situation.[13] On the other hand, uncertainty is the doubt a person has concerning his or her ability to predict which of many possible outcomes will occur. Unlike probability and risk, uncertainty cannot be measured by any commonly accepted yardstick.[14] While the chaotic character of nature is called scientific *uncertainty* in the natural sciences which cannot be determined beforehand, insurance law has *insurable risk* standards. The method in natural sciences is the refutations of conjectures. Certain conjectures about the external world are produced, and they must be tested by observations consistently. Observations that refute the conjectures require to put forward new conjectures because in this way the assumption will need to be updated and scientific doubt will always be preserved as it should. Although this method produces the most reliable norms, it never claims to fully grasp the truth. How can we characterize this legally, specifically in

[8] Ibid 10.
[9] Ibid 11.
[10] Ibid 19-23.
[11] MOX Plant Case, Ireland v United Kingdom, Order, Request for Provisional Measures, ITLOS Case No 10, ICGJ 343 (ITLOS 2001), 3rd December 2001, International Tribunal for the Law of the Sea [ITLOS] 89.
[12] Harry Cockburn, "Sellafield nuclear decommissioning work 'significantly' delayed and nearly £1bn over budget, report reveals" (The Independent, 31.10.2018) <https://www.independent.co.uk/climate-change/news/sellafield-nuclear-power-plant-decommission-overspend-delays-budget-report-a8609671.html> Access: 28.05.2021.
[13] Arthur Williams and Richard M. Heins, *Risk Management and Insurance* (McGraw-Hill Book Company 1989) 10.
[14] Ibid 11.

insurance law? More clearly, is it possible to accept this uncertainty as an insurable risk? Earthquake insurance is the most prominent answer to this question. Although there are various parameters and models to manage the earthquake risk, this is a pure scientific uncertainty. Here, risk and premiums are calculated with a certain limit. Thus, overcoming the scientific uncertainty becomes possible with the certainty of assurance, to be priced, and to calculate the premium. This approach could have been also applied to the MOX case by an *insurance provision*, that we propose as a new type of decision.

Insurance Provision

An insurance provision means ordering the respondent state to be a party to an insurance contract when there is a proven, *attributed*, and unexpected environmental *risk* in the absence of damage. This is a nuisance-based approach that can be both an alternative and complementary to strict precautionary regulations and compulsory insurances. Although this proposal is towards the precautionary approach in general, this study frames the public international law field. In public international law, states cannot litigate each other in national courts because of state immunity. An international court can judge states only if the consents of the parties to the dispute exist.[15] Insurance provision is a specific procedural method for a competent international court.

Provisional measure type decisions are regulated in Article 41 of the ICJ Statute and Article 290 of UNCLOS. General features of this type of decision are followed also in arbitration. Proposed insurance provision is not a provisional measure since the proposed type decision cannot be made without going into the merits of the case.

Steps

Proposed insurance provision is a constructive provision in terms of procedural law because it constitutes an insurance contract. Therefore, the status of the courts will need to be amended in order to be able to make this decision, which offers a more effective pre-damage protection for the environment by considering the today-future cost balance. After this amendment, international courts will be able to determine the existence and attribution of the risk, i.e. the link between the data that may cause harm and the action of the respondent state. After the risk attribution, the court will determine the security deposit according to the possible

[15] See International Court of Justice, 'Basis of the Court's Jurisdiction' <https://www.icj-cij.org/en/basis-of-jurisdiction> Access: 30.05.2021.

damage character. While making these decisions, judges should receive support from experts.[16] International courts will issue invitations for a tender for the premiums and future updates to the contract and take the opinion of the defendant. Eventually, an "insurance provision" with the best bidder will be established.[17] The type of insurance is environmental *damage insurance*[18] and the environment is a beneficiary as a legal person[19] in this contract. This proposal aims to present an interdisciplinary *de lege feranda* perspective in the fields of natural sciences, the precautionary principle, and insurance law.

[16] Dutch insurers moved to environmental damage insurance because they wanted to exclude the uncertainties connected to the involvement of the judge. See Michael Faure and Albert Verheij, *Shifts in Compensation for Environmental Damage* (Springer 2007) 95. To preserve this advantage of damage insurance, a special *normative* effect of expert reports that provide consistent parameters should be established for the insurance provision.

