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Some private international law problems relating to insurance law in Turkish practice

UDC: 368:341.9(560)

Received: 4. 11. 2012

Accepted: 28. 11. 2012

Introductory work

Abstract

Insurance is an international activity. Whenever a foreign element exists, international private law rules apply. It is important to examine the legal rules governing the insurance contract containing a foreign element and the problems that a foreign insurer may face in another country. The study below deals with the basic international private law issues that may appear with regards to insurance in Turkey with special focus on the law applicable, jurisdiction, legal or contractual subrogation of foreign insurers seeking recovery in Turkey, direct action against the foreign liability insurer and reinsurance.

Key Words: Insurance, International Private Law, Law and Jurisdiction, legal or contractual subrogation, exequatur

1. INTRODUCTION

Insurance contract creates a relationship that must be placed within the private law context. Sometimes this contract contains a so-called "foreign element." In this case the problem arises to know which national law will govern the contract.

Obviously this is not the only issue of private international law to deal with in the field of insurance. The legal or contractual subrogation of the foreign insurer constitutes also an interesting problem to examine. In some instances a foreign insurance company may seek to recover from a Turkish physical person or legal entity

before Turkish courts. A number of questions arise in connection with this task.

Below we will shortly examine the most frequent international private law questions faced in relation to an insurance contract taking into account the Turkish rules. We will especially focus on the following:

- Choice of the applicable law
- Jurisdiction
- Consumer protection
- Legal or contractual subrogation of the foreign insurer
- Reinsurance
- Direct Action

Turkey has enacted a special Law in 2007 "Law no.5718 on International Private Law and on International Procedural Law" (Turkish IPL Act) where

- the conditions of application of a foreign national law
- the enforcement of foreign judgments or arbitral awards (exequatur) and recognition of foreign judgments or arbitral awards (as final evidence) are regulated. This new law repealed and replaced the previous Turkish Law of 1982.

Turkish IPL Act contains a special provision with regards to the jurisdiction of Turkish courts in disputes relating to insurance contract. The other issues concerning insurance contract however are subject to general rules.

2. THE LAW APPLICABLE TO INSURANCE CONTRACTS

- According to the article 24 of the Turkish IPL Act
- The contractual relationship is governed by the law expressly or implicitly chosen by the parties
 - Partial choice is allowed

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– The choice of law (or the change of the law chosen) can be made anytime.

– The choice of law made after the conclusion of the contract shall have a retroactive effect (to the extent that third parties' rights are not infringed)

– If the parties did not make any choice of law, the national law most closely linked shall apply (the law most closely linked to the insurance contract is normally the law of the place of business of the insurer that has assumed the characteristic performance of the contract).

3. CONSUMER PROTECTION

In most cases one of the parties to the insurance contract is a "consumer" (defined generally as a person not acting for the purposes of his trade and profession). When the insurance contract is at the same time a consumer contract, special rules shall apply (Article 26 Turkish IPL Act):

– The choice of law by the parties is still possible but under the strict condition that the law chosen grants at least the same level of protection as the mandatorily applicable legal provisions of the consumers' habitual residence.

– In the absence of any choice of law, the contract of insurance to which a consumer is a party shall be governed by the law of the habitual residence of the consumer. But additional requirements should also be met:

- The insurance contract must have been entered into in the country where the consumer has its habitual residence upon special invitation sent by the insurer or public announcement and the acts necessary for the conclusion of the contract must have been accomplished by the consumer in that country
- The insurer (or its representative) must have received the command of the consumer in that country

– The contract of insurance to which a consumer is a party shall be subject to the form requirement of the law of the consumer's habitual residence

Debate exists in Turkish law as to know whether the consumer law rules should apply also to insurance contract. There is a widespread opinion that insureds are adequately and sufficiently protected by the insurance legislation and there is no need to refer to consumer law.¹ Where the insurance legislation grants a better-

¹ Turkish Court of Cassation has ruled that the insurance contract is regulated in the Turkish Commercial Code and cannot be regarded as a consumer contract (decision no. E.2000/10251-K.2001/197 of the 11th Civil Chamber, dated 18.1.2001 published in the *Yargıtay Kararları Dergisi* 2001 (6), p.855. This decision

protection the consumer legislation would certainly not apply exclusively. But where the consumer legislation protects the consumer in a broader extent there is no option but to apply those rules.

