TURKISH SPECIAL ARBITRATION SCHEME FOR CLAIMS AGAINST INSURERS

Sigortacıya Karşı Yöneltilen Talepler Bakımından Türk Hukukunda Özel Bir Tahkim Usulü

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1. Introduction

Policyholders expect that the insurers pay promptly and without shortage. But sometimes insurers refuse to effect payment and the policyholders have to apply for redress. In many countries the need to protect the policyholders (at least the consumers) against insurers has pushed the Legislators or the insurance sector or the Regulator to implement different solutions.

Turkish legislator, upon initiative and initial preparatory work of the Turkish Regulator, has enacted special rules to create a special arbitration scheme for claims against the insurers arising out of insurance contracts. We will examine below the main points of this special scheme.

2. Dispute Resolution Methods

In Turkey, the principal dispute resolution methods regarding the insurance are "complaints" and "legal actions".

3. Complaints

Very often the policyholder or the insured will, upon unwillingness of the insurer to pay the insurance money, formulate a complaint hoping redress.

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- **Insurance Intermediary**

It is not rare that the policyholders/insured formulate their complaint at first glance to the insurance intermediary in the expectation that the intermediary will put pressure on the insurer. Not only brokers who are appointed by the policyholders but also insurance agents who owe a legal duty of loyalty to the insurer regularly interfere and try to convince the insurer to pay or to ease the process that might lead to payment. The insurance agent will consider that after all, the policyholder being a component of its portfolio deserves special support, despite the fact that such initiative often creates a conflict with its legal duties.

- **Insurance Undertaking**

Insurers establish in accordance with legal requirements special services for complaints. The person who will deal with the complaint must be different from the one who rejected the claim. However, it is rare that a positive outcome is achieved through this option.

- **Regulator**

In Turkey, the most efficient complaint is doubtless that filed with the Regulator. In our country the Regulator has come to the conclusion (and is persevering with its position) that it should examine the complaints made by policyholders in order to augment its awareness (about what is going on in the practice). The Regulator, if persuaded that the insurer is in breach of its contractual obligations, demands the insurer not to insist on its decision to reject the claim. Where this approach is not complied with, the Regulator imposes sanctions.

4. Courts

In case the policyholder or the insured does not receive any or adequate sum from the insurer upon materialization of the risk, despite redress mechanisms available, there will be no other option but to resort to legal action.

- **Commercial Courts**

In Turkey, the insurance contract is regulated in the Commercial Code providing that matters arising out of commercial provisions must be decided by commercial courts regardless of whether all the parties involved are traders. So commercial courts dealt with insurance law disputes during decades until the enactment of the consumer legislation. Consumer courts established by that special legislation began thereafter to examine the disputes between insurers and consumers. But this practice was challenged by some insurers and this led to an interesting decision of the Turkish Court of Cassation which stated that the rules about the competence of the commercial courts (with regard to the matters regulated by the Commercial Code) were "lex specialis" vis-à-vis the rules in the consumer legislation and would apply therefore exclusively[1]. We don't think this reasoning to be right. On the contrary the provisions of the (Turkish) Consumer Protection Act should have priority over the commercial provisions, the main objective of the consumer legislations being to establish the supremacy of rules aimed at protecting the consumer. Where one of the parties is a consumer, the need of its protection prevails and takes the precedence[2].

- **Other Courts of First Instance**

Where no commercial court exists (in most departments commercial courts are not founded yet) or where commercial courts are not competent (this is for example the case for certain insurance contracts regulated in special acts such as the motor vehicle operator liability insurance) the disputes generated by insurance relationship are decided by the ordinary courts of first instance. Concerning the direct action of the victim in liability insurances, it is not clear

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1 11th Civil Chamber, decision no.E.2000/10656, K.2001/197 dated 18.1.2001.

2 However one must recognize also the reality: Commercial courts are much more convenient for insurance law disputes that require special knowledge and experience in respect of rules applicable to insurance contracts (but they may lack of expertise with regards to the protection afforded by consumer law provisions).

whether consumer courts are competent if the policyholder is a consumer. It seems difficult to find a link between the consumer protection and the direct action.