[17] Blockchain-based peer to peer insurance model could also be used. See. The National Association of Insurance Commissioners 'Peer-to-Peer (P2P) Insurance' (NAIC, 14 October 2021) <https://content.naic.org/cipr_topics/topic_peertopeer_p2p_insurance.htm> Access: 30.05.2021

[18] The environmental damage insurance introduced by the Dutch insurers is a completely voluntary system, without any public intervention. See Faure and Verheij (n 16) 95. This study proposes a different and innovative interpretation of damage insurance. On the other hand, principally the trigger for compensation under that kind of policy is no longer tort law, but the insurance policy as it has been concluded between the insured and the insurance company. Since this study has a different taxonomy that distinct risk attribution and damage attribution, risk attribution leads international courts to constitute insurance policy, and damage should arise from the risk categories that are attributed to the respondent state and that are clearly defined in the insurance policy.

[19] Although it is a field of public international law, the main parties to environmental risks and damages are not two states. It is our planet and the civilization that we established as humankind. In this respect, the environment should be given a legal personality. See Erin L. O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) Ecology and Society 7.

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BANKS' DUTY OF GOOD FAITH AS INSURANCE INTERMEDIARIES: AN ANALYSIS WITH REGARD TO THE CONCEPT OF UNFAIR COMPETITION

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Generally speaking, insurance distribution channels can be listed as agencies, brokers, banks or direct sales. Among these, the bank-led distribution channel is also known as 'Bancassurance'.[1] Bancassurance applications have developed rapidly all over the world including Turkey.[2] To begin with the legal framework of bancassurance in Turkish Law, firstly the absence of a definition specifying banks providing insurance services should be pointed out. Turkish Insurance Act[3], however, regulates bancassurance within the scope of other insurance intermediaries. Article 2 of the Insurance Act defines insurance intermediaries as insurance agents and brokers.[4] Additionally, Article 23 regulates the insurance agent in a way that considers banks as an insurance distribution channel. Banking Law, also, specifies the services of insurance agency and individual private pension intermediary within the banks' field of activity.[5] Banks, therefore, play a role as actors in Turkish insurance sector.[6] This paper will study unfair competitive practices of banks, which 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 which act as insurance intermediaries are, indeed, based on the said Article 32. The study will, therefore, constitute both theoretical and practical contribution through evaluating this issue from legislative and adjudicative aspects.

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[1] Muharrem Umut, 'The Role of Banks as a Marketing Tool of Insurers: Bancassurance' (2020) 16 The International Journal of Economic and Social Research 115, 116; Necla Tunay, 'Türkiye'de Bankasürans Uygulamaları ve Türk Banka ve Sigorta Sektörlerine Dinamik Etkileri' (2014) 8 BDDK Bankacılık ve Finansal Piyasalar 35, 38.

[2] Erim Saka, 'Türkiye'de Sigortacılık Faaliyetleri ve Bankasürans' (2017) 1 Bankacılık ve Sermaye Piyasa Araştırmaları Dergisi 33, 35.

[3] Insurance Act n 5684, Official Gazette 03 June 2007 n 26552.

[4] Article 2: (1) For the purposes of this Act,
…(b) "Intermediary" shall mean insurance agent and broker…"

[5] Article 4 (1) (u) of Banking Law n 5411, Official Gazette 1 November 2005 n 25983.

[6] Umut (n 1) 121; Tuna (n 1) 59.

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/she wishes. The freedom of trade is, however, subject to its limitations as any other right. The second element relates to such limitations. Actors, who conduct activities pursuant to the freedom of trade, are required to carry on their businesses in accordance with the fundamental rules and necessities of the social life. Actors who take 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 ensuring the competition by preventing wrongful business practices that economically harm consumers or business entities.

All competitors shall ensure the duty of good faith and fair dealing as well as 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 generally by the provisions of Turkish Commercial Code[7] and other legislative rules,[8] which are directly or indirectly related to economic field. Some of those provisions are explicitly associated with unfair competition. Some of them, however, may only be applied if an appropriate interpretation can be made so that they can be associated with unfair competition rules. Insurance Act contains special provisions governing any unfair competition related behavior of the banks acting as insurance intermediaries. According to Article 32[9] that regulates good faith, banks shall act in good faith

[7] Turkish Commercial Code numbered 6102 sets forth unfair competition between Articles 54-63. (Turkish Commercial Code n 6102, Official Gazette 14 February 2011 n 27846).