4. JURISDICTION IN RESPECT OF DISPUTES RELATING TO THE INSURANCE CONTRACT

Debate exists in Turkish Law as to whether the mere choice of foreign jurisdiction creates a foreign element, necessary for the application of the Turkish IPL rules. The dominating conservative approach requires that the contract must include a foreign element other than the choice of the foreign jurisdiction (foreign element should exist with regards to for example the insurer or the policyholder, the place where the risk is situated, the place of performance etc. in insurance contracts).²

Article 46 of the Turkish IPL Act provides that the court of the insurer's principal place of business or the court of the place of the branch or the agent who concluded the insurance contract is situated, shall be competent in disputes arising out of the insurance contract. According to the same provision (second sentence) legal actions against the policyholder, insured or the beneficiary must be started at the court of the domicile or habitual residence of these persons.

Article 46 is mandatory (Article 47 (2) Turkish IPL Act). Therefore the (foreign) jurisdiction clauses inserted in the insurance contract by a Turkish insurer shall not be regarded as valid by the Turkish judge who will

- Examine on the merits the claim made against a Turkish insurer despite the jurisdiction clause, or
- if *exequatur* was demanded for a foreign court decision, reject that request.

concerns the problem to know whether consumer courts are competent in insurance disputes. In our belief the Court of Cassation did not argue in a convincing way. The consumer law is above the insurance law and consumer law rules shall apply also to insurance contracts (see Nomer. (2011) *Devletler Hususi Hukuku – International Private Law*, 19th ed., p. 319; Sirmen, *Türk Kanunlar İhtilafı Hukukunda Zarar Sigortaları Kapsamına Giren Milletlerarası Unsurlu Sigorta Akitlerine Uygulanacak Hukuk – Law Applicable to Indemnity Insurance Contracts of International Character According to Turkish International Private Law Rules – Batider*. 2010 (3), p. 54; contrary view Ekşi. (2012) *Türk ve Avrupa Birliği Hukukunda Yabancı Unsurlu Sigorta Sözleşmelerine Uygulanacak Hukuk – Law Applicable to Insurance Contracts of International Character in Turkish and EU Legislations*, p.18).

² Çelikel/Erdem. (2012) *Milletlerarası Özel Hukuk (International Private Law)* 11th ed., p.561.

5. LEGAL OR CONTRACTUAL SUBROGATION

Turkish law grants the loss insurer a “legal subrogation.” The loss insurer takes the place of the insured (and not the policyholder when the policyholder is a different person) when he has paid the insurance indemnity. The subrogation occurs up to the amount effectively paid. If part of the loss is not compensated by the insurer because of a deductible clause in the policy or any other ground enabling the insurer to reduce the indemnity (for example breach of a duty incumbent on the policyholder/insured) the insured shall have a claim against the third party liable for that part. In such a case (i.e. partial indemnification) the insurer and the insured shall be joint creditors.

In many cases foreign insurers seek recovery based on subrogation from Turkish real persons or legal entities that are allegedly liable for the loss indemnified by those insurers. If the foreign insurer starts legal action in Turkey before a Turkish court Turkish IPL rules will be decisive.

