# Matching the Covers: Reinsurance Law Implications of the Different Regimes for Risk Control Clauses Under English and Turkish Laws

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**Abstract:** This article comparatively analyses the regimes on insurance warranties under English law and contractual duties of the insured under Turkish law. Where the underlying insurance is governed by Turkish law and the reinsurance contract is subject to English law, the distinctions between the regimes may cause mismatches between the covers. Such mismatches may result in coverage gaps, depending on the construction of the reinsurance contract and the position taken regarding the nature of reinsurance under English law. Coverage gaps can deprive the parties of the aimed benefits of the reinsurance arrangement. This article aims to draw attention to such possible areas of mismatch and make recommendations for achieving back-to-back covers.

## 1. Introduction

Turkey has an emerging insurance market with low penetration and strong growth potential.[1] Art. 15 of the Turkish Insurance Act[2] (TIA) requires the insurable interests of Turkish residents to be insured by companies operating in Turkey and disallows obtaining coverage from abroad. This restriction aims to develop the country's insurance business, fully utilise its existing capacity, and channel the funds to the national economy.[3]

The said limitation does not prohibit Turkish insurance companies from obtaining reinsurance coverage abroad.[4] Given the Turkish reinsurers' insufficient capacity, the market is highly dependent on reinsurance from abroad,[5] with a significant contribution from the London market.

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[1] '*Türkiye Sigorta Birliği Strateji Raporu* (2020-2024) (Turkish Insurance Association Strategy Report)' (*Türkiye Sigorta Birliği*, 4 June 2020). https://tsb.org.tr/media/attachments/20200604_TSB_STRATEJI_TR_19.pdf accessed 24.08.2022.

[2] *Sigortacılık Kanunu* (Insurance Act) numbered 5684.

[3] *Sigortacılık Kanunu Gerekçesi* (Justification of Insurance Act).

[4] *Sigortacılık Sektöründeki Uluslararası Faaliyetlere İlişkin 2007/12467 Sayılı Karara Dair 2007/5 Sayılı Genelge* (Circular no. 2007/5 Regarding Decree no. 2007/12467 on International Activities in Insurance Sector).

[5] Türkiye Barolar Birliği, *'Türkiye'de Sigorta Hukukunun Sorunları ve Geleceği* (The Issues and Future of Insurance Law in Turkey)' (2004) 49, 50 http://tbbyayinlari.barobirlik.org.tr/TBBBooks/sigorta-hukuku.pdf accessed 24.08.2022; 'Turkish Insurance: Ratings Under Pressure Despite Manageable Pandemic Impact' (Fitch Ratings, 11 November 2020) https://your.fitch.group/rs/732-CKH-767/images/Turkish%20Insurance%20Ratings%20Under%20Pressure%20Despite%20Manageable%20Pandemic%20Impact.pdf accessed 24.08.2022.

Under Turkish law, parties can freely choose the law applicable to their contract,[6] provided that there is an element of foreignness, such as the nationality of the policyholder or insurer or the location of the risk.[7] Parties cannot opt out of Turkish law where such element is lacking, as will be the case in most insurance taken out per the restrictions under Art. 15 TIA.[8] Therefore, insurance contracts taken out in Turkey are generally governed by Turkish law.

The Turkish reinsured and English reinsurer can agree on Turkish law to also govern the reinsurance contract. However, the Turkish Commercial Code[9] (TCC), which regulates insurance contracts, does not specifically regulate reinsurance contracts beyond providing a definition. It is generally accepted that the terms of the TCC on insurance contracts shall also apply to reinsurance contracts.[10] As criticised by the scholars adopting this view, this results in Turkish law-governed reinsurance contracts being subject to all the overriding mandatory provisions of TCC, which actually aim to safeguard the interests of ordinary policyholders.[11] Foreign reinsurers will often not be willing to be bound by these disadvantageous terms in their relationship with the reinsured.[12] Given the element of foreignness in such arrangements, the parties can freely choose the law to govern their contract.[13] Thus, it is typical for the foreign, and mostly London-based, reinsurers to opt for a more favourable and familiar governing law, which often is English law.[14]

Consequently, the reinsurance contract may have a different governing law than the underlying contract, which is the scenario the discussions in this article are based on. In principle, the rights and liabilities of the parties under each contract are subject to the respective governing law. Thus, the different legal regimes of the Turkish and English insurance laws may lead to discrepancies between the scopes of cover under the insurance and reinsurance contracts.

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[6] *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun* (Act on International Private and Procedure Law (TIPLL)) numbered 5718 Art. 24.

[7] K Sedat Sirmen, *'Türk Kanunlar İhtilafı Hukukunda Zarar Sigortaları Kapsamına Giren Milletlerarası Unsurlu Sigorta Akitlerine Uygulanacak Hukuk* (Law Applicable to Loss Insurance Contracts with International Elements in Turkish Conflict of Laws)' (2010) 26(3) BATİDER 46; Selahattin Kaya, *Yabancı Unsurlu Sigorta Sözleşmelerine Uygulanacak Hukuk* (Law Applicable to Insurance Contracts with International Elements) (On İki Levha, 2016) 89.

[8] This being the dominant view in Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk* (International Private Law) (11th edn, Beta Basın Yayım 2012) 561; *conf* the view that the choice of a foreign jurisdiction is a foreign element in itself 2006/8585 M. 2006/12877 J. dated 07.12.2006, 11th Civil Chamber of the Turkish Supreme Court; 2016/3365 M. 2016/4525 J. dated 3.11.2016, 15th Civil Chamber of the Turkish Supreme Court.

[9] *Türk Ticaret Kanunu* numbered 6102.