[8] Such as Turkish Code of Obligations numbered 6098 and Industrial Property Code numbered 6769. (Turkish Code of Obligations n 6098, Official Gazette 4 Februrary 2011 n 27836 and Industrial Property Law n 6769, Official Gazette 10 January 2017 n 29944.)

[9] "Article 32: (1) Insurance companies and intermediaries shall not design their brochures, explanatory notices, other documents and their advertisements and commercials in a way that results in an understanding outside the limits and scope of the rights and benefits which they shall provide to the insured, and shall not make statements that are unreal, misleading, deceiving or that give rise to unfair competition. Where violation of this provision is ascertained, the matter shall be referred to the Advertising Board that acts upon the Law on Consumer Protection.
…
(3) Insurance companies shall not delay the payment of insurance claims in violation of the rules of goodwill.
(4) The Undersecretariat is authorized to take all the measures in order to ensure that insurance companies, reinsurance companies, intermediaries and loss adjusters comply with the above-mentioned rules.
(5) Rights of persons to choose an insurance company shall not be restricted. In contracts, where one of the parties is obliged to buy insurance, any provision requiring the conclusion of the insurance contract with a certain company shall be void."

and refrain from unfair competition while carrying out insurance activities, as is the case for all other activities. Article 32 regulates the relationship 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 of Article 32 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.[10] 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 that breaches the covenant of good faith. The last paragraph prohibits restricting the right to choose the insurance company. Accordingly, any provision imposing consumers an obligation to conclude an insurance contract with a certain insurance company shall be void.

Second paragraph of Article 32[11] also bears significance. The regulation underlines three sub-factors for the insurance companies with regards to good faith obligations:

1) Refraining from endangering the rights and benefits of the insured,

2) Acting in accordance with law and business plans,

3) Behaving in compliance with the principle of good faith.

Firstly, one should note that each three sub-factors involve vagueness. For instance, which acts would endanger the "benefits of the insured" as mentioned under the first sub-factor is not clear. Those concepts need to be evaluated based on the facts of each case. Similarly, the meaning of "non-compliance with good faith" is vague as well. Business judgment rule in Article 18 of Turkish Commercial Code may be taken into consideration in this context.

Secondly, it should be emphasized that the penalty for the violation of the 3 sub-factors is not regulated under the second paragraph of Article 32 itself. However, there are other provisions

[10] Murat, Aydoğdu, '6502 Tüketicinin Korunması Hakkında Kanun'un Getirdiği Yeniliklere Genel Bakış, Sözleşmeye Aykırılık, Ayıplı İfa Kavramlarına Getirdiği Farklı Yaklaşım ve Bu Konudaki Önerilerimiz' (2013) 15 DEUHFD 1, 18.

[11] "Insurance companies, reinsurance companies, intermediaries and loss adjusters are obliged to refrain from acts which may endanger the rights and benefits of the insured, to act in accordance with the legislation and principles of the business plan, and to behave in compliance with the requirements of insurance and the principle of good faith."

that stipulate penalties. Article 35 paragraph 27,[12] indeed, foresees judicial penalty for the violation of good faith principle under the said Article 32 paragraph 2. Accordingly, the judicial penalty in this case will not be less than 300 days. Violation of Article 32 paragraph 2 has been considered as a behavior requiring a judicial penalty. Therefore, such behavior is envisaged as a criminal actIt can be categorized as an economic crime by its nature.[13] A bank breaching this rule while acting as an insurance intermediary will also be subject to this judicial fine. Article 34[14] has additional administrative penalties for the acts that constitute unfair competition within aforementioned Article 32 paragraph 5. Indeed, the Treasury and Finance Ministry Directorate General of Insurance, has recently fined top Turkish banks two hundred and eighty-two million Turkish Liras for the violation of Article 32. Insurance brokerage activity of such banks was also suspended for 15 days.

