



Insurance and Insurance Brokers under the New Regulations



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Abstract

Today, a large percentage of insurance contracts all over the world have been executed through insurance intermediaries, called "insurance agents" and "brokers". The insurance and reinsurance brokers examined in this study are the people who only perform intermediate activities, and also represent the *insured* in the insurance contracts. The insurance brokers, who are assumed as middlemen in legal terms, mediate the establishment of insurance contracts and are assumed as traders according to clause 12 of the Article 12 of TCC. The Paragraph 2 of the Article 11 of TCC should not be considered applicable to insurance brokers. This article should be re-defined with a clearer expression in order to prevent the legal chaos caused by it.

Key Words English: Insurance, Agent, Insurance Brokers, Reinsurance Brokers, Insurance Contract

YENİ DÜZENLEMELER İŞİĞİNDA SİGORTA VE SİGORTA BROKERLARI

Özet

Günümüzde bütün dünyada sigorta sözleşmeleri büyük bir oranda “sigorta acenteleri” ve “broker” olarak adlandırılan sigorta aracıları eliyle gerçekleşmektedir. Bu çalışmada incelenen sigorta ve reasürans brokerleri sadece aracılık faaliyetinde bulunan, ayrıca sigorta

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sözleşmelerinde *sigortalıyı* temsil eden kişilerdir. Hukuki bakımdan tellal olarak kabul edilen sigorta brokerleri, sigorta sözleşmelerinin kuruluşuna aracılık ederler ve TTK. m. 12/b.12 anlamında tacir sayılırlar. TTK. m. 117/f.2'nin sigorta brokerlerine uygulanması düşünülmemelidir. Bu madde neden olduğu hukuki karışıklığın engellenmesi için daha açık bir ifade biçimi ile yeniden düzenlenmelidir.

Introduction

In our day, it is almost impossible for the insurance companies to find clients and to contact them directly, personally and to enter into contracts. Yet, addressing the whole population within the country from certain centers is highly burdensome and costly. Therefore, the insurance companies carry out the phases of execution of insurance contracts and spreading to the broader environments in all worldwide approaches through insurance agencies to a considerable extent¹. In this sense, the insurance companies feel the necessity to establish an external organization that covers a broader area, to the greatest possible extent². That kind of secondary dealers, operating within the external organization on behalf of insurance companies, are called "*insurance agencies*"³, and "*insurance brokers*"⁴ (against. Insurance Law, Art. 2 b).

¹ **Koenig, Willy**, Schweizerisches Privatversicherungsrecht, 3. Auflage, Bern 1967, p.47; **Memiş, Tekin**, Insurance Intermediary Services in European Union and Turkish Law, <http://www.jura.uni-sb.de/turkish/TMemis.html>. <29/11/2003>

² **Doğanay, İsmail**, Annotation of Turkish Trade Code, 3. Edition Ankara 1990, p.498.

³ For broader information about insurance agencies, see. **Kayhan, Şaban**, Agency Contracts in Turkish Legal System, 2. Edition, Ankara 2003.

⁴ **Kuntalp, Erden/Omağ, Merih Kemal**, Bank and Insurance Law, AÜAÖF. Publications, Eskişehir 1994, p.93; **Kender, Rayegan**, Private Insurance Law I in Turkey, Insurance Enterprise-Insurance Contract, Reviewed 5. Edition, İstanbul 1995 p.87 and so on.; **Arkan, Sabih**, Commercial Enterprise Law, Reviewed Fourth Edition, Ankara 1998, p.210 and so on.; It can be recognized that three insurance intermediary concepts those are defined also in European Union Law. These are the concepts of insurance broker (producer, broker), agency and secondary agency. It is pointed out in the grounding part of EEU, numbered 77/92 regarding the limitation of the activities between the insurance agencies and insurance producers that it is required to define the concept of insurance



The agencies as of insurance intermediary are out of our study's scope. In our study, we aim to address the insurance broker concept and legal status of insurance broker within the frame of new Insurance Law⁵ dated 03.06.2007 and numbered 5684 and Insurance and Reinsurance Brokers Regulations⁶, issued subject to that Law.

I. Insurance Broker Concept

The term Broker, originated from English language, has been used to cover the middleman concept in British law. The insurance middleman in that language is called “*Insurance broker*”. Also in the countries of Continental Europe, the persons who mainly intermediate among the insurance contracts, are characterized as agency or middleman. Other intermediaries operating as well as the agencies (Agent, Vertreter)and those who remain in the forefront in insurance intermediary services, are called *Middleman* (Makler) in German and Australia, and *Broker* in Sweden. However, especially in German Law, the insurance middleman and broker concepts incorporate mostly the same meaning⁷.