The credit insurer is among the loss insurers benefiting from legal subrogation although controversy may arise. Normally, by way of subrogation, the right to claim indemnity of the insured from the third persons liable for the loss sustained by the insured passes on to the insurer. In case of credit insurance though, there is no indemnity claim but simply a credit that is not paid by the debtor when it falls due.³ However, the situation may be assimilated to the compensation of a loss and the credit insurer who pays (totally or partially) the sums due by a third party may be regarded as subrogated to the rights of the insured. Otherwise the insured would hold in addition to the sum paid by the credit insurer the right to claim from the debtor (if no contractual subrogation occurred). Differently from German law that requires for the legal subrogation “that the insured had a claim for indemnity” (VVG § 86(1)), Turkish law seems to admit as a principle that the insurer would take the place of the insured when it pays the insurance money.⁴

³ The credit insurer pays only (very often partially) the sums due to the insured by its debtor (usually a buyer of goods or services) and not the losses suffered by that non-payment (for example the penalty that the insured had to pay to its own creditor).

⁴ Turkish Commercial Code, Article 1472(1) is not very clear and the first sentence (stating that the insurer would take the place of the insured after payment of the insurance indemnity) does not seem to be in harmony with the second sentence (saying that the insured’s right of claiming indemnity from third persons, if any, would pass onto the insurer). Discussion arises to know whether any claim of the insured is sufficient or not i.e. whether the insured’s claim has to be a claim “for indemnity”. In our belief, the fact that the insured has a claim against third parties for what

The insurer is subrogated to the rights of the insured (regardless whether they are contractual or extra-contractual)

- Ex lege when it indemnifies the policyholder
- By way of a legal transaction (assignment) made in its favour by the policyholder

The legal subrogation of the insurer occurs under certain conditions sometimes not easy to prove. In order to avoid the difficulties to prove that legal subrogation did effectively occur, insurers ask the insureds before payment of the insurance money that their claim (if any) against third parties be assigned. In the practice the insureds don’t oppose to such request and the insurer becomes then subrogated by way of voluntary assignment.

In credit insurances the insurer renders additional services: One of them is “recovery.” To facilitate the recovery service, credit insurance contracts provide often that the insureds (usually a seller or service provider) will have to assign to the credit insurer the sums due to them by their clients even before the insurer pays the insurance money. Thus the credit insurer may acquire those sums before the legal subrogation occurs. The payment of indemnity will be effected by the insurer according to the policy conditions later, after five months have elapsed for example from the maturity date.

Therefore the cases where only the legal subrogation operates are rare.

How a foreign insurer will avail itself of the legal or voluntary subrogation against a Turkish third party? The answer is dependent on the rules about international private law (IPL) in force.

The subrogated foreign insurer can take legal action against the Turkish third party before Turkish Courts or abroad (but in the latter case for the enforcement in Turkey he will have to obtain “*exequatur*.”)

In case of arbitration clause in the contract between the insured and the third party (for example in the carriage contract) the insurer (for example a cargo insurer) will have to start arbitration proceedings. If arbitration takes place abroad, there will be again the need to obtain “*exequatur*” to enforce the arbitral award in Turkey.

5.1 Turkish IPL rule about contracts

The legal subrogation of the insurer is dependent on the insurance contract and whether the conditions for the legal subrogation are fulfilled will be determined in accordance with the rules applicable to that contract.

It had been indemnified by the insured would suffice for the legal subrogation. In other words, the insurer would be subrogated to the rights of the insured had the insured not have any loss upon the third party’s payment.

But sometimes a second contract is also relevant and decisive in some respects: If the third party who caused the death, bodily injury or loss of or damage to property—and against whom recourse action would be taken—is liable in contract (for example a “carrier”), the law governing that contract shall also be taken into account.

With regards to the subrogated foreign credit insurer two contracts are important when determining the applicable laws in respect of his claim against the debtor:

- the contract between the insured and its client (sale or service contract or other contract), and
- the insurance contract

Turkish IPL Act regulates the law applicable to contracts (Article 24) in general but does not contain any special rule of attachment for the insurance contract. Therefore the general rule applicable to all contracts (Turkish IPL Act Article 24) shall apply also to insurance law. When the Turkish IPL Act was drafted, it was suggested that it was too early then to provide a special “status of insurance.” A single article on insurance was thought to be too narrow to regulate all the eventualities that might be encountered in practice.⁵

As stated earlier, the Turkish rule is twofold:

- choice of law, and
- absence of such choice.