It shall also be noted that the Law on Consumer Protection has overlapping provisions; namely Article 29, for consumer loans and Article 38, for housing finance.[15] Pursuant to these regulations, the creditor cannot issue an insurance for a loan without the explicit request of the consumer. The creditor is, also, obliged to accept any insurance company that the consumer prefers. The insurance should also comply with the subject matter, remaining debt and the term of the loan. Consumer Loan Agreement Regulation has also a similar provision.[16] Therefore, it

[12] "Judicial Penalties
Article 35:…(27) Those who violate the paragraph two of Article 32 of this Act and who delay the payment of claims in violation of the principles of good faith referred to in the third paragraph of Article 32 shall be punished with a judicial fine not less than 300 days."

[13] For further information see: Edwin Sutherland, *White Collar Crime* (Holt Rinehart and Winston INC, 1949); Fatih Selami Mahmutoğlu, *Ekonomik Suçlar Bağlamında Kredi Hukukundan Kaynaklanan Suç ve İdari Suçlar* (Seçkin Yayınevi, 2003) 38; Şehnaz Şensoy Cin, 'Ekonomik Suç Kavramı ve Ekonomik Suçların Kriminolojik Özellikleri' *Çetin Özek Armağanı* (Galatasaray Üniversitesi Yayınları, 2004), 840.

[14] "Administrative Penalties
Article 34:…(2) The following administrative fines shall apply:
Twenty thousand Turkish Liras for failure to comply with the measures taken in accordance with the fourth paragraph of Article 32, and to act in accordance with the provision of the fifth paragraph…"

[15] The Law on Consumer Protection numbered 6502 (Official Gazette 07 November 2013 n 28835), Articles 29 (1) & 38 (1): "Insurance regarding a loan shall not be issued without explicit request of the consumer either in writing or through a durable data storage device. If the consumer wants to have insurance issued, the creditor shall be obliged to accept the guarantee provided by the insurance company that the consumer prefers. This insurance should comply with the subject matter of the loan, the debt amount remaining in the fixed sum insurance and its term."

[16] Consumer Loan Agreement Regulation, Official Gazette 22 May 2015 n 29363.
"Article 26: (1) Insurance regarding a loan shall not be issued without explicit request of the consumer either in writing or through a durable data storage device. If the consumer wants to have insurance issued, the creditor shall be obliged to accept the guarantee provided by the insurance company that the consumer prefers. This insurance should comply with the subject matter of the loan, the debt amount remaining in the fixed sum insurance and its term. Amount of the insurance policy coverage cannot exceed the debt amount remaining in the fixed sum insurance. Insurance term also cannot exceed the loan period.
(2) The insurance agreement shall terminate in the events that the loan is paid off before it is due or an alteration of the debt structure in fixed sum insurances made regarding a loan. However, the policy may continue or amended in accordance with the alteration of the debt structure in terms of the current insurance policy amount and insurance

should be emphasized that the consumer protection regulations are parallel to the regulations under Article 32 paragraph 5 of the Insurance Act.

In the event of Articles 27 and 38 are violated, Article 77 further stipulates an administrative fine for each unlawful action.[17] Moreover, Article 77/A indicates an interesting conciliation mechanism between the Ministry and the ones who is charged with those administrative fines.[18] Conciliation in this article differs from the conciliation envisaged under the Turkish Criminal Law.[19] Other sub-paragraphs of Article 77/A govern the procedures of the conciliation. To summarise, we can conclude that there is a *sui generis* set of regulations and penal provisions about insurance contracts.

All in all, banks play an important role in insurance activities. Bancassurance's improving effect on both banking and insurance sectors proves a win-win situation for both of these sectors. However, there is a consumer or business-related dimension besides these two sectors. This study reaches an evaluation including all these actors within the frame of unfair competition. General regulations of unfair competition are regulated under Turkish Commercial Law. Unfair competition provisions that are special for the bancassurance activities apply to the activities of the banks . Article 32 of the Insurance Act is a special unfair competition regulation in this context. Above-mentioned provisions of Consumer Protection Law are also applicable. When all these regulations are evaluated within the concept of unfair competition, the whole system resembles a legal labyrinth. This study shall, therefore, propose that the concept of unfair competition shall specifically be regulated in this context rather than as a part of Turkish Commercial Code.[20] Indeed, for the market maker actors like banks, provisions regarding the unfair competition should be drafted by taking their special operational features into consideration. This, however, shall not amount to a disregard for the consumers. In fact, consumers are among the crucial actors of a free market economy. Therefore, enacting a

period on the conditions that the consumer is individually informed and an explicit approval from the consumer is obtained."