[10] Samim Ünan, *Türk Ticaret Kanunu Şerhi Altıncı Kitap: Sigorta Hukuku Cilt I Genel Hükümler* (Commentary on the Turkish Commercial Code Sixth Book: Insurance Law Vol.I General Provisions) (On İki Levha , 2016) 47; 2016/8924 M. 2017/5110 J. dated 5.10.2017, 11th Civil Chamber of the Turkish Supreme Court; *conf.* Hakan Koçak, *Reasürans Sözleşmeleri* (Reinsurance Contracts) (Seçkin, 2023) 136-142.

[11] Samim Ünan, 'Some private international law problems relating to insurance law in Turkish practice' (2012) (4) European Insurance Law Review 67.

[12] Ünan (n 10) 49.

[13] Discussions on the application of Art. 5 and 6 TIPLL in terms of (re)insurance contracts, where provisions of Turkish law apply despite the parties validly choosing a foreign law, are beyond the scope of this article.

[14] Özlem Gürses, *Reinsuring Clauses* (Informa 2010) 2.82; see *Gan Insurance Company Limited & Anr v Tai Ping Insurance Company Limited* [1999] I.L.Pr. 729.

One of the most significant differences between the English and Turkish insurance laws concerns the contractual terms requiring the policyholder to do or not to do something to prevent or minimise the risk of loss, which are referred to as precautionary measures under the Principles of European Contract Law (PEICL).[15] Such terms are regulated as contractual duties under Turkish law.[16] Although no direct equivalent exists, these terms could fall under the concept of warranties under English law.[17] This article will first comparatively analyse these concepts and discuss the possible points of mismatch in the respective covers which may arise from the differences between the two regimes.

The subsequent discussions of this article will focus on facultative reinsurance, where the reinsurer usually assumes the single risk originally undertaken by the reinsured.[18] Especially where the risk is reinsured in full or in higher percentages proportionally, the parties to the reinsurance contract usually aim to match the reinsurance cover with that of the underlying contract.[19] To achieve that, the reinsurance contracts often fully incorporate the terms of the underlying contract.[20] However, even then, the scope of liability of the reinsurer is a matter of construction of the reinsurance contract.[21] Some previous English case law had acknowledged the presumption of a back-to-back coverage, meaning that in the absence of clear words to the contrary, whatever is covered by the underlying contract shall also be covered under the reinsurance contract.[22] Nevertheless, this presumption was dismissed in other cases depending on the philosophical view adopted on the nature of reinsurance.[23] With reference to such discussions, this article will discuss the possibility of coverage gaps between the contracts; and finally, make suggestions for enhancing back-to-back covers.

Overall, this article is concerned with the possible coverage gaps in reinsurance arrangements which may arise due to the distinctions between the regimes on insurance warranties under English law and contractual duties of the insured under Turkish law. Coverage gaps may deprive the Turkish reinsured of the aimed benefits in obtaining reinsurance. Meanwhile, the ambiguities on the extent of the cover may adversely affect the legal foreseeability and discourage reinsurers from providing cover to Turkish reinsureds. In the bigger picture, this may have a negative impact on the stability and growth of the Turkish market. Drawing attention to the possible areas of mismatch and making recommendations on how to overcome them, this article aims to serve the overall goal of strengthening the Turkish market's capability.

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[15] Principles of European Insurance Contract Law Article 4:101.
[16] Greg Pynt and Kyriaki Noussia, 'Report on, and Minutes of, the Consumer Protection and Dispute Resolution Working Party Session on Precautionary Measures' (IV AIDA Europe Conference London Consumer Protection, London, September 2012) 15.
[17] John Habergham, 'Precautionary Measures' (IV AIDA Europe Conference London Consumer Protection, London, September 2012) 32.
[18] Terry O'Neill and others, *The Law of Reinsurance* (1st supp, 5th edn, Sweet & Maxwell 2021) 1-017.
[19] Gürses *Reinsuring Clauses* (n 14) 2.82.
[20] Robert Merkin, *A Guide to Reinsurance Law* (Informa Law from Routledge, 1st edn, 2007) Ch 4.
[21] O'Neill (n 18) 4-001, 4-004.
[22] Gürses *Reinsuring Clauses* (n 14) 2.89; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852; *Groupama Navigation et Transports and Ors v Catatumbo Ca Seguros*. [2001] Lloyd's Rep IR 141.
[23] O'Neill (n 18) 4-025.

## 2. Risk control clauses under English and Turkish insurance laws

Under an insurance contract, the obligation of the insurer to provide the insured with the agreed benefit is conditional or contingent upon the occurrence of the insured uncertain event.[24] In other words, the insurer shall not pay unless the risk materialises. Thus, the insurers use various risk control clauses[25] to prevent the occurrence or aggravation of the risk insured[26] and limit their liability.[27] In different jurisdictions, such clauses can be drafted as exclusions, conditions precedent or duties.[28]

Under English law, the most common risk clauses[29] and the most significant terms of an insurance contract[30] are warranties, which "circumscribe the circumstances in which the insurer is liable".[31] Although not identical to warranties, there are other similar concepts adopted in civil law systems,[32] such as the *Obliegenheiten* (duties) in German law,[33] which, contrary to English law, require causation and some degree of culpability for breach.[34] Turkish law, influenced by German law, also adopts the concept of contractual duties.[35] Although both English law insurance warranties and Turkish law contractual duties aim to prevent and minimise the risk and the insurer's liability, they significantly differ in their nature and the consequences of their breach.