If the parties have made a **choice of law**, normally that law shall govern the contract.

If the parties **did not make any choice**, the law applicable to contracts (including the insurance contract) is the law “most closely connected” (i.e. the place of administration of the party who assumed to effect the characteristic performance).

5.2 Choice of law

As a basic preference, the so-called “subjective attachment” principle prevails in respect of contracts in general and insurance contracts in particular: Parties are free to choose the law applicable to their contractual relation. The only requirement is that the contract includes a foreign element.⁶

Is “lex mercatoria” a valid choice of law? According to the prevailing approach the (delocalised) rules elabo-

⁵ Tekinalp, G. (2011) Milletlerarası Özel Hukuk Bağlama Kuralları (International Private Law, Conflict of Law Rules) 11th ed, p. 403–404. We think that this argument is not convincing.

⁶ Tekinalp, G. *Ibidem*, p. 369; Ozdemir-Kocasakal, H. (2010) Sözleşmelere Uygulanacak Hukukun Möhüm.24 Çerçevesinde Tespiti ve Üçüncü Devletin Doğrudan Uygulanan Kuralları – The Determination of the Law Applicable to Contracts in Accordance with Turkish International Private Law Act Article 24 and Overriding Mandatory Rules of a Third Country-MHB, (1–2), p. 33; contrary view: Nomer, p. 307.

rated by international institutions or unions, don’t fall within the scope of the “choice of law.”⁷

Hence references to international instruments (or to international conventions to which Turkey is not a party) will not be regarded as “choice of law” but as “incorporation” and all mandatory Turkish provisions will apply if the applicable law were Turkish material law.⁸

However it is alleged in the literature that in the field of international insurance law (in reinsurance contracts) reference is often made to “customs and traditions of the international insurance practice”, therefore it would be appropriate to accept that the parties concerned may validly agree (as a choice of law) to subject their relationship to that kind of rules. This view seems doubtful.⁹

Whether the choice of a foreign law in the contract would enable the parties to avoid the mandatory rules of the national law otherwise applicable: (violation of “ordre public”)?

The choice of law means that the material law rules of the chosen law would apply. If the parties concerned desire that the conflict of law rules of the chosen law be taken into account, they must explicitly agree on that.

Partial choice is possible as well as the floating choice of law.¹⁰

Late choice is also possible. Parties may agree on the law that will govern their contract after a dispute has arisen (that agreement shall have a retroactive effect, third party rights being reserved)

Turkish law requires that the choice of law be made clearly but recognizes also that a tacit choice is possible, if having regard to the contract or the circumstances, it can be deduced without any doubt. (In that respect Turkish literature mentions as an example *Amin Rasheed Shipping Corp v. Kuwait Insurance Co* in which the law of the country where the central administration of the insurer is located was deemed as tacitly chosen as the governing law in respect of an insurance policy with his standard terms.)¹¹

5.3 Absence of choice law

If the parties did not make any choice of law the contract shall be governed by the law of the country connected most closely to it.

⁷ Nomer, *Ibidem*, p. 307; Tekinalp, G. *Ibidem*, p. 356; contrary view: Sirmen, *Ibidem*, p. 46, footnote 10.

⁸ Ozdemir-Kocasakal, H. *Ibidem*, p. 37.

⁹ Sirmen, *Ibidem*, p. 46, footnote 10.

¹⁰ Nomer, *Ibidem*, p. 314.

¹¹ Sirmen, *Ibidem*, p. 47.