[17] "Penal Provisions
Article 77: …(3) An administrative fine of 2.282 TL Turkish Liras shall be imposed for each unlawful action or contract detected, for those violating the liabilities set forth in Articles 24, 25, 27, 28, 29, 34, 36, 37, 38, 39, 41, 43, 45, 46,and paragraphs one, two, and four of article 31, paragraph two of article 40, paragraphs three, four, five, seven of article 47, the fourth, fifth, sixth, seventh, ninth and eleventh paragraphs of Article 50 of this Law."

[18] "Article 77/A: (1) The Ministry and the person who is charged with administrative fee in accordance with this Article can refer to conciliation in the events that the violations ascertained allegedly result from misconception or misinterpretation of law or court decisions and administration have conflicting views over the matter in dispute."

[19] Turkish Criminal Code n 5237, Official Gazette 26 September 2004 n 25611.

[20] Hamdi Pınar, 'Reklam ve Satış Yöntemlerine İlişkin Haksız Rekabet Halleri' (2012), 6102 Sayılı Yeni Türk Ticaret Kanunu'nu Beklerken Sempozyumu (Legal Yayınları, 2012) 129, 154.

comprehensive regulation on unfair competition in the market for the maintenance of good faith would sharpen the boundaries and preclude contradictory practices and decisions.

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WARRANTY & INDEMNITY INSURANCE IN MERGERS AND ACQUISITIONS TRANSACTION

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Warranty and indemnity insurance (also known as "representation and warranty insurance";[1] hereinafter referred to as the "**W&I Insurance**") is basically an insurance policy that provides coverage for financial losses resulting from breaches of representation and warranty promises[2] made by the seller in an acquisition agreement concluded within the scope of a mergers and acquisitions ("**M&A**") transaction.[3] The W&I Insurance has its roots in the Anglo-American market, and is becoming a phenomenon in the European market as well.[4] It can be used in any M&A transaction, either in the form of a share deal or an asset deal.[5]

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[1] See eg Sean J. Griffith, 'Deal Insurance: Representation & Warranty Insurance in M&A Contracting' (2020) 104 Minnesota Law Review 1839, 1842.

[2] At their simplest forms, representations and warranties are promises exchanged by the contractual parties. More specifically, in Anglo-American common law, where representations and warranties stem from because of the foundational principle of "caveat emptor", a warranty is defined as a contractual promise or undertaking that a fact is true, whereas a representation is a statement of fact which is relied on by the receiving party and induces her to enter into the contract. See John Kitching and John Young, 'Why Do You Need Warranties and Indemnities?' (1995) 6(10) I.C.C.L.R. 336, 336-37. As a result, if a warranty is not true, the receiving party has a claim for breach of contract but if a false representation has been made, the other party may then claim *misrepresentation* which is a tort action and may result in rescission of the contract. See Robert Thompson (ed), *Sinclair on Warranties and Indemnities on Share and Asset Sales* (11th edn, Sweet & Maxwell 2020) para 3-01 ff. Having said that, courts are inclined to award damages in the event of misrepresentation as well. Nevertheless, even if the buyer gets recovery in any case for her damages, the measure of damages differs depending on the cause of action. Accordingly, in the case of a claim in contract (ie breach of a warranty), damages are measured by the amount of money that would put the buyer in the same position as if the seller had performed the contract (expectancy interest), whereas in the case of a claim in tort (ie misrepresentation), the aim is to put the buyer into a position they would have been in has the agreement never been made (reliance interest). See Karim & Anor v Wemyss [2016] EWCA Civ 27 para 23. See also Sycamore Bidco Ltd v (1) Sean Breslin (2) Andrew Dawson [2012] EWHC 343 (Ch) para 201. On the other hand, in Turkish legal system as well in some other continental European legal systems, including Germany and Switzerland, the term 'representation' and the term 'warranty' have similar meanings and lead to same remedies unless otherwise is agreed in the acquisition agreement. Yet, in practice both terms are being used as in Anglo-American law system, rather than using only representation or warranty or any other term for the same purposes.

