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REINSURANCE CONTRACTS AND PRINCIPLES ON REINSURANCE CONTRACTS WITHIN THE FRAMEWORK OF TURKISH PRIVATE INSURANCE LAW

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PART ONE

OVERVIEW OF INSURANCE LAW

Insurance law, which examines the whole of the relationship of insurance between the parties and the legal rules governing the activities of entities engaged in insurance, within a system, is divided into two main branches: "Social insurance law" and "private insurance law". The subject of our study is private insurance law and our examinations and evaluations will be carried out within the framework of private insurance law. Firstly, by pointing out the legislation in which private insurance law is regulated in our country, the establishment and operating principles of insurance companies and reinsurance companies will be outlined in accordance with this legislation. Subsequently, the types, legal nature and elements of insurance contracts concluded between insurance companies and the insured will be determined. Finally, whether reinsurance contracts can be subject to the principles on which insurance contracts are bound to, the importance, the legal nature and the scope of reinsurance contracts in the field of Turkish private insurance law, and special cases regarding reinsurance contracts containing foreign elements will be discussed.

1. THE CONCEPT OF INSURANCE

Insurance is a risk transfer system in which the amount collected by a person who is legally authorized to engage in insurance activities in accordance with the law and legislation by people facing the same type of danger paying a certain amount of money is used only to cover the damage incurred by those who actually suffered as a result of the occurrence of this danger. With this system, individuals share their losses that can be measured with money, which can be caused by the risks they face, through premiums that they have paid in relatively small amounts.

The concept of insurance is based on the distribution of risk. The insurers ensure the insurance of their own risks that may arise due to the risk they have secured, in other words, reinsurance, through which the risk is distributed.

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2. THE LEGISLATION REGULATING INSURANCE LAW IN OUR COUNTRY

Regarding insurance law, there are regulations in the Turkish Commercial Code No. 6102, the Insurance Law No. 5684, the relevant provisions of other laws, regulations, and general conditions.
In the first article of the Insurance Law No. 5684 entitled "Purpose and Scope", it is set forth that;

"The purpose of this Law is to set forth the matters regarding the principles and procedures of the commencement of activities, organization, management, and operation of persons and entities who are subject to this Law, to develop our country's insurance sector, to protect the rights and interests of persons who are included in the insurance agreement and to ensure the efficient operation of the insurance sector in a safe and stable environment, and the procedures and principles regarding insurance arbitration system aimed at the resolution of disputes arising from insurance agreements.

Insurance companies, reinsurance companies, (Amended phrase : 6327 - 13.6.2012 / art.46) "Insurance, Reinsurance, and Pension Companies Association of Turkey", intermediaries, actuaries, and insurance appraisers operating in Turkey, are subject to the provisions of this Law.

Social security institutions, Türkiye İhracat Kredi Bankası Anonim Şirketi (Export Credit Bank of Turkey) and other entities engaging in insurance activities in accordance with the special laws regarding them, except for the provisions of this Law regarding supervision, do not fall within the scope of this Law."

Insurance law is regulated in detail in the Sixth Book of the Turkish Commercial Code No. 6102. In article 1401 of the Code, "insurance agreement" is set forth as;

"An insurance agreement is an agreement in which the insurer is obliged to compensate for the danger, risk, in case it occurs, that damages the interest of a person that can be measured in terms of money, in return for a premium, or to pay an amount of money or perform other obligations due to the length of lives of one or more individuals or because of certain incidents that occurred in their lives.

Articles 604 and 605 of the Turkish Code of Obligations apply to insurance agreements concluded with an unlicensed company, while being aware of this status. This provision does not apply to insurance agreements established with insurance companies that do not reside in Turkey."

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In addition, in article 1451 of the Turkish Commercial Code No. 6102 entitled "Provisions to be Applied to Insurance Contracts", it is set forth that;

"In cases where there are no applicable provisions in this Code, the provisions of the Turkish Code of Obligations apply to the insurance agreement." and a reference has been made to the Turkish Code of Obligations No. 6098.