- **Consumer Courts**

If a dispute arises between a consumer and a trader it will be referred normally to a consumer court. Insurance being a "service" within the ambit of the consumer legislation, protective norms will apply to safeguard the legitimate interests of the weak party.

5. Arbitration

Insurance relationship arises necessarily out of a contract concluded with a trader (insurer). Thus it is a private law matter. Arbitration is a dispute resolution means widely used in private law and at first glance there seem to be no obstacle to refer to arbitration for insurance litigation. However the problem arises to know whether by referring to arbitration the mandatory rules are circumvented. This is the case when the arbitrators are given the authority to decide "ex aequo et bono" and not in accordance with material law provisions.

- **According to Turkish International Arbitration Act**

If the insurance contract contains a foreign element or if the parties so agree, the arbitration will be conducted in accordance with the International Arbitration Act. This act will apply especially to disputes between Turkish insurers and foreign reinsurers.

- **According to Turkish Civil Proceedings Act**

The common rules for arbitration are in the Civil Proceedings Act. The parties may agree that their eventual disputes in the context of their contract shall be referred to arbitration.

In our view, if an arbitration clause (stipulating that arbitration will take place in accordance with the provisions of the Civil Proceedings Act) is inserted to the insurance contract, this will have the effect of lifting the option to apply to the special arbitration

scheme for insurance defined in the Insurance Activities (Control) Act.

- **According to Insurance Activities (Control) Act Article 30 (= Special Arbitration Scheme for Insurance)**

Turkish Insurance Activities (control) Act (enacted in 2007) provides a special arbitration scheme for insurance disputes. We will examine this scheme in details below.

6. No Ombudsman - Alternative to Ombudsman

Turkish law did not provide for Ombudsman service. The special arbitration scheme for insurance is said to have been designed as an alternative to the Ombudsman solution.

7. Administration

The "Special Insurance Arbitration Scheme" is managed by a commission constituted within the Union of Insurers, Reinsurers & Pension Companies. The majority of its five members are selected by the Regulator. The composition of the Commission is as follows: One representative of the Regulator, one academic, two representatives of the Union and one representative of the Consumer Association. The Regulator appoints its own representative, the consumer association representative (amongst three candidates proposed by that association) and the academic.

8. Claims Eligible

The Special Arbitration Scheme for Insurance is provided only for claims against the Insurer and the "Account".

Claims against the Pension Companies arising from the pension contract are not within the scope of arbitration. But disputes under a "yearly income insurance" contract concluded with a Pension Company will fall under the arbitration since claims arising out of insurance contracts are subject to arbitration.

Pursuant to an amendment made in 2012, claims against the "Account" (Insurance Fund) are also eligible for arbitration. The

"Account" is a fund that compensates death, personal injuries, loss and damages

- where compulsory insurances are not taken or
- the insured could not be identified, or
- in other cases mentioned by the law.

Claims addressed by the insurer based on the contract of insurance are not eligible: e.g. for return of excessive payments of insurance monies or for the premium.

9. Claimants- Defendant Insurer

Claimants who may apply to arbitration are

- policyholders (they are party to the insurance contract)
- insured (in case of insurance on account of a person other than the policyholder, when this person is entitled to sue the insurer)
- beneficiary (in personal insurances i.e. life, accident, sickness)
- third party victim (in liability insurances – Turkish law grants the victim the right to sue directly the liability insurer)
- subrogees of the persons above including insurers (in case the indemnity insurer is subrogated to the rights of the insured, the subrogated insurer may apply to the special arbitration scheme against the liability insurer of the person liable for the indemnified loss).

Claimant may be any policyholder or insured or beneficiary, regardless of whether it is a professional or a trader. The Turkish special arbitration scheme is not designed exclusively for consumers.

Resort to arbitration is possible only against the insurer who adhered to the arbitration system (recourse is possible only against members of the "Club"). Although membership is "voluntary", nearly "all" the insurers are members. As of September 2012, market

shares of member companies cover 95% in non-life and 96% in life business. The Regulator made it very clear that it would appreciate the insurers became "member". This invitation was very largely accepted.