In English law, the primary sources of (re)insurance contract law are common law, Marine Insurance Act 1906 (MIA), and the Insurance Act 2015 (IA) which introduced significant reforms. In Turkish Law, (re)insurance contracts are regulated to a large extent under TCC dated 2011. Both IA and TCC intended to depart from the all-or-nothing solutions adopted by their predecessors and to enhance the balance between the interests of the insurer and insured,[36] although through different approaches. However, in both cases, the reforms were subject to further criticisms, as will be discussed below on warranties and contractual duties, respectively.

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[24] *Prudential Insurance Co v IRC* [1904] 2 K.B. 658, 663.
[25] Baris Soyer, 'Risk control clauses in insurance law: law reform and the future' (2016) CLJ 75(1) 109.
[26] Jürgen Basedow and others (ed), *Principles of European Insurance Contract Law (PEICL)* (Otto Schmidt KG Verlag, 2nd ed, 2015) 186.
[27] John Birds, Ben Lynch, Simon Paul, *MacGillivray on Insurance Law* (Sweet & Maxwell, 15th edn, 2022) 10-001.
[28] Ünan *General Provisions* (n 10) 527.
[29] Soyer (n 25) 109.
[30] Robert M Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th edn, 2021) 8-073.
[31] FD Rose, *Marine Insurance Law and Practice* (Informa Law from Routledge 2013) 9.23.
[32] Law Commission of England and Wales and Scottish Law Commission (hereinafter LCs), *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Law Com No 182 / Scot Law Com No 134, 2007) 7.61-7.67.
[33] J. Han Wansink, 'Precautionary Measures: A Friendly or Hostile Tool of Limiting Insurance Coverage?' [2008] ERA 1; Ünan *General Provisions* (n 10) 531.
[34] LCs (182/134) (n 32) 7.62; Barış Soyer, *Warranties in Marine Insurance* (Routledge, 2nd edn, 2006) 182.
[35] Ünan *General Provisions* (n 10) 531.
[36] LCs, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353 / Scot Law Com No 238, 2014) 1.6; ibid 393.

### *2.1. English law*

#### *2.1.1. Classification of risk control clauses*

Under general English contract law, warranties are relatively minor contractual terms, with conditions as the major terms.[37] Whereas the breach of a condition entitles the innocent party to terminate the contract in addition to claiming damages, the breach of a warranty gives rise only to the right to damages if the innocent party has suffered a loss as a result of the breach.[38] They are of a different nature in insurance contract law;[39] in a broad sense, warranties being the major terms and conditions the subsidiary blanket concept for all remaining clauses.

This section will mainly focus on the warranties as the major terms and the most common risk clauses in insurance contracts.[40] It is, however, worth mentioning the other frequently used risk control clauses:[41] conditions precedent to insurer's liability, non-compliance with which prevents the insurer from becoming liable regarding a particular loss, without the need to prove loss or prejudice from the breach;[42] suspensory conditions, which have the effect of putting the insurer off risk during the period of breach and reattaching it once the breach is remedied;[43] and exclusion or exception clauses, non-compliance with which relieve the insurer from liability for the loss resulting from the relevant event in a way to limit the extent of the cover provided.[44]

The aforementioned terms essentially serve the same objective: "to try and marshal the risk the insurer is taking on".[45] Nevertheless, in common law, the effect of a term and the consequence of its breach depends on the term's classification.[46] Classification of terms is a matter of construction,[47] which has previously caused confusion in itself.[48] However, the distinction between the terms and their classification is expected to be less relevant under IA, which is said to assimilate warranties into other risk control terms.[49]

That said, IA still contains provisions that are solely applicable to terms classified as warranties; thus, discussing how to define and distinguish a warranty is still unavoidable.

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[37] *Colinvaux* (n 30) 8-003; Ünan (n 10) 393.
[38] *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235; Hugh Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 34th edn, 2021) 27-013.
[39] *MacGillivray* (n 27) 10-002.
[40] Soyer (n 25) 109.
[41] ibid.
[42] *Colinvaux* (n 30) 8-007.
[43] ibid 8-011.
[44] *MacGillivray* (n 27) 10-009.
[45] Habergham (n 17) 33.
[46] *Colinvaux* (n 30) 8-002.
[47] ibid.
[48] LCs (353/238) (n 36) 13.4-13.5.
[49] *MacGillivray* (n 27) 10-124; Soyer (n 25) 126, 127.

### *2.1.2. Definition and nature of warranties*

MIA codified the common law on warranties. Apart from the principles that are unique to marine insurance contracts, like the implied warranty of seaworthiness, the warranty regime under MIA is equally applicable to non-marine insurance by analogy.[50]

Under s 33 MIA, an insurance warranty is defined as a promissory warranty, through which the insured may undertake to do or not to do something, or to fulfil a condition; or affirm or deny the existence of facts.[51] The warranty shall be exactly complied with, whether the act undertaken, or the facts affirmed are material or even relevant to the risk or not.[52] It is irrelevant whether the warranty influenced the insurer's decision when taking the risk[53] or whether its breach caused the loss.[54] Accordingly, for example, prior to the IA reforms, the insurer would be discharged from liability for the loss caused by a flood where a warranty for a burglar alarm is breached.[55] In other words, before IA, the consequences of non-compliance with a policy term were dealt with in consideration of how the term was classified, irrespective of its substantive effect on the risk.[56]

Besides the definition under MIA, the classification of a term is a matter of construction of the contract.[57] The construction shall be made considering the contract as a whole,[58] and the meaning which would be perceived by a reasonable person with the same background knowledge reasonably available to the parties.[59] Although the language used can be a "good starting point" to identify a term as a warranty, it is not conclusive.[60] In *HIH v New Hampshire*[61], Rix LJ has established three non-cumulative tests for distinguishing a term as a warranty: Is it a term that goes to the root of the transaction? Is it descriptive of the risk? Would damages be an unsatisfactory or inadequate remedy?