3. THE OBLIGATION OF PERSONS RESIDING IN TURKEY TO INSURE THEIR INSURABLE INTERESTS IN TURKEY WITH INSURANCE COMPANIES OPERATING IN TURKEY AND THE EXCEPTIONS

As the main rule in our law; residents of Turkey must insure, in Turkey, their insurable interests within Turkey with insurance companies operating in Turkey.
The exception to this rule is set forth in article 15/2 of the Insurance Law No. 5684 as;

"However;

a) Transport insurance for goods subject to export and import,

b) Insurance for aircraft, ships, helicopters purchased by external credit, to be solely limited by the amount of external credit amount, and until the external debt is paid; boat insurance to be taken out, in case they are brought in from abroad by way of financial leasing, as limited to the duration of the leasing agreement,

c) Insurance for liabilities arising from the operation of ships,

ç) Life insurance,

d) Personal accident, illness, health, and motor vehicle insurance that persons can take out during their temporary stay abroad, provided that they are limited to this period for the time that they will be outside of Turkey,

can also be taken out abroad.

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The President of the republic is authorized to expand the scope of insurance that can be taken out abroad."

4. TYPES OF INSURANCE

In the Turkish Commercial Code No. 6102, which also regulates insurance law, types of insurance are separated into two fundamental categories: loss insurance and life insurance. However, in the literature, types of insurance have been subjected to different classifications.

4.1. Types of Insurance According to the Turkish Commercial Code No. 6102:

In the section entitled "Special Provisions on Types of Insurance" of the Turkish Commercial Code No. 6102, types of insurance are separated into two fundamental categories: "Loss Insurance" and "Life Insurance". Loss Insurance is then separated into two sub-divisions: "Property Insurance" and "Liability Insurance", while Life Insurance is separated into three sub-divisions as "Life Insurance", "Accident Insurance" and "Disease and Health Insurance".

4.2. Types of Insurance According to the Insurer's Obligation:

Types of insurance can be characterized, based on the insurer's obligation, separated into two fundamental categories: "Loss Insurance" and "Fixed Sum Insurance".

4.2.1. Loss Insurance

Its intention is to compensate for the damage caused as a result of the occurrence of the risk covered by the insurance agreement. The insurer assumes the remedy of the damage caused as a result of the realization of the risk stipulated in the insurance agreement, limited to the insurance price. Loss insurance is also divided into active insurance and passive insurance.

The main thing in active loss insurance is the compensation of the damage caused by the risk over the interest that is part of the assets of the insured person, secured by the insurance agreement. In order for the insurer's liability to arise under active loss insurance, it is necessary that the risk specified in the insurance agreement is realized and the loss occurs as a result of the realization of this risk. Examples of active loss insurance include property insurance, credit insurance, and profit insurance.

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With passive insurance, the risks related to increases that will occur in the liabilities of the insured are secured. One of the examples of passive insurance is liability insurance.

4.2.2. Fixed Sum Insurance

For fixed sum insurance, the intention is that the insurer pays the agreed insurance amount, if the risk stipulated in the insurance agreement is realized, regardless of whether the damage has occurred or regardless of the amount of the damage. Therefore, the insurance in question is independent of the loss itself. Examples of fixed sum insurance are life insurance and accident insurance.

4.3. Types of Insurance According to Whether It is Mandatory or Not

The main rule in Turkish Law is that private insurance is facultative. However, in cases where the legislator or the President deems it necessary, it may be decided to deem certain insurance mandatory.

4.3.1. Mandatory Insurance

Under Article 48 of the Constitution of the Republic of Turkey, the freedom of contract is counted among fundamental rights and freedoms, and under Article 13, it is stipulated that fundamental rights and freedoms can only be limited by law. Accordingly, it is obvious that the obligation to enter into an insurance contract can only be stipulated by law.

In addition, under Article 13 of the Insurance Law, stipulating *"The President may establish mandatory insurance if he deems it necessary from the point of view of the public interest. Insurance companies shall not refrain from drawing up any mandatory insurance that falls within the scope of the branches of insurance in which they operate, without prejudice to the provisions of subparagraph (b) of the second paragraph and the third paragraph of article 20."* the President has also been granted such authority.

4.3.2. Facultative Insurance

In Turkish private insurance law, it is essential that insurance agreements are concluded on a facultative basis.

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PART TWO

PRINCIPLES OF ACTIVITY OF INSURANCE COMPANIES AND REINSURANCE COMPANIES OPERATING IN TURKEY

In the Law, the insurance company is defined as "the insurance company established in Turkey and the organization of an insurance company established abroad in Turkey", the reinsurance company is defined as "the reinsurance company established in Turkey and the organization of a reinsurance company established abroad in Turkey".

The main principles regarding the establishment, operation, and supervision of insurance companies and reinsurance companies are regulated by Insurance Law No. 5684 and the regulation on the principles regarding the establishment and operation of insurance companies and reinsurance companies.