Clause d of Article 2, including the sub titled of Descriptions, of Insurance Law, numbered 5684, describes insurance broker as: “ *The person who has acquired the profession of performing the preliminary works before executing the contracts and supporting in adaption of*

intermediaries due to the fact that there are different provisions in the approach of union member countries and therefore the uniformity should be provided. Accordingly, the insurance intermediaries are defined as: the persons who perform a duty as the intermediary between the insurance buyer and under-writer or selected reinsurer and who act independently from any of the parties, carry out the preparation operations in order to execute the contract and perform the required procedures, especially in case of loss assessments (77/92/AET, art. 2, b.1/a).

See. **Memiş**, Insurance Indermediaries in European Union and Turkish Law, <http://www.jura.uni-sb.de/turkish/TMemis.html>. <29/11/2003>

⁵ See. RG. T. 14 June 2007, S. 26552.

⁶ See. RG. T. 21 June 2008, S. 26913.

⁷ **Özdamar, Mehmet**, Insurance Brokers And Their Legal Nature, <http://auhf.ankara.edu.tr/dergiler/auhfd-arxiv/AUHF-2008-57-03/AUHF-2008-57-03-ozdamar.pdf>, (18.08.2010).



the contracts or in collection of the indemnity when required by representing the ones who desire to execute an insurance or reinsurance contract, by acting completely objective and independent towards selection of the companies, with which these contracts shall be executed and by protecting the rights and benefits of the persons who request warranty”.

The insurance and reinsurance brokers have to receive a license from Treasury General Directorate (Insurance L. Art.21/cl.2). As can be understood from the definition of the article, insurance and reinsurance brokers are not only active in intermediary business, also they are able to deliver the insurance contracts to the *insured*⁸.

II. Legal Nature

A. General

Before indicating the legal nature of the insurance brokers, we have to answer this question:

Which of the insurance intermediaries are included within the scope of application of clause 2 of Article 114 of TCC?

Let's immediately express that, the insurance agencies are already the insurance intermediaries who are automatically subject to agency provisions. Therefore, if the legislator had considered only the insurance agency for the agency provisions, it would not require referring to Article 117/b.2 of TCC. Accordingly, as mentioned above, the legislator has aimed to adopt the provisions of TCC regarding the agency relations also for the broker, being another insurance intermediary who intermediates the execution of the insurance contract besides the insurance agencies. However, that attitude of the legislator has caused also some problems in practice. Yet, the legal characteristics of insurance brokerage and which provisions should be

⁸ Tekil, Fahiman, Commercial Enterprise Law, İstanbul 1997, p.222.



adopted thereto, have been discussed in our law. The point of origin of this discussion has been especially defined in Article 117/b.2 of TCC.

B. Comments on the Doctrine

Karayağın, suggests that Article 117/b.2 of TCC can be interpreted in two ways: At first, although they are not continuously subject to the insurer or agency and they do not perform this business as their profession, these provisions are directed in order to subject the ones who intermediate in execution of the insurance contracts to the agency provisions. In case that this interpretation is accepted, regardless of the elements of regularity and getting a profession, the agency provisions shall be applied to all insurance intermediaries. Therefore, in terms of private law, there won't be any differences between the insurance agency and insurance broker. An explicit record, confirming this approach, has not been identified, in the justification of the judgment regarding TCC and also in Justice Commission⁹.

Secondly, **Karayağın**, has indicated that this is a redundant provision, if the interpretation of this provision as mentioned above is not possible. Yet, the provisions of TCC regarding agency are basically adopted from Italian Civil Law (art. 1742-1753) and in this law the agency contract provisions have been regulated pursuant to conception that agency relation should be deemed as “*permanent intermediary (brokerage)*” contract and adoption of these provisions to insurance agency has been conditioned to the fact that the said provisions should comply with the characteristic of insurance business (art. 1753)

According to **Kender**, when the definition of insurance broker is examined, we can recognize that especially intermediating item is dominant. Such kinds of intermediaries have been available in all countries and in terms of their legal characteristics, they are not more than broker (Makler) basically¹⁰. **Arseven** has also confirmed the same opinion as **Kender**¹¹.

⁹ **Karayağın, Yaşar**, commercial law courses, Ankara 1968 p.518, . **Arslanlı, Halil**, Land Trade Law Courses, General Provisions, 3. Edition, İstanbul 1960, p.189.

¹⁰ **Kender**, p.89.

¹¹ **Arseven, Haydar**, Insurance Law, 2. Edition, İstanbul 1991, p.63.



C. Our Opinion

According to our opinion, the most convenient institution that complies with the legal characteristic of the insurance brokers is the institution of *middleman*. Ie. insurance broker is a middleman in terms of its legal characteristic and the differences of such kinds of intermediaries from the agency in principle are the same differences as a middleman from an agency¹². In this respect, it is not legally convenient to call such kinds of intermediaries agencies.

III. Requirements for Becoming Insurance and Reinsurance Broker

The requirements to perform the insurance brokerage profession have been determined by “*Sub-Title of Features and Conditions required for Brokers*” in the provisions of Article 4 of the Insurance and Reinsurance Brokers Regulation, issued subject to clause 2 of Article 21 of Insurance Law numbered 5684.

