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From : **Topdemir İnandıoğlu Kömüç Law Office**

To : **Mr. Niels Jørn Friborg**

Subject :

1. Which laws and rules govern contracts of insurance, including H&M and P&I insurance, in your jurisdiction?

Insurance Law (*Sigorta Hukuku*) is mainly governed by:

- 1) The Turkish Commercial Code (TCC),
- 2) Turkish Code of Insurance,
- 3) Turkish Code of Obligations,
- 4) The Directive No. 18971 dated 12.12.2012 regarding Insurance Companies and P&I Clubs Deemed Effective for the Administrative Acts within the Scope of Implementations of Flag State,
- 5) The Regulation No. 27759 dated 14.11.2010 on Insuring and Auditing the Vessels regarding the Marine Claims published in the Official Gazette,
- 6) The regulation No. 28453 dated 31.10.2012 of Ports published in the Official Gazette,
- 7) The Regulation No. 27766 dated 25.11.2010 on Regular Voyages by Seaway published in the Official Gazette,
- 8) Turkish Vessel Policy Conditions dated 01.08.1996

The provisions of (TCC) are divided into six books. The sixth book regulates the fundamental rules applicable to insurance contracts, as well as the marine insurance contracts including H&M and P&I. Marine insurance contracts are also governed by several supplementary legislations mentioned above. The first chapter of the sixth book is “general provisions”, which govern all types of insurance contracts. (Art. 1406-1482) “Indemnity insurances” are regulated between articles 1453-1486 and this part falls into two categories: “property insurance”(Art.1453-1472) and “liability insurance” (Art. 1473-1485).

H&M and P&I insurances are not governed separately in Turkish Law System. However indemnity provisions also apply to H&M insurances, liability insurance provisions apply to P&I insurances.

Protection and Indemnity insurance actually is regulated in the Article 1402 of TCC named Mutual Insurance. It is described in the Article that under mutual insurance, several persons mutually undertake to compensate the loss sustained by one of them as a result of the materialisation of a defined risk.

Turkish marine insurance law implements English marine insurance law and benefits from English Clauses such as; English Institute Time Clauses Hulls and International Hull Clauses. The General Conditions of Hull Insurance is used as a fixed policy. Parties may also add specific conditions to the policy, unless they do not breach the general conditions.

2. Do the laws and rules governing contracts of H&M and P&I insurance prescribe any post-inception warranties or other terms, which – if breached by the insured – may allow the insurer to deny or limit coverage of an insured event?

If so, please identify such warranties and terms and state specifically whether (i) unseaworthiness, (ii) deviation from the agreed vessel trading area or route, (iii) violation of safety rules and/or (iv) negligence, gross negligence or wilful misconduct of the insured may cause loss or limitation of coverage.

Several Articles in TCC allow the insurer to deny or limit coverage if breached by the insured. The articles 1429 (Policyholder's fault in the materialisation of the risk), 1439 (Remedy; the insurer may avoid the contract or request additional premium), 1444 (During the contract period in general), 1445 (Rights of the Insurer), 1446 (At the time of the materialisation of the risk), 1447 (Duty to provide information and duty to allow investigation), 1448 (Duty to prevent, mitigate the loss; duty to protect insurer's right to recourse), 1449 (Violation of the duties stipulated in the contract), 1471 (Policyholder's duty to refrain from changes to lost property and at the scene of loss), 1472/2 (Subrogation), 1475 (Duty of notification), , 1477 (Intentional acts of the insured) of TCC set out the rules providing clauses for the insurer to deny or limit the coverage in case of a breach by the insured (policyholder).

Since the general insurance provisions apply to all types of insurances, those articles mentioned hereinabove also apply to H&M and P&I insurances.

As a reply of the specifically given questions,

-According to the Article 1027/2, which regulates the insurance on maritime mortgage, the insurer may deny the coverage in cases; (i) the insurance premium is not paid when due, (ii) **unseaworthiness of the vessel**, (iii) **deviation from the agreed vessel trading area or route**.