1. Establishment and Activities of Insurance Companies and Reinsurance Companies:

The Law provides for certain conditions regarding the establishment and activities of insurance companies and reinsurance companies. To mention some of these conditions;

- Insurance companies and reinsurance companies that will operate in Turkey must be established as joint-stock companies or cooperatives.
- It is not possible for insurance companies and reinsurance companies to engage in any activity other than insurance activities and work that has a direct connection to them.
- With regard to insurance and reinsurance companies operating as joint-stock companies, the conditions stipulated for the founders of the company, the articles of association of the company, share certificates, and private equity must be met.
- Insurance cooperatives can be established as "not executing any insurance agreement with people other than their members" and "executing insurance agreements with people other than their members".

It is mandatory that insurance companies and reinsurance companies established as cooperatives that do not execute insurance agreements with persons other than their

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members, carry out mutual insurance, that the number of partners is not less than two hundred, and that they do not give any privileges to their managers.

The ability of cooperatives to conclude insurance agreements with persons other than their members is subject to the permission of the Ministry of Treasury and Finance (Undersecretariat), provided that this is clearly included in their articles of association. In order for an insurance agreement to be concluded with persons other than members of the cooperative, it is mandatory for cooperatives to increase their capital to an amount to be determined by the Undersecretariat.

- The procedures and principles regarding the operation of foreign insurance companies and reinsurance companies in Turkey are determined by the President.
- The conditions stipulated for the organization of the insurance company (board of directors, general manager, supervisory board, and internal audit) must be met.
- Insurance companies and reinsurance companies must obtain a license from the Undersecretariat for each insurance branch in which they wish to operate in order to be able to operate. The licenses obtained must be registered with the trade registry and announced in the Trade Registry Gazette and in two of the daily newspapers distributed throughout Turkey and ranked in the top ten in terms of circulation.
- Insurance companies can operate in only one of the life and non-life insurance groups.
- It is necessary to apply for a license within one year from the completion of the incorporation procedures. Otherwise, the words insurance company and reinsurance company may not be used in the commercial title.

2. Supervision of Insurance Companies and Reinsurance Companies:

At the universal level where insurance activities are carried out, insurance and reinsurance companies are subject to government supervision. Insurance and reinsurance companies that meet the requirements stipulated in the relevant legislation in the Turkish Legal system must obtain permission from the government, in other words, a license, in order to start operating.

3. Activities of Foreign Insurance and Reinsurance Companies in Turkey:

In accordance with Insurance Law No. 5684, the procedures and principles for the operation of foreign insurance companies and reinsurance companies in Turkey are determined by

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President. According to the decision of the President, foreign insurance companies can operate only by opening branches. For insurance companies that will operate in Turkey by opening branches;

- Their paid-in capital allocated to Turkey shall not be less than the amount determined for insurance and reinsurance companies established in Turkey,
- They shall not be banned from conducting insurance activities in the countries where they operate,
- They shall have the necessary license.

PART THREE

INSURANCE AGREEMENTS AND THEIR PROPERTIES

Principles regarding insurance agreements are set forth in articles 1401-1520, in the Sixth Book of the Turkish Commercial Code No. 6102. First of all, the general provisions and then the special provisions based on the types of insurance are set forth in the Code.

1. Definition of Insurance Agreement and Legal Character of Insurance Agreement

In our legal system, in contrast to some foreign legal systems, the definition of "insurance agreement" is included in the Turkish Commercial Code No. 6102. In article 1401 of the Code, it is defined as, *"An insurance agreement is an agreement in which the insurer is obliged to compensate for the danger, risk, in case it occurs, that damages the interest of a person that can be measured in terms of money, in return for a premium, or to pay an amount of money or perform other obligations due to the length of lives of one or more individuals or because of certain incidents that occurred in their lives."*

The parties to the insurance agreement consist of the insurance taker and the insurer. As may be understood from the definition in the Code, under an insurance agreement, the insurance taker undertakes the obligation to pay a premium, and the insurer undertakes the obligation to provide insurance protection. In this aspect, it may be said that the insurance agreement is an agreement that imposes obligations to both parties.

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2. Elements of the Insurance Agreement

The main elements of an insurance agreement may be determined based on the definition of an insurance agreement contained in the Turkish Commercial Code No. 6102.