Before IA, where the true nature of a term was not explicit, in the Law Commissions' (LCs) words, "…the courts have reached some surprising and contradictory results in applying these definitions, in order to avoid the harsh consequences of the law of warranties".[62] For example, in *Kler Knitwear,* where a sprinkler system was required to be inspected within 30 days of the renewal of the policy, although the term was in nature a warranty rather than a suspensory condition, the court has held that its breach merely

[50] HM Treasury, *Explanatory Notes to Insurance Act 2015,* 86.
[51] *MacGillivray* (n 27) 10-022.
[52] *De Hahn v Hartley* (1786) 99 E.R. 1130; O'Neill (n 18) 6-152.
[53] *MacGillivray* (n 27) 10-035.
[54] ibid.
[55] LCs (353/238) (n 36) 12.4, 13.29-13.31; *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636 (Comm) [2011] Lloyd's Rep IR 198.
[56] Colinvaux (n 30) 8-002.
[57] O'Neill (n 18) 6-154; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; *Arnold v Britton* [2015] UKSC 36; *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735.
[58] *Wood* (n 57).
[59] *Investors Compensation Scheme Ltd v West Bromwich Building Society* (No.1) [1998] 1 W.L.R. 896, 912.
[60] *Bluebon Ltd v Ageas* (UK) Ltd [2017] EWHC 3301 (Comm) [2017] 2 C.L.C. 890 [34]; *Sugar Hut* (n 55) 41.
[61] *HIH* (n 57) 101.
[62] LCs (353/238) (n 36) 15.13.

suspended the cover.[63] The way the courts dealt with such ambiguities in distinguishing between the terms was criticised as being based on judicial instinct instead of a sensible rationale.[64]

Through IA, major reforms were introduced to the warranties' regime and amendments were made to MIA, which apply to the insurance contracts concluded or renewed after 12 August 2016.[65] Although, the definition under s 33 MIA remains intact[66] with no changes to the strict compliance rule and no materiality requirement;[67] there are alterations on the effects of the breach of warranties (s 10) and the breach of the terms which are not relevant to the actual loss (s 11) under IA. As discussed below, it is submitted that through ss 10 and 11, under IA, the consequences of the breach will depend more on the substantive effect of the non-compliance on the risk, rather than the classification of the term as was the case before IA.[68]

#### *2.1.3. Consequences of breach of warranties*

Before the amendments to s 33 MIA, subject to any express provisions in the contract, a breach of warranty would automatically discharge the insurer's liability in full, from the date of the breach.[69] Combined with no materiality requirement and the strict compliance rule, this consequence was found too harsh and draconian. LCs[70] summarised the major criticisms regarding the warranties regime as:

> "(1) An insurer may refuse a claim for a trivial mistake which has no bearing on the risk.
>
> (2) The insured cannot use the defence that the breach has been remedied.
>
> (3) The breach of warranty discharges the insurer from all liability, not just liability for the type of loss in question…"[71]

In response to such criticism, s 10(1) IA abolishes any rule of common law which results in the automatic discharge of the insurer's liability upon the breach of warranty; and s 10(7)(a) abolishes the statutory reflection of the rule under s 33(3) MIA.

The new regime regarding the breach of a warranty is provided under s 10(2) IA: the insurer shall be discharged from liability in respect of any loss occurring, or attributable to something happening, after a warranty is breached but before it is remedied. Under s 10(4)(a), the insurer shall be liable in respect of

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[63] *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47; LCs (353/238) (n 36) 13.26; Colinvaux (n 30) 8-132.
[64] Robert Merkin and Özlem Gürses, 'Insurance contracts after the Insurance Act 2015' (2006) Law Quarterly Review 132 (3) 445-469.
[65] S. 22(3) IA.
[66] *Explanatory Notes* (n 50) 86.
[67] *MacGillivray* (n 27) 10-124.
[68] *Colinvaux* (n 30) 8-002.
[69] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233, [1991] 3 All ER 1 AC 233 [263].
[70] LCs (353/238) (n 36) 12.4.
[71] This article will not deal with the abolished basis of the contract clauses, which are not a common practice in Turkey either.

losses occurring, or attributable to something happening before the breach; and (b) where the breach is taken to be remedied as per s 10(5), after it is remedied.

Under s 10(3), the insurer shall not be discharged from liability if (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, (b) compliance with the warranty is rendered unlawful by any subsequent law, or (c) the insurer waives the breach of warranty.

Overall, although maintaining the definition under MIA s 33, s 10 abolished automatic discharge and, in a way, has converted the effect of the insurance warranties to suspensory conditions.[72] Accordingly, it is asserted that distinguishing between warranties and suspensory conditions and other terms delimiting the risk under IA will not be as essential.[73]

#### *2.1.4. Breach of terms not relevant to the actual loss*

Section 10 IA serves to improve the warranties law by abolishing the automatic and full discharge, introducing the suspensive effect to the terms, and allowing the remedy of the breach. However, with s 10 alone, the problem identified by the LCs on the insurer being provided with a remedy even when the term breached is of no relevance to the risk would remain unresolved. The lack of a causal connection requirement often resulted in unjust denial by the insurers on trivial grounds,[74] which Lord Griffiths found to be "…one of the less attractive features of English insurance law".[75]

To improve the unfavourable position in which the lack of nexus puts the insured, further reforms were made under s 11, which in a broad sense, allows recovery in cases where the breach is unrelated to the loss. It applies not only to warranties but all terms which relate to a particular type of loss, or the risk of loss at a particular time or place. The idea is that where the term breached was intended to prevent a certain loss, and an unrelated loss occurs, the breach should not prevent the insured from recovery.[76] As per LCs' examples, under s 11 IA:

> "…breach of a warranty requiring a policyholder to have a fire safety system in place would result in suspension of the insurer's liability in respect of fire-related losses, but not in respect of flood losses. Breach of a condition that a building must retain a night watchman would mean that the insurer will have no liability for losses occurring at night, while a watchman should be present."[77]

For the insured to benefit from the protection under s 11, the criteria under subsections (1) and (3) must be satisfied. Per s 11(1), there needs to be a contractual term other than a term defining the risk as a whole, and compliance with it should tend to reduce the risk of (a) loss of a particular kind and/or (b)

[72] Kendall and Wright, 'Practical Guide to the Insurance Act 2015' (2017) 88, 89; *MacGillivray* (n 27) 10-124.
[73] MacGillivray (n 27) 10-124; Soyer (n 25) 126, 127.
[74] LCs (182/134) (n 32) 8.21.
[75] *Vesta* (n 22) 893; *Colinvaux* (n 30) 8-123; Soyer (n 25) 110.
[76] *MacGillivray* (n 27) 10-126.
[77] LCs (353/238) (n 36) A.85.

loss at a particular location and/or (c) loss at a particular time. Per s 11(3), the insured must show that non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Where these two conditions are satisfied, under s 11(2), "the insurer may not exclude, limit or discharge its liability under the contract for the loss".

It has been observed that the phrase "circumstances in which it occurred" could be interpreted in two ways, one of which is causation-based, and the second is whether non-compliance with the term could have increased the risk in the circumstances that the loss occurred in broader terms.[78] The Explanatory Notes point to the second approach, setting out that the test is not whether the non-compliance actually caused or contributed to the loss.[79] In other words, according to this second approach: "The cause of the loss is immaterial, and in particular it is irrelevant that compliance with the obligation would not actually have made any difference: it is enough that it could have made a difference".[80]

There are other ambiguities regarding the application of s 11. For example, s 11(4) provides that ss 10 and 11 may apply together. Nevertheless, some scholars submit that the relationship between the two sections on their application to warranties is unclear,[81] though it is generally argued that s 11 was intended to prevail.[82] However, as s 11 does not apply to "terms defining the risk as a whole", some scholars suggest that s 11 may have a severely limited effect on warranties, given the risk-defining nature of warranties as set out by Rix LJ.[83] Another point raised is that s 11 may not preclude the insurer from pursuing remedies other than excluding, limiting, or discharging its liability, such as raising claims for damages.[84] So far, there are no court precedents on this section yet, therefore the application of s 11 remains to be seen.

#### *2.1.5. Contracting* out

According to s 17 IA, ss 10 and 11 can be contractually excluded in non-consumer contracts provided that the transparency requirements are satisfied. The insurer must take sufficient steps to draw any disadvantageous terms to the insured's attention before the contract is entered into, unless the insured or their agent had actual knowledge of it. The term must also be clear and unambiguous concerning its effect.

Accordingly, it is still possible for the parties to agree that the insurer will be relieved from liability automatically upon a breach of any warranty, irrespective of any connection between the breach and loss.[85]

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[78] Merkin and Gürses (n 64).
[79] *Explanatory Notes* (n 50) 96; Owen A, *The Law of Insurance Warranties: Flawed Reform and a New Perspective* (Informa Law from Routledge 2021) 9.34; ibid.
[80] Merkin and Gürses (n 64).
[81] Owen (n 79) 9.59.
[82] Merkin and Gürses (n 64).
[83] ibid; *HIH* (n 57).
[84] O'Neill (n 18) 6-193.
[85] *MacGillivray* (n 27) 10-127.

### *2.2. Turkish law*

#### *2.2.1. Definition and nature of contractual duties*

The former TCC numbered 6762 did not contain any provisions on the contractual duties of the policyholder and focused only on statutory duties; whereas in practice, insurance policies contained contractual duties.[86] Responding to this legislative gap, the current TCC regulates the contractual duties under Art. 1449.[87]

Art. 1449 does not define or regulate the contractual duties themselves, instead, it only sets out some restrictions regarding the consequences of the breach of contractual duties.[88]

Concerning the nature of the terms, the title of Art. 1449 actually refers to *sözleşmesel yükümlülükler* (contractual obligations). However, scholars argue that this does not reflect the true nature of the said terms under Turkish law,[89] and instead refer to such terms as *sözleşmesel görevler* (contractual duties). Whereas *yükümlülük* (obligation) refers to obligations the performance of which can be claimed through the courts (such as the obligation of the policyholder to pay the premium); the performance of *görev* (duties) cannot be claimed through courts even if breached. Indeed, the only outcome of the breach of the terms regulated under Art. 1449 is to deprive the insured of certain rights and the insurer cannot request the performance of such terms through a legal action;[90] adopting this view, this article also refers to such terms as contractual duties.

Art. 1449 applies to the contractually stipulated duties. Statutory duties which are explicitly regulated under TCC, such as the duty of disclosure (Art. 1435), the duty not to aggravate the risk (Art. 1444-1445), the duty to provide information (Art. 1447), and to mitigate the loss (Art. 1448) are outside the scope of application of Art.1449.[91] The mere insertion of such statutory duties under the general or special conditions of insurance contracts shall not transform these into contractual duties and subject them to Art. 1449. In principle, the statutory provisions as to the specific duty shall remain reserved.[92]