To become a member, the insurance company must make a written declaration to the Commission. When necessary formalities are fulfilled, the insurer becomes bound by the arbitration application even in the absence of an express arbitration clause in the insurance contract.

Against an insurer who is member of the special arbitration scheme, the claimant has to choose between state courts or special arbitration. The claimant may prefer courts or arbitration in its sole discretion. However once the choice is made, it is not possible to change it.

10. Arbitrators

Arbitrators have to work only in life or non-life fields. They are not necessarily jurists. In our view this is one of the weaknesses of the system. Requirements for being an arbitrator are experience, clean record of crime and high studies. The Regulator has the duty to check whether the candidates who apply for being inscribed in the official list of arbitrators fulfil the conditions. As of September 2012 there are 149 arbitrators in the official list.

The Commission appoints the arbitrators in accordance with turn (their order in the list). But if the first arbitrator whose turn has come has no sufficient expertise for the dispute in question, the next (appropriate) arbitrator will be appointed.

Arbitrators must be impartial. To help achieving this goal, a prohibition is provided: Persons working in insurance companies, insurance intermediaries, loss adjusters (or their spouses or children) are prohibited to act as arbitrator.

Arbitrators appointed in arbitrations conducted pursuant to Civil Proceedings Act must fulfil also the requirements of special arbitration scheme. In our opinion this is going too far. Insurance is

not more important than other areas where arbitration is possible. There is no reason justifying additional requirements for insurance arbitrators chosen by the free will of the concerned parties when the arbitration is subject to general rules.

11. Costs

Special arbitration scheme is not "gratis". An application fee is collected from the applicant (claimant). But those fees are not too high (up to TL 5.000 only TL 35 –less than EURO 15; for claims higher than TL 15.000 only TL 250 - less than EURO 100).

The system is alimented by insurers and the "Account". Insurers pay an annual fixed subscription fee + a fee per file (paid beginning from the 30th file of the year). Funding by the "Account" occurs upon request by the Regulator. In case the annual budget is not sufficient, additional support has to be provided by the "Union" or the "Account"

Arbitrators are paid directly by the Commission as well as notification/service expenses. Other costs are borne by the loosing party (witness expenses, expertise). Court fees issue is not very clear (It is reported that the initial court fee is paid by the Commission. What about the subsequent court fees?).

12. Conditions of Application

The claimant must first have made a request to the insurer. Application to start special arbitration is allowed only in case of negative answer or no answer within 15 days.

Disputes referred to (ordinary or consumer) courts cannot be brought to arbitration (choice made once and for all).

Consequences of the application: The legal action is deemed initiated at the date of application (prescription interrupted that very day). The applicant cannot start legal action at state courts from that moment.

13. Rapporteur

The application is examined first by a "rapporteur" (who must have clean criminal record, be experienced in insurance and have completed high studies). If the case is not resolved while in the hands of the rapporteur, it will be then submitted to the arbitrators.

The rapporteur has to complete its examination within 15 days. It has to examine whether the formal application conditions are fulfilled (the rapporteur takes no decision as to the merits of the claim).

The rapporteur must prepare a report stating the factual and legal grounds of the dispute and containing information about the allegations together with the list of evidences submitted by the parties concerned.

14. Procedural Rules

For disputes over TL 15.000, a panel of arbitrators (at least three persons) must be appointed. Unanimity is not required. Arbitrators can take a decision by a simple majority.

The arbitral decision is rendered "on the file" (hearing is optional). The case must be decided within 4 months following appointment (if not extended later by mutual agreement). Otherwise the case will be sent to the competent Court.

Upon dismissal of the claim one fifth of the minimum official lawyer fees only will be charged to the applicant. This solution is provided in order to lighten the economic burden put on the claimant's shoulder, but is obviously contrary to law (in that it decreases the holy and untouchable fees of the lawyer).