2.1. Parties to the Insurance Agreement

Insurance agreements are concluded between the insurer and the insurance taker. The insurer is the person who is held responsible for the damage or amount arising from the realization of the risk provided for in the agreement. In other words, the insurer is the party that assumes the risk stipulated in the insurance agreement in exchange for a certain premium and undertakes insurance protection. The insurance taker, however, is the natural or legal person who executes an agreement with the insurer, which provides, in case the risk that harms an interest of him or a third person, that can be measured monetarily, is realized, the said damage shall be compensated by the insurer in return for the payment of a premium, or the insurer shall pay an amount of money or perform other obligations due to the length of lives of one or more persons or certain events that occurred within their lives.

In property insurance, the insurance taker may take out insurance for his own interests, as well as insure the interests of a third party. In this case, there would be insurance in favor of others which is regulated by Article 1454 of the Turkish Commercial Code No. 6102. In the aforementioned provision, it is stipulated that *"The insurance taker may take out insurance for the interests of a third party by specifying or not specifying their name. The rights arising from the insurance agreement belong to the insured. The insured, if there is no agreement to the contrary, may ask the insurer for payment of insurance compensation and sue him."* For insurance in favor of someone else, the obligations arising from the insurance agreement belong to the insurance taker, while the rights arising from the insurance agreement belong to the insured.

2.2. Interest

Article 1408 of the Turkish Commercial Code No. 6102. stipulates, *"At the time of conclusion of the insurance agreement, if the insured interest does not exist, the insurance agreement is invalid.* If the interest existing at the time of the conclusion of the agreement disappears within the term of the agreement, the agreement becomes invalid at that moment.", which

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is an imperative provision. Therefore, it is possible to say that the element of interest is one of the most important building blocks of the insurance agreement. If the element of interest is missing at the time of conclusion of the insurance agreement, the insurance agreement shall be invalid, if the interest ceases to exist after the conclusion of the agreement, the agreement shall be invalid from that moment on.

2.3 Risk

In our legal system, unlike some other foreign legal systems, the words risk and danger have been used as synonyms and no distinction has been made between these two concepts. If it is necessary to make a common definition for the risk in loss and fixed sum insurance, we may define the risk as an event that is likely to occur or is certain to occur but not clear when it will occur, and when it occurs, it causes damage or further financial need.

2.4. Commitment to Pay Insurance Compensation

By means of the insurance agreement, the insurer undertakes to compensate the insured if the risk, that damages a benefit of the insured person that is monetarily measurable, occurs, or to pay money or perform other actions due to the length of life of one or more people or due to some events that occur in their lives. The insurance consideration specified in the insurance agreements indicates the upper limit of the insurer's liability. The insurer will fulfill its liability for compensation, limited to this limit.

2.5. Obligation to Pay Premiums

With an insurance agreement, the insurance taker assumes the obligation to pay a premium to the insurer. In accordance with the Turkish Commercial Code No. 6102, as the main rule, the insurer's liability begins with the payment of the premium or its first installment. However, it is possible to make an arrangement stipulating otherwise. Insurance for the transportation of goods on land and at sea is an exception to this rule; in this type of insurance, the insurer becomes responsible for the conclusion of the agreement

From the point of view of the main rule, an obligation to pay a premium is necessary for the establishment of an insurance agreement. However, whether the premium payment debt is fulfilled or not does not have any effect on the validity of the insurance agreement. It is sufficient that the insurance taker undertakes to pay a premium with the insurance

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agreement. In short, the fulfillment of the premium payment obligation by the insurance taker is not a requirement for the validity of the agreement, but it is necessary to pay the first installment in terms of the commencement of the insurer's liability.

PART FOUR

REINSURANCE AGREEMENTS IN TURKISH LAW

1. The Concept of Reinsurance

1.1 The Principle of Risk Distribution in Insurance Law

The concept of insurance is based on the distribution of risk. The distribution of risk can be classified as internal distribution and external distribution. In internal distribution, it is essential that the insurer shares and distributes the risk among the insured persons exposed to the same danger; in external distribution, it is essential that the insurer shares and distributes the risk to insurers other than itself.

External distribution may occur as joint insurance, reinsurance, retrocession. From the point of view of the insurer, it is almost a necessity to subject the risk to external distribution in order to meet especially large financial risks.

Joint insurance is the insurance of interest by multiple insurers at the same time for the same periods and against the same risks. Here, the risk is shared between multiple insurers.

Reinsurance is reassuring some or all of the risks insured by the insurer, by another insurance company.

Retrocession is the transfer of part or all of the risk assumed by the reinsurer through reinsurance to another insurance company.