[3] Klaus Grossmann and Ulrike Mönnich, 'Warranty & Indemnity Insurance: Die Versicherbarkeit von Garantierisiken aus Unternehmenskaufverträgen' [2003] NZG 708, 709; Murad M. Daghles and Thyl N. Haßler, 'Warranty & Indemnity-Versicherungen im Rahmen von Unternehmenstransaktionen' [2016] GWR 455, 455; Urs Schenker, 'Versicherung von Gewährleistungsrisiken' in Rudolf Tschäni (ed), *Mergers & Acquisitions XIX* (Europa Institut Zürich Band/Nr. 179, Schulthess Juristische Medien AG 2017) 248; Griffith (n 1) 1842.

[4] As regards the history of the W&I Insurance see Griffith (n 1) 1863-64.

[5] Daghles and Haßler (n 3) 455. As regards the underwriting process see George-Peter Kränzlin, Sabine Otte and Burkhard Fassbach, 'Warranty & Indemnity-Versicherungen im Rahmen von Unternehmenstransaktionen' [2013] BB 2314, 2317; Klaus Marinus Hoenig and Sebastian Klingen, 'Die W&I-Versicherung beim Unternehmenskauf' [2016] NZG 1244, 1248; Schenker (n 3) 271 ff.

Despite this type of insurance is relatively new not only in the Turkish market but also in others, it has already become widespread in European markets and in the United States. Estimates suggest that in the United States, the W&I Insurance was used in more than 50% of private acquisitions last year,[6] and in the European market, it was purchased in nearly 50% of large deals in the years of 2019 and 2020.[7] Hence, the trend is expected to rise in the Turkish market as well.

I. Typical Motivations of the Parties

Motivations of the parties in purchasing a W&I Insurance policy may differ in each transaction depending on the specifics of each deal. In general, W&I Insurance can bridge the gap between the buyer and the seller when they disagree with the level and scope of the representations and warranties in an acquisition agreement.[8] 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 contract negotiations in any M&A deal.[9] Sellers prefer a clean exit by immediately pocketing the full purchase price and without responsibility for unknown contingent liabilities. On the other hand, buyers want to ensure that the target is worth the purchase price they 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 the 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.[10]

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[6] See CMS European M&A Study (2021) 13th edn 13.

[7] See CMS European M&A Study (2020) 12th edn 53; CMS European M&A Study (2021) 13th edn 53. See also Max Hyatt, 'Warranty and Indemnity Insurance: Proliferation of Moral Hazard or Legitimate Risk Mitigation Tool' (2017) 51 USF L Rev 127, 127.

[8] Griffith (n 1) 1865-66.

[9] Rudolf Tschäni, Hans-Jakob Diem and Matthias Wolf, *M&A-Transaktionen nach Schweizer Recht*, 2nd edn (Schulthess Juristische Medien AG 2013) 166, para 29. Information asymmetry is the biggest challenge between the parties in any M&A transaction, except for the management buy-outs where the buyer as the manager of the target company possesses the relevant information necessary to value the shares or assets on sale. For a correct valuation, the buyer needs to know various information on the operations, revenues, assets, and liabilities of the target. Sellers, who presently own and operate the target, have access to such information. The contractual solution to this problem centers on the representations and warranties. By representing and warranting on the target's operations, revenues, assets, liabilities as well as all other areas that are critical for the target's business, the seller assumes the risk associated with all those matters. In other words, representations and warranties serve to allocate the risk between the buyer and the seller. For this reason, clauses related to the representations and warranties are in most cases heavily negotiated between the transacting parties. See Hyatt (n 7) 129; Griffith (n 1) 1848-49.

[10] Hoenig and Klingen (n 5) 1245; Hyatt (n 7) 133; Schenker (n 3) 248. See also Florian Metz, 'Grundzüge der W&I-Insurance beim Unternehmenskauf' [2010] NJW 813, 813-14.

Additionally, W&I Insurance policy shifts the transactional risk to an insurer, meaning that the seller is no longer financially liable, and the buyer has a financially strong opposing party for the claims in connection with representation and warranty breaches.[11] Therefore, it also eliminates the need for security mechanisms that the buyer would normally prefer. As such, in the absence of an insurance, the buyer will negotiate for a traditional security model against claims of representation and warranty breaches. These security models are commonly recognized as escrow mechanism and purchase price retention, where a portion of the purchase price is deposited to an account as a security for the buyer and the seller is not paid the entire purchase price at closing. If, on the other hand, a W&I Insurance policy is in place, the seller receives the entire amount of the purchase price, and the premium is separately paid to the insurer.