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The law of the country “connected most closely” means the law of the country where is situated

– the habitual residence of the party who assumed the characteristic performance at the conclusion of the contract

– **in respect of contracts concluded for commercial or professional purposes**

- the place of administration of the party who assumed to effect the characteristic performance
- if he has more than one place of administration, the place most closely connected

In insurance contracts “characteristic performance” shall be effected by the insurer.

Therefore insurance contracts shall be governed normally by the law of the insurer’s place of administration. However the risk (the place where the risk is situated) can also constitute a point of attachment in some situations.

Double insurance may create some confusion. (*Before deciding whether double insurance exists, it is necessary to determine the validity of each separate insurance contract. If those contracts are concluded in different countries, their validity may be subject to different laws. After having understood that different contracts are validly formed, it will be question of determining whether double insurance exist. The place of the risk may be a convenient attachment in this case.*)

Regarding the contract between the policyholder (insured) and the third party liable for the death, personal injury or loss of or damage to property the characteristic performance must be determined case by case. With regard to credit insurances, the contract between the insured and its client (usually sale of goods or service contract), the characteristic performance is incumbent on the seller or service provider (on the policyholder / insured).

For the assignment contract the characteristic performance is normally incumbent on the assignor.

5.4 Statute of the contract

5.4.1 *The statute of the contract shall govern matters relating to*

- the conclusion of the contract
- the validity of the contract
- the consequences generated by the contract

5.4.2 *The contract statute shall not govern the following:*

- legal capacity
- form

- representation
- direct action against the insurer in liability insurances

5.5 The law governing (voluntary or legal) subrogation

The determination of the law that will govern the subrogation may create problems.

The Turkish IPL Act does not explicitly regulate the issue.

In the literature solutions are proposed. According to the authors:

– The voluntary assignment (of a debt arisen from a contract) will be subject to the contract status (i.e. the law chosen by the parties and in the absence of such choice the law applicable to the characteristic performance).

– Legal subrogation of the insurer will be subject in principle to the law applicable to the insurance contract. However in respect of the provisions protecting the debtor, the assignability of the debt and the discharge of the debtor the law governing the debt would prevail.

5.6 Legal subrogation

For the legal subrogation of the insurer several conditions must be fulfilled:

- Conditions related to insurance law:
 - the insurer must have indemnified the insured as performance of a valid obligation (“*solvendi causa*”), he must not have paid “*ex gratia*”
 - he is subrogated upon payment and to the extent of payment
- Conditions related to civil law:
 - the insured must have a claim against the person liable for the loss compensated by the insurer

The problem to know

– Whether the conditions related to insurance law are fulfilled must be decided according to the law that governs the insurance contract.

– Whether the conditions related to civil law are fulfilled must be decided according to the law that governs the obligation of indemnity incumbent on the third party liable.

The discharge of the third party liable, the relation between the third party liable and the insurer shall then be governed by the law applicable to the debt generated by the contract between the third party liable and the insured or if liability is in tort, to the law applicable to the tortious behavior.

5.7 Contractual subrogation / voluntary assignment

In respect of the voluntary assignments there are two different relations

- The contract (carriage, sale, service or other) between the insured and the third party liable or the relation generated by the tortuous act perpetrated by this latter person against the insured

- The assignment contract or act between the insured and the insurer (or a third party acting on his own behalf, or on behalf of the insurer or on account of the insurer)

The third party liable is not a party to the second relation. Its situation should not be adversely affected by a transaction made out of its control.

Therefore the law governing the assigned or subrogated claim (i.e. the law governing the contract between the insured and third party liable that gives rise to the contractual liability of the third party liable against the insured or the law applicable to the tort perpetrated by the third party liable against the insured) will determine

- whether the claim is assignable
- the relationship between assignee and the third party liable
- the conditions under which the voluntary assignment or contractual subrogation can be invoked against the third party liable
- whether the third party liable is discharged.¹²

6. FOREIGN JUDGMENTS

Another eventuality to take into account is the enforcement of foreign judgments. If the foreign insurer has obtained abroad a court judgment against the Turkish liable person- that will be the case for example when the contract of carriage or sale of goods or services or other contract between the insured and the liable person) includes a foreign jurisdiction and applicable law clause.