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[86] Erhan Bora, *Sigorta Hukuku: Türk Ticaret Kanunu Altıncı Kitap* (Insurance Law: Turkish Commercial Code Book Six) (2020) 319; Ünan *General Provisions* (n 10) 524.
[87] Ünan *General Provisions* (n 10) 524.
[88] Evrim Akgün, *Ferdi Kaza Sigortası Sözleşmesi* (Insurance Contracts on Personal Accident) (On İki Levha, 2017) 283.
[89] Ünan *General Provisions* (n 10) 388; Kerim Atamer, 'Yeni Türk Ticaret Kanunu Uyarınca Zarar Sigortalarına Giriş' (Introduction to Indemnity Insurance Under the New Turkish Commercial Code) BATİDER 2011 (27) 40; Melisa Konfidan, *Deniz Araçları Sorumluluk Sigortası Sözleşmesi* (Contract of Protection and Indemnity Insurance) (On İki Levha, 2023) 293-295; Rayegan Kender, *Türkiye'de Hususi Sigorta Hukuku (Private Insurance Law in Turkey)* (On İki Levha, 2021); Emine Yazıcıoğlu and Zehra Şeker Öğüz, *Sigorta Hukuku* (Insurance Law) (On İki Levha, 2019) 129-131,151.
[90] Ünan *General Provisions* (n 10) 389.
[91] ibid 533; Konfidan (n 89) 325 supra note 123; c*onf* the view that it also applies to any duties arising in relation to the contract Memet Sinan Cebe Uygulamalı Sigorta Hukuku, (Practical Insurance Law) (Adalet Yayınevi, 2018) 388.
[92] Ünan *General Provisions* (n 10) 535.

In cases where a certain act or omission by the policyholder breaches both a contractual and a statutory duty, in principle, the insurer shall be allowed to rely on either of the remedies respectively available.[93] In particular, the breach of a contractual duty may often result in the aggravation of the risk, thereby also breaching the statutory duty not to aggravate the risk under Art. 1445.[94]

On the other hand, according to Art. 1452(3), statutory duties can be modified contractually, provided that such modifications are not to the detriment of the policyholder, insured, or beneficiary. Accordingly, to the extent that the outcome favours the policyholder, insured or beneficiary, a statutory duty can be contractually modified and thereby subjected to Art. 1449 instead. This shall be a matter of construction of the contract and shall be evaluated on a case-by-case basis.[95]

#### *2.2.2. Consequences of breach*

Art. 1449 provides as follows:[96]

> "(1) 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 obligation towards the insurer shall be ineffective if the breach was not negligent, unless otherwise provided by this Code or other legislation.
>
> "(2) If the breach was negligent, the right to terminate, which is not used within one month from the date of awareness, is lost, unless a different period is provided in this Code.
>
> "(3) The insurer cannot terminate the contract where the violation had not any effect on the materialisation of the risk or the extent of the insurer's obligation to be fulfilled."

Art. 1449 does not provide a statutory remedy for the breach and mainly aims to limit the sanctions which can contractually be made available to the insurer.[97] Where the contract sets out a duty without providing a remedy, the consequence of its breach is not clear and remains to be resolved by the courts.[98]

If the contract provides for the right to terminate, Art. 1449(2) requires such right to be used within a month of learning about the breach. However, termination does not in itself discharge the insurer from

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[93] ibid 537.
[94] ibid.
[95] *see* ibid 535 and Emine Yazıcıoğlu, 'Zarar Sigortalarında Sigorta Himayesinin Sınırlandırılması ve Davranış Yükümlülüklerinin Teminat Şartı ya da İstisna Olarak Öngörülmesi Sorunu' (Problem of Limiting Insurance Coverage in Loss Insurances and Establishing Conduct Obligations as a Condition to Cover or Exception), *Prof. Dr. Ergon A. Çetingil ve Prof. Dr. Rayegan Kender'e 50. Birlikte Çalışma Yılı Armağanı,* (2007) 1194; Konfidan (n 89) 327 supra note 129 for further discussions in this respect.
[96] Translation by Atamer and others, *New Turkish Insurance Contract Law*, AIDA Turkey, (2012) 26, except here 'obligation' is used as the literal translation for *'yükümlülük',* instead of the contextual translation as 'duty'.
[97] Konfidan (n 89) 327.
[98] Akgün (n 88) 283.

liability. The already-arisen liabilities remain intact upon termination since it does not have a retrospective effect.[99] Thus, for the insurer to be discharged, the contract should additionally express that as a remedy.[100]

For the remedy of discharge from liability, Art. 1449 refers to "provisions to the effect that the insurer will be discharged from its obligation of performance by terminating". Scholars assert that the Turkish lawmaker aims for the right of discharge of liability to be subordinated to the termination of the contract through this phrase.[101] However, it is submitted that making termination a pre-requisite of discharge from liability is too restrictive for the insurer and may even be to the detriment of the policyholder.[102] Especially since the law does not distinguish the breach of contractual duties before or after the occurrence of the risk,[103] subordinating the discharge from liability contradicts the ex-nunc nature of termination.[104] Additionally, Art. 1449 was criticised to contradict the proportional approach the new TCC was aiming to adopt, by requiring the termination of the contract instead of discharge from liability only for the risk concerned.[105]

The mechanism under Art. 1449 regarding termination and discharge was based on PP. 6(1) of the former-German Insurance Act (VVG) dated 1908, which also provided that the insurer must terminate the contract in order to be able to be discharged from liability upon breach.[106] However, this had already been amended under P. 28(2) of the new VVG in 2008 (four years before TCC entered into force), which allows for the insurer to be discharged from liability irrespective of whether the contract is terminated.[107] Thus, the approach in Art. 1449 is criticised for being "born old" for following a mechanism that had already been abandoned.[108]

Additionally, the scholars assert that the requirement under Art. 1449 for the insurance contract to provide for both discharge and termination is inconsistent with the market practice in Turkey and that such a mechanism had never been seen in practice before Art. 1449.[109] Accordingly, a possible solution suggested was disregarding the requirement of termination under Art. 1449,[110] however, it will not be easy to convince the Turkish courts to disapply an express statutory term.