1.2 Definition, Purpose and Legal Character of Reinsurance

Reinsurance is a necessary risk transfer and distribution tool for insurers to assume and bear the risks belonging to the insured through the insurance agreements they will

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conclude. As a matter of fact, there may be cases when the insurer is forced to bear risks that exceed its own capacity. In addition, the insurer (cedent) has the opportunity not to keep the risks it assumes on itself and to transfer most or a significant part of these risks to other entities (reinsurers).

The insurance agreement provides coverage for the interest of the insured, and the reinsurance agreement provides coverage for the insurer's liability. In other words, a reinsurance agreement is not an agreement in which the insurer reinsures the interest it has insured. The insured interest is the interest of the insurance company, which is in the position of the insurance taker for this agreement.

The reinsurance agreement aims to ensure the solvency of the insurer, eliminate the risk of bankruptcy due to the payment of insurance compensation, and support confidence in the sector, by transferring and distributing the risk nationally and globally.

Reinsurance is divided into two main groups as *"Treaty Reinsurance"* and *"Facultative Reinsurance"*. Treaty reinsurance is a general agreement that ensures that all policies issued by an insurer, except for some insurance that is reserved, are covered by reinsurance under predetermined conditions. Facultative reinsurance, on the other hand, refers to reinsurance agreements that allow the insurer to obtain reinsurance protection on some policies individually.

Reinsurance is, in Turkish Law, set forth by Article 1403 of the Turkish Commercial Code No. 6102 entitled *"Reinsurance"*, as;*"The insurer may re-insure the interest it has insured on any terms it wishes. Reinsurance does not eliminate the insurer's debts and obligations to the insurance taker; it does not give the insurance taker the right to file a lawsuit and make a claim directly against the reinsurer."*

Along with this regulation, unlike many foreign legal systems, reinsurance is defined as insurance and is subjected to the provisions regarding insurance agreements. In accordance with the definition set forth in the Turkish Commercial Code No. 6102; reinsurance is a method of obtaining insurance coverage against the insurer's obligations arising from the insurance agreement. In this aspect, it may be said that the reinsurance agreement is a type of passive insurance, which is a type of damage insurance.

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1.3. Relationship between the Insurance Taker of the Insurance Agreement and the Reinsurer

This is expressly set forth in Article 1403/2 of the Turkish Commercial Code as *"Reinsurance shall not eliminate the insurer's debts and obligations to the insurance taker; it shall not give the insurance taker the right to file a lawsuit and make a claim directly against the reinsurer."*

The insured and the insurer are the parties to the insurance agreement and the reinsurer is not a party to this agreement. Therefore, as a general rule, the insured does not have the right to make a claim directly against the reinsurer.

However, if there is no provision to the contrary in the reinsurance agreement, the right to make a claim of the insurer against the reinsurer may be assigned.

If there is a "Cut Through Clause" in reinsurance agreements, it may be agreed that the damage payment will be made directly to the insured by the reinsurer.

1.4. The Relationship of Reinsurance with Joint Insurance Regulated by the Turkish Commercial Code No. 6102

In the Turkish Commercial Code No. 6102, "Joint Insurance" is classified as one of the types of "Multiple Insurance".

In article 1465 of the Code entitled "Multiple Insurance", it is set forth that;

"If the same interest is insured against the same risks for the same period of time by multiple insurers on the same or different dates, the insurance taker shall not be paid more than the insurance amount.

In multiple insurances, the insurance taker notifies each of the insurers that both the risk has occurred and other insurances are taken out for the same interest. In case of violation of this provision, the provision of Article 1446 shall apply."

In article 1466 of the Code entitled *"Joint Insurance"*, it is set forth that;

"If an interest is insured by more than one insurer at the same time for the same periods and against the same risks, all multiple insurance agreements concluded are considered valid only up to the value of the

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insured interest. In this case, each of the insurers will be liable at the rate of the amount it insures, based on the sum of the insurance amounts.

If the insurers are jointly liable in accordance with the agreements, the insured cannot ask for money more than the damage suffered, and each of the insurers is only liable to the amount that they are obliged to pay according to their own agreement. In this case, the right of recourse that the insurer making the payment has against other insurers is in the proportion of the amounts that the insurers must pay to the insured in accordance with the provisions of the agreement."

In accordance with these regulations, joint insurance may exist if the same risk is insured by more than one insurer at the same time within the same period of time, provided that each insurer is responsible for only part of the risk.

Joint insurance may manifest in the form of open joint insurance (open co-insurance) or closed joint insurance (closed co-insurance). In open joint insurance, multiple insurers who have the will to act together must insure the same risk for the same time and for the same periods with an insurance agreement that they will make separately with the insurance taker, provided that each insurer is responsible for a certain part of the risk. Joint insurance, set forth in article 1466 of the Code, has the character of open joint insurance.