Furthermore, there may be instances where it is important for the buyer to retain a good relationship with the seller. This is the case when the seller stays in the company as a key employee post-acquisition, or when a contractual relationship is established between the seller and the target. In these cases, it is useful to go after a third party for any breaches instead of directly applying to the seller, to maintain the good relations.[12]

Last but not least, W&I Insurance can be used in distressed M&A. In these deals, the target has financial difficulties and generally, no or very limited contractual protection is available from the seller. Insurers may issue a policy in such sales even if the underlying acquisition agreement does not provide any protection.[13]

II. Two Policy Types: Buy-Side vs. Sell-Side Policy

W&I Insurance policies can be designated as buy-side or sell-side, while a considerable portion of the policies placed are buy-side.[14] The main difference between the two is the party who will seek recovery from the insurer. In sell-side policies, it is the seller who knocks on the insurer's door when the buyer resorts to the seller for indemnification.[15] In buy-side policies, on the other

[11] Hoenig and Klingen (n 5) 1245; Hyatt (n 7) 129; Griffith (n 1) 1842, 1865.
[12] Hyatt (n 7) 134.
[13] Ibid 135. For additional benefits of the W&I Insurance and reasons for purchasing these policies, see Hoenig and Klingen (n 5) 1245-46; Hyatt (n 7) 133-35. cf. Thomas Grädler, Sven Fritsche and Rain Andrea Beilborn, 'Warranty & Indemnity-Versicherungen bei Unternehmenstransaktionen – Echter Mehrwert oder kurzfristige Modeerscheinung?' [2018] GWR 464, 467.
[14] Daghles and Haßler (n 3) 456; Hyatt (n 7) 129-30; Schenker (n 3) 249, 255; Griffith (n 1) 1866. See also CMS European M&A Study (2021) 13th edn 54.
[15] Grossmann and Mönnich (n 3) 710. Sell-side W&I Insurance policies are designated as a third-party liability insurance policy. See Kränzlin, Otte and Fassbach (n 5) 2315; Daghles and Haßler (n 3) 455.

hand, the buyer directly gets recovery from the insurer without having to pursue the seller.[16] The other critical difference between the policies is that the buy-side generally has additional fraud coverage which sell-side policies do not provide.[17] That is to say, with a buyer policy, if the seller commits fraud (e.g. if the seller has been fraudulent in giving a representation), then the policy would still payout.[18] This is because the buyer is the insured party, and they have neither been fraudulent nor has it fallen foul of the obligation to make full disclosure to the insurer.[19]

III. General Policy Terms

Although there is no standard policy for W&I Insurance, each policy issued contains the following terms:

a. Coverage limit: Policies contain a limit for coverage, which is typically a dollar amount equal to approximately 10% of the purchase price.[20] This means that if the buyer as the insured party incurs losses exceeding that amount, they will not be able to recover the excess from the insurer, and they can get recovery only up to the limit.

b. Retention: Policies further include a deductible amount that is excluded from coverage. It is basically a financial threshold at which the insurer becomes liable under the policy.[21] It is called as the "retention", and typically corresponds to 1% of the purchase price.[22]

c. Policy period: Policy period ranges from 12 months to 7 years depending on the scope of the representation and warranty to be covered under the policy.[23] For general warranties, the term is generally 12 to 36 months, whereas for fundamental ones the term may go up to 7 years.[24] Also, for tax warranties the policy term is often set as the respective statute of limitation, which is 5 years under Turkish law.[25]