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[99] M Kemal Oğuzman and M Turgut Öz, *Borçlar Hukuku Genel Hükümler* (General Provisions of Law of Obligations) (Filiz Kitapevi, 2nd Ed, 1998) 403.
[100] Samim Ünan, *Precautionary Measures in Turkish Law* (IV AIDA Europe Conference London Consumer Protection, London, September 2012) 78.
[101] Ünan *AIDA* (n 100) 78, 79.
[102] ibid.
[103] Ünan *General Provisions* (n 10) 526; Konfidan (n 89) 327.
[104] Ünan *AIDA* (n 100) 78; Konfidan (n 89) 327 supra note 130.
[105] Ünan *General Provisions* (n 10) 395.
[106] ibid 388, 531.
[107] ibid 531-533.
[108] ibid.
[109] ibid 534; Ünan *AIDA* (n 100) 78, 79.
[110] Samim Ünan, *Türk Ticaret Kanunu Şerhi Altıncı Kitap: Sigorta Hukuku Cilt VI Yargı* Kararları (Commentary on the Turkish Commercial Code Sixth Book: Insurance Law Vol.I Judgments (On İki Levha 2020) 401.

### *2.2.3. Standard of conduct*

Art. 1449 provides that the policyholder is responsible for the performance of the contractual duty. However, some scholars suggest that Art. 1412 TCC, which provides that the knowledge and acts of the insured and agent shall also count as those of the policyholder, shall equally apply to the contractual duties.[111] Consequently, it is suggested that the insured and agent shall also be responsible for the contractual duties.[112]

Art. 1449 also requires the breach to be negligent for the insurer to be able to rely on the remedies, without distinguishing between the degrees of negligence. It follows that the insurer can be discharged from liability in full, regardless of whether there was slight negligence or intent. This also contradicts the proportional approach adopted by TCC in other grey areas. For example, for statutory duties, the insurer shall be discharged of liability only in case of intentional breach and when it is merely negligent, there shall be a proportional deduction from the insurance payment.[113] The scholars suggest that a fairer solution for the contractual duties would be to allow remedies only in cases of intentional and gross negligence,[114] or in proportion to the degree of the fault.[115]

### *2.2.4. Causal link*

Although Art. 1449 does not expressly state the requirement of causal link,[116] its legislative justification[117] provides that for termination and discharge from liability in case of a breach, causal link between the faulty breach and the occurrence of the risk is required. The risk must have occurred, or the indemnity payable must have increased in connection with the breach.[118] A prominent scholar's example concerns a declaration by the insured that they installed a new steel door at the insured property. Where the door in fact has not been installed yet, if thieves enter through the old door, there is clear causality. However, if they enter through the window, there is no causality, and the insurer cannot be relieved of liability.[119]

### *2.2.5. Contracting out*

Art. 1452(3) provides that the provisions of Art. 1449 are semi-mandatory, meaning that they cannot be contractually modified to the detriment of the policyholder, insured, or beneficiary. If so modified, such

[111] Akgün (n 88) 284, 285; Ünan *General Provisions* (n 10) 530.
[112] Ünan *General Provisions* (n 10) 530.
[113] ibid 542; Ünan *AIDA* (n 100) 79.
[114] Ünan *General Provisions* (n 10) 541.
[115] Ünan *AIDA* (n 100) 79.
[116] Bora (n 86).
[117] *Türk Ticaret Kanunu Gerekçesi* (Justification of TCC).
[118] Ünan *General Provisions* (n 10) 544.
[119] ibid 394.

contract terms will be deemed non-existing and the statutory terms of TCC shall apply instead, with the rest of the contract remaining in force.[120]

### *2.3. Main differences between insurance warranties under English law and contractual duties under Turkish law*

Much has been said about the draconian nature of insurance warranties in English law, some of which were referred to above. Their difference from the continental European approach to contractual duties was described as: "The very existence of a warranty is anathema to many continental lawyers who are blessed with far more forgiving regimes in relation to contractual stipulations and their breach".[121]

Although amending the disproportionate consequences of its breach, IA maintained some aspects of the insurance warranties regime, raising further criticisms as referred to above. Modelled after the continental European approach, Turkish law has its own shortcomings and ambiguities. This section aims to summarise the main distinctions between the two current regimes.

#### *2.3.1. Terminology and nature*

Both concepts are contractual risk control clauses used for preventing the occurrence or aggravation of the risk insured and limiting the insurer's liability. However, right from the basics, the two concepts differ in terms of terminology, definition, and nature.

While the terminology used in English law refers to a promissory warranty by the insured, Turkish law uses the word '*yükümlülük'* (obligation), with the scholars rather referring to such terms as *'görev'* (duty). However, they mainly have the same effect in that a breach of the term may deprive the insured of certain rights. As for definition, whereas s 33 MIA somewhat defines the insurance warranties, Art. 1449 TCC does not provide a definition for contractual duties and merely limits the remedies which may be made available for their breach. Furthermore, contrary to the lengthy scholarly and judicial discussions in English law concerning the characteristics of warranties and how to distinguish them, in Turkish law, the discussions on the nature of the terms mainly focus on the incorrect naming under TCC as '*yükümlülük*' (obligation) and the interaction between the contractual and statutory duties.

From a broader perspective, contrary to the judicial and scholarly attention on the English law insurance warranties and relatively detailed provisions of IA, TCC does not provide a solid regime on contractual duties despite regulating a civil law system. Although English law has its uncertainties on warranties, Turkish law on contractual duties seems even more ambiguous, with surprisingly limited judicial and scholarly discussions. Such ambiguity alone may cause bigger confusion on how to construct a term and its effects under Turkish law.