The applicant will not pay any fee for the arbitrators (only the application fee is incumbent on it). The arbitrators are empowered to take certain steps. They may in particular

- Upon demand of one party decide for preventive measures
- Upon demand of one party, gather (or determine) the evidences

- Appoint experts
- Conduct investigation on site

The arbitral decisions concerning disputes up to TL 40.000 are final. The parties concerned cannot appeal against them. But in respect of decisions concerning disputes over TL 40.000 appeal is possible. In that context what is relevant is the amount of the dispute and not the amount allowed. If in respect of a claim for TL 50.000, the arbitrators condemned the insurer to pay TL 30.000, both parties would be entitled to appeal.

Appeal for procedural grounds is possible regardless of the amount (e.g. decision rendered after the arbitration period is exhausted; decision on something which was not claimed; decision outside the competence of the arbitrators; no decision for the claims and defences).

Are the arbitrators allowed to decide "ex aequo et bono" ("according to the right and good" or "from equity and conscience")? We believe this is not possible for two reasons:

- The Civil Proceedings Act (applicable as complementary) clearly states that the arbitrators are not empowered to decide "ex aequo et bono" if not expressly authorized by the concerned parties to do so.
- The decisions about claims higher than TL 40.000 are subject to appeal. But appeal is relevant only for legal errors. Appeal against a decision based on the equity does not seem logic. Therefore the arbitrators must base their decision on material law provisions. As it is not justifiable to have different regimes for small claims and the big ones, the requirement to apply material law provisions exists also for claims less than TL 40.000.

The arbitral decisions are enforceable immediately. The principle is that appeal does not stop enforcement. But enforcement may be postponed by a judicial decision, if adequate security is furnished. The solution is the same for court decisions.

15. Pros and Cons

Advantages of the special arbitration scheme

The special insurance arbitration scheme is advantageous for policyholders/insured/beneficiaries especially in two respects:

- Costs are considerably less (but we must underline that this fact encourages and increases the "hopeless" applications – "let's try, we lose nothing" temptation)
- High speed is achieved (this is particularly important in a country where the average duration of court cases is relatively long – two years)

The "high speed" is also of utmost importance for insurers: For claims made against them, insurers have to constitute important "reserves" that may adversely affect their financial sheets.

The arbitral awards were so far more detailed than the court decisions. As courts are submerged in a very large number of disputes, often decisions are written as shortly as possible.

One of the principles of the private arbitration is "privacy". Arbitral awards may not be published without the express consent of the parties to the dispute. However decisions rendered of the special arbitration scheme for insurance are regularly published (without giving the names) in the hope that insurers would draw the necessary lessons.

Disadvantages

The special arbitration scheme should also extend to disputes generated by pension contracts. The special arbitration scheme should comprise only "small claims". In our opinion the submission of large claims to arbitration is not a good solution since those claims require more time and special procedures for being adequately decided. There are claims brought to arbitration for more than one million US$. In the worst scenario, such big claims would be decided by a panel with a majority of non-jurists, after an examination on the file and within two months. In that context, the defendant insurers would have been given only one opportunity for their written submissions.

In the list of arbitrators there are as much non-jurists as jurists. In my belief, a non-jurist arbitrator should not be appointed as "sole arbitrator" since decisions ex aequo et bono are not allowed. Whether it is an appropriate solution to appoint non-jurist arbitrators in the panel seems also debatable.

On the other hand the level of the arbitrators seems also to be a controversial issue. The quality of the decisions rendered in the special arbitration is not below the court decisions. However this "not bad" level is not sufficient. It should be improved. This requires arbitrators of higher formation.

Reliability

Is the new special arbitration scheme reliable? This is vital for its future and intended purpose. Although the number of applications increases each year, we don't believe that this demonstrates a widespread "take up" by the targeted consumers. More than half of the applications are finally rejected. This fact shows that the proper victims don't choose yet the special arbitration and prefer courts.

16. Some Figures

Start: August 2009

The number of applications: increase each year.

As of end September 2012: 4.731 applications.

92% non-life; 8% life

A total of 2798 cases were decided by arbitrators

Average duration: 61 days

80% of claims: below TL 15.000

17. Conclusion

The special insurance arbitration scheme has been revealed so far as useful. It must be maintained but at the same time immediately improved.