Turkish IPL Act allows the enforcement (as well as the recognition) of foreign judgements under certain conditions -which are in line with established international rules and practice.

According to Turkish IPL Act Article 50, the final judgments rendered by a foreign court can be enforced only upon "exequatur" decision of the competent Turkish court.

6.1 Exequatur

Turkish IPL Article 54 enumerates **the conditions for the exequatur decision:**

- reciprocity (legal or factual) must exist (as to the enforcement of Turkish judgments in the relevant foreign country)

- the decision should not fall within the Turkish courts exclusive competence

- the decision should not be rendered by a foreign court not having any connection with the dispute or with the parties involved (objection of the defendant during proceedings is also required)

- Turkish public order should not be violated manifestly

- Adequate defense should not have been denied to the defendant (defendant should have been duly invited to defend himself before the court, given the right to be represented, sentence should not be given in his absence and the defendant must have objected for the cited grounds before the Turkish court).

- The exequatur decision can be appealed against. Exequatur decisions are enforced as Turkish domestic court decisions. Appeal shall stop the enforcement.

- Turkish IPL Article 58 provides that foreign court judgments are recognized as final judgment or as conclusive evidence (from the moment they are final) if the competent Turkish court determines that they fulfill the conditions for exequatur.

7. FOREIGN ARBITRAL AWARDS

For arbitral awards the system is similar: Final and (according to the law that is applicable) enforceable arbitral awards or arbitral awards that are binding for the concerned parties can be enforced in Turkey upon the "exequatur" decision by the competent Turkish court. The request for exequatur is refused in the following cases:

- if there was no arbitration agreement or clause
- if the arbitral award is against the public order or the moral values

- if the dispute cannot be resolved by way of arbitration (exclusive competence of courts according to Turkish law)

- if a party concerned is not duly represented before the arbitrators or if he did not later manifestly approved the acts done in his absence

- if the party against which exequatur is requested was not duly notified of the appointment of arbitrator(s) or deprived of his right of defense

- if the arbitration agreement or clause is invalid according to the law chosen by the parties or if there is no such choice, to the law of the country where the arbitral award is rendered

¹² Tekinalp, G. *Ibidem*, p. 484-485.

– if the appointment of the arbitrators or the arbitral proceedings are not conform to the agreement of the parties or in the absence of such an agreement to the law of the country where the arbitral award is rendered

– If the arbitral award is about an issue falling outside the scope of arbitration agreement or clause or if the arbitral award exceeds the limits provided by the arbitration agreement or clause (in the latter case the court must refuse the exequatur to the extent that the limits are not respected)

– If the arbitral award is not final or enforceable or binding according to the law applicable or to the law of the country where it is rendered or if the arbitral award is canceled by the competent authority of the country where it was rendered

– The recognition of foreign arbitral awards is subject to the rules about exequatur.

8. OVERRIDING MANDATORY PROVISIONS

Turkish law recognizes the notion of overriding mandatory provisions.

Firstly, Turkish law intervenes to safeguard Turkish State's interest and impedes the application of foreign law. Turkish IPL Act Article 6 states "where a relation is to be governed by a competent foreign law, if the case falls within the scope of an overriding mandatory Turkish provision, the latter shall apply."

Secondly, it intervenes for preventing the application of the competent law in order to safeguard the interests of a third State. According to Article 31 Turkish IPL "While applying the law to which the contractual relation is subject, effect can be given to directly applicable provisions of a third country. The aim, quality, content and consequences of these provisions shall be taken into account when giving effect to and applying them."

An overriding mandatory provision that may concern closely the insurance sector is the rule imposing on the persons residing in Turkey to take out insurance to cover their interest in Turkey from a Turkish insurer (Insurance Control Act, article 15).