-According to the Article 1429, if the policyholder, the insured, the beneficiary and the persons for whose acts these persons are legally liable **intentionally cause** the materialisation of the risk, the insurer shall be discharged from liability and shall not reimburse the premiums paid.

According to the Turkish case law, the insurer may deny the coverage in case of unseaworthiness of the vessel or the deviation from the agreed route.

Certainly, in the event of negligence, gross negligence or willful misconduct of the insured, the insurer is not obliged to pay the indemnity. Therefore, even if the negligence of the insured causing the risk is slight (*culpa levis*), the loss caused by this facts remains out of the warranty.

3. Under which conditions may a breach of the warranties or other terms identified in reply to question 2 cause loss or limitation of coverage? As part of your answer, please describe how the burden of proof is allocated.

As a general rule during the contract period Article 1444 provides; "(1) After conclusion of the contract, the policyholder shall not accomplish acts or transactions, which would lead to an increase of the amount of indemnity due to aggravation of the risk or current status, without the insurer's prior consent. (2) If the policyholder or another person authorised by the policyholder accomplishes acts or transactions, which increase the probability of

materialisation of the risk or aggravate the current status of if circumstances designated by the parties at the conclusion of the contract as aggravation of the risk are materialised, the policyholder shall notify the insurer immediately or, if these transactions had been concluded without its knowledge, within ten days as of the date of awareness.”

Apart from this rule;

- if circumstances of importance to the insurer are not disclosed at all or disclosed incorrectly, the insurer may avoid the contract or request additional premium, (Art. 1439/1 of TCC)

- After the materialisation of the risk, in case the duty of disclosure was negligently violated by the policyholder and if this violation affected the amount of the indemnity, a deduction from the indemnity shall be made in proportion to the degree of negligence. Where the policyholder acted with intent, the insurer shall be discharged of its obligation to indemnify. (Art. 1439/2 of TCC)

-During the contract period, the insurer may terminate the contract or request additional premium within one month from the date it became aware of the facts increasing the probability of materialisation of the risk or aggravating the current status or of the events designated by the parties at the conclusion of the contract as aggravation of the risk. (Art. 1445 of TCC)

-If the insurance indemnity or the fixed sum to be paid increased as a result of a failure or delay in giving notice of the materialisation of the risk, the insurance indemnity shall be reduced by taking into consideration the degree of the negligence, (Art. 1446 of TCC),

-If the amount to be paid increased because of a breach of the duty to provide information and duty to allow investigation, a deduction shall be made from the indemnity by taking into consideration the degree of negligence (Art. 1447/2 of TCC),

-If the breach of the duty to prevent, mitigate the loss and duty to protect the insurer's right of recourse have created a situation detrimental to the insurer, the insurance indemnity shall be reduced proportionally by taking into consideration the degree of negligence (Art. 1448 of TCC),

-Provisions to the effect that the insurer will be discharged from its obligation of performance by terminating the contract entirely or partly in the event that the policyholder is in breach of a contractual duty towards the insurer, shall be ineffective if the breach was not negligent, unless otherwise provided by this Code or other legislation (Art. 1449 of TCC),

-In the event of negligent of the duty to refrain from changes to lost property and at the scene of loss, the indemnity shall be reduced in the proportion to the negligence provided that there is a casual link between the breach and the loss or damage (Art. 1471/2 of TCC),

-The insured shall be liable as against the insurer if it were in breach of the rights that have passed on to the insurer. (Art. 1472/2 of TCC),

-The insurer shall not be liable for loss arising out of any event for which the insured is liable, if caused by intent. (Art. 1477 of TCC),

-And eventually, pursuant to Article 1429 of TCC titled fault in the materialisation of the risk; if the policyholder, the insured, the beneficiary and the persons for whose acts these persons are legally liable intentionally cause the materialisation of the risk, the insurer shall be discharged from liability and shall not reimburse the premiums paid.