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[16] Grossmann and Mönnich (n 3) 710; Kränzlin, Otte and Fassbach (n 5) 2315; Daghles and Haßler (n 3) 455; Hyatt (n 7) 130.
[17] Grossmann and Mönnich (n 3) 710; Kränzlin, Otte and Fassbach (n 5) 2315. See also Turkish Commercial Code no 6762 cls 1435, 1439.
[18] Hyatt (n 7) 130; Schenker (n 3) 250. cf. OLG Frankfurt a. M. 26 November 2020, BeckRS 2020, 35848, para 4.
[19] For further information on comparison of sell-side and buy-side insurance policies see Michael Jakobs and Alexander Franz, 'Können W&I-Versicherungen des M&A-Geschäft beleben?' (2014) 16 VersR 659, 662-64.
[20] Griffith (n 1) 1867. Coverage limit may go up to 50% of the enterprise value of the target. See Hoenig and Klingen (n 5) 1247; Grädler, Fritsche and Beilborn (n 13) 464.
[21] Grossmann and Mönnich (n 3) 711; Schenker (n 3) 265.
[22] Kränzlin, Otte and Fassbach (n 5) 2316. Retention amount may decrease to 0.5% of the enterprise value of the target. See Hoenig and Klingen (n 5) 1247.
[23] Hoenig and Klingen (n 5) 1248; Schenker (n 3) 266-67.
[24] Kränzlin, Otte and Fassbach (n 5) 2316. See also Grädler, Fritsche and Beilborn (n 13) 466.
[25] See Tax Procedural Law no 213 cl 114.

d. Premium: The insurer will charge a fee (the "premium") for issuing the policy. This is one-off amount and expressed as a percentage of the limit of coverage purchased. Accordingly, a policy costs around 1% to 2% of the liability limit, commanding up to 3% if the deal is considered risky.[26]

IV. Policy Exclusions

There is no standard policy; it is tailored for each deal considering the specifics. While the policy generally covers all representations and warranties in the underlying acquisition agreement, certain issues are typically excluded from the policy coverage.[27]

First, the policy provides cover only for unexpected and unknown issues that may lead to losses after the acquisition. Risks that are known through seller's disclosures or uncovered during the due diligence process are excluded from coverage.[28] The reasoning behind this approach is that any known risk is expected to be negotiated and priced into the deal by the parties. In addition, revenue projections, forward-looking warranties, and profit milestones are excluded because they depend on various factors, including the buyer's success in managing the target post-acquisition.[29] Collection of receivables related warranties and monetary penalties are also generally not insured.[30] Moreover, there are certain areas of coverage that are difficult to get, such as corruption, union activity, wage and hour violations, environmental pollution, and some tax matters such as transfer pricing taxes.[31] Further, as noted above, in sell-side policies, fraud is excluded.[32] Policies may also contain some deal specific exclusions, for instance industry-specific risks that an insurer has no appetite to cover, like product liability and bodily injury.[33]

V. Legal environment in Turkey

[26] Hoenig and Klingen (n 5) 1248; Hyatt (n 7) 132; Schenker (n 3) 267; Griffith (n 1) 1867. See also Grädler, Fritsche and Beilborn (n 13) 466.
[27] Grossmann and Mönnich (n 3) 711; Hoenig and Klingen (n 5) 1246.
[28] Daghles and Haßler (n 3) 456; Hoenig and Klingen (n 5) 1246; Hyatt (n 7) 130; Schenker (n 3) 250, 253; Griffith (n 1) 1868.
[29] Grossmann and Mönnich (n 3) 711; Kränzlin, Otte and Fassbach (n 5) 2317; Hoenig and Klingen (n 5) 1247; Hyatt (n 7) 130.
[30] Grossmann and Mönnich (n 3) 711; Hoenig and Klingen (n 5) 1247; Schenker (n 3) 260.
[31] Grossmann and Mönnich (n 3) 711; Kränzlin, Otte and Fassbach (n 5) 2317; Hoenig and Klingen (n 5) 1247; Schenker (n 3) 261-62; Grädler, Fritsche and Beilborn (n 13) 465.
[32] For additional exclusions see Hyatt (n 7) 131.
[33] Schenker (n 3) 260; Grädler, Fritsche and Beilborn (n 13) 465.

W&I Insurance is relatively new to the Turkish market, and the number of M&A projects involving the insurance is still quite low.

There are multiple reasons for that. The most prominent one is the lack of regulations. Turkish legislation does not explicitly regulate any legal framework for the instrument, and there is no existing local insurer directly offering W&I Insurance in the Turkish market. Therefore, parties need to obtain the insurance policy from foreign insurance companies. Second, premium amounts are relatively high in Turkey given that there is no competition in the market. As no local insurer issues the policy, there are only few foreign insurers interested in the market, and those insurers tend to request higher premium amounts in Turkey due to instability in the economy and regional security issues. For these reasons, W&I Insurance is not effectively recognized in the country yet, but is expected to gain popularity as many more cross-border deals involving Turkey develop in the market.

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