Thus if a firm based in Turkey applies to a foreign credit insurer and obtains coverage for eventual unpaid debts of its domestic buyers, the foreign insurer may encounter difficulties later when it takes recourse action against the Turkish debtor. In such case the insurance contract is to be normally governed by the foreign law as well as the legal subrogation. However it is feared that the Turkish Judge refuses to decide in favour of the foreign insurer on the grounds that an overriding mandatory Turkish rule would be otherwise circumvented. In the IPL doctrine, the Article 15 of the Insurance Con-

trol Act is given as a characteristic example of overriding mandatory rule.¹³

In our opinion the cited scenario is unlikely to happen because first Insurance Control Act Article 15 should not apply if there is no domestic cover available; secondly foreign insurers would most probably use a local fronting company.

9. ORDRE PUBLIC

In case the applicable foreign law is manifestly against the Turkish "ordre public" the Turkish Judge would not allow the application of that foreign law. In such situation Turkish law may apply.

10. FORM REQUIREMENT

Legal acts are valid if they comply with the form requirement of the governing law or to the form requirement of the law of the country where they are done (LRA=Locus RegitActum).

11. PRESCRIPTION (OR OTHER TIME LIMITATIONS)

According to Turkish IPL Article 9 the time bar is governed by the material provisions of the national law applicable to the legal act or relationship that gave rise to the claim.

12. CLAIMS CONTROL

Sometimes the foreign insurer uses a local fronting company (for not being in breach of local laws, especially not doing business without obtaining the necessary licenses) but reserves the right to intervene on the basis of a "claims control clause" (which is inserted also into the insurance policy issued by the local fronting company in order to bind the insured).

In the case of a Turkish policyholder who took credit insurance abroad (from a foreign credit insurer) to protect himself against default or bankruptcy of his clients in Turkey, the foreign credit insurer would intervene for example for recovery.

It seems open to discussion whether the foreign credit insurer would by so doing infringe the local rules (insurance business activity without authorization.)¹⁴

¹³ For example Sirmen, *Ibidem*, p. 62; comp. Ekşi, *Ibidem*, p. 43.

¹⁴ It is no question of "production" but if insurance activity is regarded as comprising also the "claims handling", the judiciary may reach such conclusion.

13. REINSURANCE

Reinsurance is insurance too. It can be defined as a liability insurance taken out by the insurer to cover its liabilities arising out of contractual commitments (i.e. from insurance contracts).

However Turkish law does not allow the victims (insured against whom the liability of the insurer is engaged) to sue directly the reinsurer (Turkish Commercial Code, Article 1403(2)).

Turkish legislator did not deem it appropriate to insert a provision in the Turkish Commercial Code to exclude the reinsurance relationship from the application of the provisions regulating the insurance contract, contrary to what the German or the French legislator did. Indeed Article L111-1 of the French Code des Assurances (“...les opérations de réassurance conclues entre assureurs et réassureurs sont exclues de leur champ d’application”) and § 209 of the German VVG (“Die Vorschriften dieses Gesetzes sind auf die Rückversicherung..... nicht anzuwenden”) clearly state that the provisions about the insurance contract are not applicable to reinsurance.

The choice of the Turkish legislator to submit the reinsurance contract to the rules applicable to insurance will give rise to the following consequences:

- Jurisdiction clauses in the reinsurance contracts will not lift the right of the Turkish insurer to sue the reinsurer before the (otherwise) competent Turkish court.

- All the Turkish mandatory provisions aimed at protecting the policyholders / insureds will apply to reinsurance contracts governed by Turkish law

- Although the choice of foreign law is possible, in cases where Turkish courts are involved the choice of law made by the parties may be qualified as contrary to Turkish “ordre public.”