In closed joint insurance (closed co-insurance), the insurance agreement is concluded between the insurance taker and the insurer. After that, this risk, which is secured by the insurer, is shared with other insurers. Here, another agreement is concluded between the insurer and other insurers. There is no agreement between the insurance taker and other insurers. For this reason, it is not possible to classify closed joint insurance as multiple insurance. In closed joint insurance, it is not possible for the insurance taker to claim the rights arising from the insurance agreement from other insurance companies. The insurance taker will only be able to claim the rights arising from the insurance agreement from its own insurer. The right to make a claim from other insurance companies will belong to the insurer who has concluded an insurance agreement with the insurance taker. In this case, it will not be wrong to say that closed joint insurance is a reinsurance transaction.

2. Provisions Applicable to Reinsurance Agreements

2.1. Provisions to Which Insurance Agreements are Subject

In general, the rules to which insurance agreements are subject may be listed as the imperative provisions contained in Turkish legislation, special insurance conditions,

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general insurance conditions, provisions of the Turkish Commercial Code No. 6102, commercial customs, and general provisions.

2.2. Special Assessment of Whether Reinsurance Agreements are Subject to the Imperative Rules of the Turkish Commercial Code No. 6102

The Code has set forth reinsurance as a variant of the insurance contract. As a natural consequence of this, reinsurance agreements will be subject to the provisions regarding insurance agreements in the Code. According to this, it can be said that reinsurance agreements are subject to the imperative legal rules present in the Turkish Commercial Code No. 6102. However, with a clear provision of the law, the imperative provisions can be bypassed.

Regarding this issue, in the decision of the 11th Civil Chamber of the Court of Cassation, case numbered 2016/8924 and decision numbered 2017/5110 and dated 05.10.2017, it is stated that;

"In the doctrine, the insurance practice in which the insurer shares, partially or fully, its obligation arising from the insurance coverage for which it is solely responsible before the insurance taker, with other insurers, with special agreements it has concluded with them is called "closed coinsurance". (Prof. Dr. Samim Ünan, Türk Ticaret Kanunu Şerhi, Sigorta Hukuku, Cilt II, s.170.) Closed coinsurance, also referred to as closed joint insurance, is a reinsurance mechanism and there is no more than one insurance in this insurance. Taking into consideration the agreements between the parties, it is understood that there is a practice of closed coinsurance between the parties, that the agreements are some kind of an insurance agreement from the point of view of its legal character, and therefore they are subject to the provisions of the Turkish Commercial Code on insurance agreements. All imperative provisions set forth in the TCC and all reserve provisions in the TCC (unless otherwise provided for in the agreement) will also apply to the legal relationship between the parties. (Prof. Dr. Samim Ünan, Türk Ticaret Kanunu Şerhi, Sigorta Hukuku, Cilt I, Genel Hükümler, s.54,55. (Prof. Dr. Samim Ünan, Commentary on the Turkish Commercial Code, Insurance Law, Volume I, General Provisions, p.54,55.))"

and thus, it has been explained that reinsurance agreements will be subject to the imperative provisions set forth in the Turkish Commercial Code No. 6102 and the reserve provisions, unless otherwise provided for in the agreement.

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3. Law Applicable to Reinsurance Agreements

3.1. Reinsurance Agreements with an Element of Foreignness

In our country's practice, it is often found that reinsurance agreements have an element of foreignness.

In the Law on International Private Law and Procedural Law No. 5718, the issues of the law to be applied in transactions and relations related to private law with an element of foreignness and the international jurisdiction of Turkish courts are set forth.

In article 24 of the Law entitled "The Law Applicable to Contractual Debt Relations", it is set forth that;

"Contractual debt relations are subject to the law that the parties have expressly chosen. The choice of law, which can be understood without hesitation from the provisions of the agreement or the circumstances of the situation, also applies.

The parties may decide that the chosen law will apply to all or part of the agreement.

The choice of law can be made or changed by the parties at any time. The choice of law after the establishment of the agreement is effective retroactively, provided that the rights of third parties are reserved.

If the parties have not made a choice of law, the law that is most strictly related to this agreement applies to the relationship arising out of the agreement. This law is accepted as the law of the place of habitual residence of the obliged of the characteristic obligation at the time of the establishment of the agreement, for agreements that are established due to commercial or professional activities, the law of the workplace of the obliged of the characteristic obligation, in case none of these exist, the law of the place of residence, in case the obliged of the characteristic obligation has more than one workplace, the law of the workplace that has the closest relation with the agreement in question. However, if there is a law that is more closely related to the agreement according to all the circumstances of the situation, the agreement will be subject to this law."