Besides from those rules mentioned hereinabove, there is also a duty of notification, which the insured shall carry out, regulated in the Article 1475 of TCC provides a warranty. The violation of this duty, the 2nd and 3rd paragraphs of the Article 1446 applies; the insurance indemnity shall be reduced by taking into consideration the degree of the negligence.

Although those rules mentioned hereinabove do not stipulate any terms related to burden of proof, it is inclusively governed by the Article 6 of the Turkish Civil Code. According to the Article, *“In the absence of a special provision to the contrary, each part is bound to prove the existence of the facts on which he bases his right.”* Additionally, the Article 190 of the Turkish Civil Procedure Law provides that the burden of proof, unless otherwise specifically stated in the Codes, is allocated to the party, which benefits from the legal result depending on the claimed matter. Therefore; in case of the terms and warranties mentioned in question 2, the burden of proof is allocated to the insurer, who claims the loss is out of the scope of the indemnity. The insurer shall prove existence of the causality between the matter and the loss.

4. Are the warranties or other terms identified in reply to question 2 mandatory, or may they be deviated form by contract either to the advantage of the insurer or to the advantage of the insured, or both. Is the insurer allowed to incorporate additional warranties or terms in contracts of H&M and P&I insurance, a breach of which may cause loss or limitation of coverage?

As regulated under the titles of ‘protective provisions’ in TCC, some of the terms identified in reply of the question 2 are mandatory and may not be deviated by contract neither to advantage of the insurer nor to the advantage of the insured. The general mandatory provisions are the Article 1449, 1472, 1477. Three provisions identified in reply of the question 2 may not be deviated to the advantage of the insurer. (Art. 1471/1,1474,1476)

The insurer is allowed to incorporate additional warranties or terms in contracts unless they breach the mandatory provisions.

5. Will a choice of law clause in the H&M policy or P&I club’s rules be recognised in your jurisdiction to the effect that the existence of such warranties and terms as are mentioned in question 2 and the consequences of their breach will be governed by the law chosen?

Turkish case law is mainly based on the English marine insurance system and the judges actually apply the English Institute Time Clauses Hulls and International Hull Clauses as seen in the Turkish Supreme Court decisions.

For Hull and Machinery insurance, a list of conditions, which is called the General Conditions of Hull Insurance is used as a main source. Parties may also add specific conditions to the policy, unless they breach the general conditions.

The ship owner of the Turkish flagged vessel may agree with a foreign P&I club and chose a foreign law to apply to a potential case. If a Turkish court proceeds a case and there is no plea of arbitration, Turkish courts would be considered a competent court. Therefore; a

choice of law clause will be recognised in our jurisdiction to effect that the existence of such warranties and terms as are mentioned in question.

6. **Unless covered by your replies above, is there any case law in your jurisdiction which considers an H&M insurer's or P&I club's right to deny coverage, in accordance with the H&M policy or the P&I club's rules or otherwise, as a result of an insurance event having been caused by (i) unseaworthiness, (ii) deviation from the agreed vessel trading area or route, (iii) violation of safety rules or (iv) negligence, gross negligence or wilful misconduct of the insured?**

There are some Supreme Court decisions in Turkish jurisdiction concerning insurer's right to deny coverage in the mentioned events. Two of the Supreme Court decisions are mentioned herein under:

- **Regarding unseaworthiness and deviation from the agreed vessel trading or route**, one of the decisions of department no 11 of the Turkish Supreme Court, dated 30.6.1998, No. 1998/3266 stated that the vessel deviated from the agreed route and it was unseaworthy in the beginning of the voyage; therefore the loss is out of the scope of the policy and the insurer is discharged.
- Also The Supreme Court (Decision No. 2001/94499) held that the insurer may incorporate additional clauses or warranties in the insurance contract and in the implementation of the clause subject to the litigation, it is required to be accepted that the risk is out of warranty and the insurer may deny the coverage.

Yours sincerely

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