14. DIRECT ACTION

Turkish law grants the victim the right to sue the liability insurer directly (alone or together with the insured). In that respect the nature of the liability makes no difference: the victim may sue the CMR (liability) insurer of the road carrier (whose liability is contractual) or the P&I Club of a vessel which caused damage to the underwater cables with her anchor in a place where it is not allowed to drop anchor (in that latter case the liability is of tortious nature).

However Turkish IPL Act only deals with extra-contractual claims. According to Article 34 Turkish IPL

- Obligations generated by tortious acts are subject to LLDC (Lex Loci Delicti Commissi) rule.

- If the tortious act was committed in a country different from the country where the loss occurred, the law of the latter will apply.

- If the obligation is more closely linked to another country the law of that country will apply

- If the law applicable to the tortious act or the law governing the insurance contract so permits, the victim can sue directly the liability insurer.

In our opinion, the victim should be allowed to claim its losses directly from the liability insurer who covered only the contractual liability and we think that Turkish Judges would allow such direct actions. Besides in most cases death or bodily injury or loss of or damage to property would give rise in addition to the liability in contract also to liability in tort. The insurer who granted cover only for liability in contract should not avoid the direct action if the act that gives rise to liability constitutes at the same time a tort.

Thus a foreign insurer who granted cover for the liability of the insured who is responsible for the death, bodily injury or property damage that occurred in Turkey should expect to face a direct action before the competent Turkish court. Foreign insurers most likely to be effected are

- the P&I Clubs of vessels

- the hull insurers of vessels (for collision claims)¹⁵

- The liability insurers of aircrafts or motor vehicles¹⁶

- Liability insurers of medical doctors

- D&O liability insurers.

- Product liability insurers

¹⁵ Although the hull insurance policies usually cover liability for salvage and general average, it seems doubtful whether the claims for salvage remunerations or general average contributions fall within the Turkish IPL Act Article 34 for they are relating to liabilities of rather a contractual nature.

¹⁶ If international conventions to which Turkey is a party provide the direct action, this faculty would derive from those international conventions. In maritime law, there exist a number of international conventions (some of them not yet in force though) providing for the direct action: For example International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 1992), Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Carriage of Passengers Convention), International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention), International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention), Nairobi International Convention on the Removal of Wrecks, 2007 (Wreck Removal Convention).

CONCLUSION

In the light of the above explanations we can summarize the main points as follows:

The foreign insurer can take legal action in his capacity of assignee against a Turkish third party by demonstrating the voluntary assignment made in his favor.

The assignment is valid if done according to the form requirement of the law applicable to assignment or the country where it was made.

The Turkish Judge will apply to determine whether the third party liable is discharged of liability, the law governing the assigned debt.

The foreign insurer who acts as legal subrogee against a Turkish third person must prove first the subrogation. The Turkish judge will apply

– to determine whether the conditions for the legal subrogation of the insurer have been fulfilled, the law governing the insurance contract.

– to determine whether the third person is discharged of liability, the law governing the relation engendering the claim between the insured and the third person (contract or tort).

The foreign insurer who obtained a foreign court judgment or arbitral award against a Turkish third person must apply to the Turkish court to have the “*exequatur*” prior to enforcement.

Turkish law assimilates reinsurance to insurance and does not exclude the reinsurance from the scope of the rules regulating the insurance contract. Thus in reinsurance contract governed by Turkish law will be subject to all mandatory provisions.

The foreign liability insurer can be sued directly in Turkey.

Foreign jurisdiction clauses inserted to the insurance contracts are not valid if Turkish courts have jurisdiction according to Turkish provisions.

SUMMARY

Insurance is an international activity. Whenever a foreign element exists, international private law rules apply. It is important to examine the legal rules governing the insurance contract containing a foreign element and the problems that a foreign insurer may face in another country. The study below deals with the basic international private law issues that may appear with regards to insurance in Turkey with special focus on the law applicable, jurisdiction, legal or contractual subrogation of foreign insurers seeking recovery in Turkey, direct action against the foreign liability insurer and reinsurance.