In this context, if the parties have chosen the law in the reinsurance agreement, it is clear that the agreement will be subject to this law.

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However, it is observed that, despite the fact that in some cases the parties have chosen foreign law, Turkish courts decide on the application of Turkish law in certain cases.

As a matter of fact, in article 5 of the Law entitled "Violation of Public Order", it is set forth that;

"If the provision of the competent foreign law applied to a particular event is clearly contrary to Turkish public order, this provision will not be applied; if deemed necessary, Turkish law will be applied."

In article 6 of the same Law entitled "Directly Applied Rules of Turkish Law", it is set forth that;

"*In cases where authorized foreign law is applied, in cases that fall within the scope of application of the rules of Turkish law that are applied directly, then that rule will apply."*

In article 32 of the same Law entitled "The Existence and Material Validity of a Contractual Relationship", it is set forth that;

"The existence and material validity of a contractual relationship or provision are subject to whichever law would apply in case the agreement is valid.

If it is understood from the circumstances of the situation that it will not be fair to grant legal effect to the behavior of one of the parties and make it subject to the applicable law, the law of the country in which the habitual residence of the party claiming that it does not consent to the existence of a statement of will shall apply."

Therefore, there is a possibility that a decision may be rendered that Turkish law shall apply even in cases where foreign law has been chosen.

3.2. Whether the Provisions of the PRICL (Principles of Reinsurance Contract Law) Can be Applied to Reinsurance Agreements:

The Principles of Reinsurance Contract Law (PRICL) have been established by a "Project Group" jointly established by the Universities of Zurich, Frankfurt, and Vienna in 2016. The aim of the project is to present uniform rules on the law of reinsurance agreements to reinsurance markets.

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The PRICL is not a set of national, international, or supranational rules that need to be adopted in domestic law (turned into a rule of domestic law). The PRICL will only find a field of application if the parties have chosen the PRICL as the "law applicable to the agreement between them". In cases where such a choice is not made, the PRICL will not apply.

4. Coverage of Reinsurance Agreements

4.1. Determining the Scope of Insurance Agreements' Coverage

In order to determine whether the risk that is realized while the insurance agreement is in force is covered or not, it is extremely important that the insurance coverage is set forth in a clear and comprehensible manner.

In article 1409/1 of the Turkish Commercial Code No. 6102 on insurance coverage, it is set forth that;

"The insurer is responsible for the loss or amount arising from the realization of the risk provided for in the agreement."

thus, the principle of "generality of risk", which was applicable in the old Turkish Commercial Code, was abandoned and the principle of "specialty of risk" was adopted. With the mentioned regulation, the structure that interpreted the coverage quite widely in accordance with article 1281 of the previous Code is departed from and the scope of the coverage is narrowed.

As a matter of fact, this is also expressed by the General Assembly of the Court of Cassation in its decision dated 14.03.2019 and numbered E.2017/11-2477, K.2019/306 as;

"In addition, in article 1409 of the TCC entitled insurance coverage, it is set forth that; "The insurer is responsible for the loss or amount arising from the realization of the risk provided for in the agreement. "The burden of proving that any or some of the risks stipulated in the agreement are excluded from the insurance coverage belongs to the insurer". In accordance with this regulation, it is understood that the TCC departs completely from the principle of "all-risk" which is expressed, in article 1281/1 of the superseded TCC numbered 6762, as "The insurer is responsible for all damages such as loss or impairment of goods arising from any cause other than war or insurrection" and which provides coverage against all risks. In fact, this point is also explained in the rationale of Article 1409 of the TCC."

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Regarding insurance coverage, in article 11/4 of the Insurance Law No. 5684, it is set forth that; *"Except for the risks covered in the insurance agreements, the risks excluded from the coverage are clearly stated. Unspecified risks are considered to be within the scope of the coverage."* The provision in question interprets the insurance coverage quite broadly, just like in the previous Code. From the article of this law, it is understood that all insurance agreements are to be considered concluded on the basis of all risks, which is by no means applicable in the conditions of today's insurance sector. As a matter of fact, this provision is disabled with article 1409/1 of the Turkish Commercial Code No. 6102.