Accordingly, the requirements for performing insurance brokerage are as follows:

(1)- Requirements for Real Person Brokers

- a) Residing in Turkey,
- b) Able to exercise his civil rights,
- c) Not to be sentenced or punished due to the crimes indicated in the sub clause four of clause (a) of the paragraph two of the article 3 of the respective Law,
- ç) Not to have announced bankruptcy and concordatum,
- d) To have graduated from a four-year higher education institution,
- e) To have at least ten-year of experience in the departments of the respective institutions and enterprises regarding the insurance area within which he/she shall carry out the brokerage business,
- f) To meet the minimum property ownership requirement,
- g) To be competent in terms of physical, technical and administrative infra structures together with human resources, to be determined by the General Directorate or to be determined by the authorized professional enterprises and to be approved by the General Directorate.

¹² See. **Kayhan**, p.60 - 61.



(2) Requirements for Legal Entities, to Carry out Legal Entity Brokerage Activities Requirements

- a) To have their head office in Turkey,
- b) To be established as joint or limited partnership,
- c) No record of bankruptcy and concordatum,
- d) To meet the requirement of minimum paid-in-capital, and equity capital after starting operations,
- e) To be competent in terms of physical, technical and administrative infra structures together with human resources, to be determined by the General Directorate or to be determined by the authorized professional enterprises and to be approved by the General Directorate.

The authorities of the legal entities who shall carry out brokerage activities, its real person partners and authorities of its legal entity partners should not have been sentenced to imprisonment or more than one judicial fine, or should not have been convicted of infamous offences such as simple or qualified embezzlement, corruption, bribery, theft, fraud, breach of trust, fraudulent bankruptcy, gross misconduct as well as smuggling offences, fraudulent acts in public procurements and purchases and sales, laundering the proceeds of crime, revealing secrets of the state or tax evasion except for crimes committed by imprudence, even if they have enjoyed amnesty (Insurance Law. Art.3 sc/4).

Moreover, by the respective Regulations, it is required for the real persons and legal entities those carry out the brokerage activity, not to be bankrupt or declared any bankruptcy.

The legislator has not contented with this, that, it is required for the managers of the legal entity that shall perform brokerage activity, except for the top level managers, should have the other requirements of paragraph 1 of the Article 4 of the respective Regulation, other than the clauses (e), (f) and (g) of the respective paragraph, in addition, they should have gained experience at least for five years at the respective departments of the institutions and enterprises related to insurance, within the areas they shall perform brokerage.

Partners of insurance companies, insurance agents and loss adjusters, persons in charge of management and audit of these, persons who have signing power on their behalf, and company



employees engaged in professional activity; shall not act as a broker, be appointed to the board of directors and auditing board of any legal person broker, use signing power on their behalf, become partners of these and accept any paid work from them. Such restrictions shall also apply the spouses of these persons and the children under their custody.

Any person banned from acting as an insurance broker shall not be employed in any activity relating to brokerage and cooperation shall not be made with these people for the execution of the brokerage profession.

Insurance brokers and their employees shall not disclose any know-hoe or confidential information they learn in the execution of their duties without the permission of the relevant authority. However it is obligatory that any incidence giving rise to a criminal offence is reported to competent authorities. (Insurance L. Art. 21 /c.3,4,5).

Conclusion

In the older regulations there was also an institution, named insurance producer having the same legal qualities as insurance broker. This situation had been causing confusion both in theory and in practice. However, in the present situation, through the new regulations, approval of only the insurance brokers has been basically well-directed. There were no differences between insurance broker and insurance producer in terms of legal features anyway. Mainly, insurance brokers are the assistant traders having the characteristic of middleman, who intermediate insurance operations. In this respect, calling insurance brokers as insurance middleman would be more well-directed according to our language.

Insurance brokers are the persons who intermediate the insurance contracts and who are assumed as trader within the meaning of clause 12 of article 12 of TCC. Somewhat different, it can not be considered to apply the paragraph 2 of the article 117 of TCC to the insurance brokers. In this respect, in order to prevent the legal chaos caused by the paragraph 2 of the article 117 of TCC, its patterns should be re-regulated by a clearer explanandum. It is not convenient to apply the agency provisions having permanent relations to the insurance brokers who are not in relation with the partners permanently. In order to eliminate these inconveniences,



either paragraph 2 of this article should be abolished, or the requirement that “complying with the insurance provisions” according to the reference Italian Civil Code, should be stipulated.

The businesses of insurance brokers are commercial and these have the trader characteristic according to the regulation of the clause 12 of Article 12 of TCC. From our point of view, until a new regulation is developed complying with the feature of insurance producer and broker, the arising problems might be solved by applying the provisions regarding the commercial businesses middleman (Article 100-115 of TCC).

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