Accordingly, in accordance with the current regulation provided for in the Turkish Commercial Code No. 6102; if the risk is realized, the coverage assessment shall be carried out in two main steps. As a first step, the definition of risk in the insurance agreement will be oversight and it will be determined whether the incident that occurred falls under this definition. If it is determined that it is not covered by the definition of risk, the insurance coverage will not apply. Otherwise, the second step shall be taken and it will be investigated whether one of the situations that fall outside of the scope of the coverage provided for in the insurance agreement exists. If it is determined that there are unsecured situations, the insurance coverage will not apply, if there is no such situation, the insurance coverage will apply.

However, when concluding an insurance agreement, the parties may decide that the insurer is responsible for all risks. As a matter of fact, since this issue will be an arrangement in favor of the insurance taker, it is not subject to any legal obstacles. The coverage assessment in insurance agreements issued on the basis of all risks will be carried out in one step by determining whether there is one of the situations that are considered to be outside of the scope of the coverage. If the risk has not occurred as a result of circumstances and/or situations that are considered to be outside the scope of this coverage, the insurance coverage will apply.

4.2. The difference between the coverage of the reinsurance contract and the insurance contract, the risks posed by the said difference for the insurance company (ceding company), and the solutions applied in practice against these risks.

In our country, it is frequently encountered that the risks insured by local insurance companies are reinsured by foreign reinsurance companies. To put it another way, reinsurance contracts are concluded between local insurance companies and foreign

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reinsurance companies. In this section, some of the problems experienced when reinsurance contracts are concluded between local insurance companies and foreign reinsurance companies and how these problems are tried to be overcome will be discussed.

In practice, there are cases where the coverage of the insurance contract and the reinsurance contract do not overlap with each other. In particular, while the insurance contract is subject to Turkish law, some problems may arise in cases where the reinsurance contract is subject to foreign law.

The biggest risk seen in terms of Turkish insurance companies; These are the cases where the realized risk is included in the scope of the insurance contract, but not in the scope of the reinsurance contract. In such cases, while the insurance company is held liable to its own insured, there is a risk that the reinsurer will not be held liable to the insurance company, and some measures are taken by Turkish Insurance Companies in order to prevent this.

As the first way; The regulations and conditions in the reinsurance contract are tried to be reflected in the insurance contract. However, these reflected regulations and conditions may also conflict with the mandatory rules of Turkish law. In this case, the mentioned risk may continue for Turkish insurance companies.

As the second way; It is observed that *"follow the fortunes clause"* (FTF) or *"follow the settlements clause"* (FTS) clauses are added to reinsurance contracts concluded under foreign law.

With the FTS clause, it is intended that the reinsurer be bound by the damage-related transactions of the insurance company. In other words FTS; means that the reinsurer will accept claims as the insurer has settled them.

With the FTF clause, it is intended that the reinsurer be bound by developments outside the control of the insurance company. The FTF clause, defined as the reinsurer's "following the fate of the ceding company", covers developments beyond the control of the ceding company, including the court ruling against the ceding company.

It should not be forgotten that the aforementioned two clauses do not have the function of expanding the collateral of the reinsurance contract.

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In line with all these explanations, when faced with a dispute arising from reinsurance contract, it is extremely important to determine the law applicable to the reinsurance contract separately, and the insurance contract and the coverage of the reinsurance contract.

PART FIVE

GENERAL INFORMATION ABOUT THE INSURANCE SECTOR IN TURKEY

In article 24 of Insurance Law No. 5684 entitled "Insurance, Reinsurance, and Pension Companies Association of Turkey", it is set forth that;

"Insurance companies, reinsurance companies, and pension companies established according to Law No. 4632, must become a member of the Insurance, Reinsurance and Pension Companies Association of Turkey, whose headquarters is located in İstanbul and which is a professional organization with the status of a public organization, by paying the entry fee. This obligation shall be fulfilled within one month at the latest, for insurance companies and reinsurance companies, from the date of receipt of the insurance license, and for pension companies, from the date of receipt of the pension license. However, the President is authorized to remove the obligation to become a member. For insurance companies, reinsurance companies and pension companies, the provision of the seventh paragraph of article 9 of the Law of the Union of Chambers and Commodity Exchanges of Turkey and Chambers and Commodity Exchanges dated 18/5/2004 and numbered 5174 shall not apply."

and thus, the Insurance, Reinsurance and Pension Companies Association of Turkey is envisaged as a professional organization, and membership in this organization is made mandatory for insurance companies, reinsurance companies, and pension companies.

As of today, there are 69 members of the Insurance Association of Turkey, 43 of which are non-life insurance companies, 21 are life insurance/pension companies and 5 are reinsurance companies.

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