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[120] ibid 395;.
[121] John Hare, 'The Omnipotent Warranty: England v. The World', Marine Insurance at the Turn of the Millennium, Volume 2 (1999) 37.

With that, the conditions for the breach of the terms and the consequences of breach are where the two concepts will cause significant differences in practice.

### *2.3.2. Breach*

#### a. Standard of conduct

Under Turkish law, where the policyholder was not negligent in breaching the contractual duty, the insurer cannot have a remedy. As opposed to that, in English law, the warranties must be strictly complied with.[122] Thus, the breach is not dependent on the insured's knowledge[123] and the insured's state of mind is not important.[124]

Another distinction is the persons whose conducts are relevant to the breach. Art. 1449 TCC explicitly refers only to the breach by the policyholder. However, scholars suggest that per Art. 1412, the insured and the agent, if different from the policyholder, shall also be responsible to perform the contractual duties.[125] Whereas, again, as per the strict compliance requirement in English law, it would not be relevant by whom the warranty was breached.

Consequently, where the policyholder (or possibly other relevant persons) is not negligent, the Turkish reinsured cannot be discharged from liability; in contrast, the English reinsurer can be relieved regardless.

#### b. Causality

Under Turkish law, the insurer shall have no remedy unless the breach caused the risk or increased the indemnity payable. On the other hand, the lack of a causality requirement between the breach and the risk was one of the most criticised points of the warranty regime in English law.[126] To protect the insured from an unjust discharge of liability for unrelated breaches, by s 11, IA aims to provide a nexus requirement. However, LCs clearly state that s 11 does not require a causality between the breach and the loss.[127] Instead, the test is whether the non-compliance could have increased the risk in the circumstances the loss occurred.

The following example was given on the application of s 11 and the distinction of the phrase "circumstances in which it occurred" from causality:[128]

> "There is a clause in the policy requiring the insured factory to install five-lever mortise locks on all doors. This is breached because the lock on one door (door A) only has three levers. Thieves break in through door A. The lock might have made a difference given the circumstances of the loss (which are that the door did not have

[122] *De Hahn* (n 52) 345.
[123] *Douglas v Scougall* [1816] 4 Dow 269 [1164].
[124] Habergham (n 17) 32.
[125] Akgün (n 88) 285; Ünan *General Provisions* (n 10) 530.
[126] Vesta (n 22) 893; Colinvaux (n 30) 8-123; LCs (182/134) (n 32) 8.21.
[127] *Explanatory Notes* (n 50) 96; LCs (353/238) (n 36) A.86; *MacGillivray* (n 27) 10-124, 10-125.
[128] House of Lords, Special Public Bill Committee, *Insurance Bill [HL]* (2014) 36.

> the requisite lock, and the thieves broke in through it), so the insurer does not have to pay. The policyholder cannot argue that the thieves would have just found another way in, or that the crow-bar they used would have shattered the wood even with the right lock. Same warranty; same breach. Thieves break in through a window, or a different door (B) which does have the required lock. In these circumstances, it would not have made any difference if door A had had a different lock. The insurer should not escape liability based on the breach."[129]

Nonetheless, it is suggested that this explanation does not in fact distinguish the application of s 11 from the causality test due to the following arguments:[130]

(a) If the thieves forcefully opened the door by breaking it, the insured could still argue that using the particular lock would not have made a difference.
(b) If the thieves broke in through the window, the insurer could argue that the breach could have increased the risk of loss of a break-in through a window, on the basis that the thieves could have realised the lack of security and targeted the building.

As such, although the Explanatory Notes and the LCs state that the term should not be considered in light of what has actually occurred,[131] some scholars argue that s 11 IA is "a form of causal linkage, introduced by the back door".[132] Therefore, it is submitted that the causation and s 11 tests give rise to different outcomes only in exceptional cases.[133] While some also suggest that in practice, in many cases, this will lead to the application of causal linkage requirement, and adopting a clear causal linkage approach would have provided more certainty.[134]

Accordingly, depending on the English courts' approach to the distinction between the tests in s 11 and causality, a breach of the same provision can still have different consequences under English and Turkish laws.

#### *2.3.3. Consequences of breach*

Per the current position under s 10 IA, a breach of a warranty suspends the insurer's liability during the period of the breach as a statutory remedy. The insurer is liable for losses that occur before a breach of warranty and after the breach is remedied.

On the other hand, TCC regulates only the scenario where the contract provides the remedy along with the duty, that is, discharge from liability by terminating the contract. There is no statutory discharge or

[129] ibid 47, 48.
[130] ibid 36; Merkin and Gürses (n 64).
[131] LCs (353/238) (n 36) 18.39.
[132] Soyer (n 25) 119; Owen (n 79) 9.34.
[133] Merkin and Gürses (n 64).
[134] Owen (n 79) 9.59.

suspension of liability unless the contract explicitly provides so. As such, unless the contract provides for discharge from liability through termination, the insurer may have no remedy for a breach at all.

Therefore, a breach of a similar term may have different consequences under the two regimes. Under Turkish law, if the contract does not provide a remedy for the breach, the insurer could still be liable to pay regardless of the breach. On the other hand, the same breach can statutorily suspend the insurer's liability under English law.

Another difference is that under Turkish law, the insurer must practice its right to terminate within a month from the breach, whereas, under English law, the insurer's liability would be suspended upon breach. Thus, for the same breach, an English insurer's liability may be suspended; while the Turkish reinsured could still be liable if they fail to abide by the statutory period in terminating the contract.

Moreover, the insurer cannot be discharged from liability without terminating the contract under Turkish law. Therefore, if the insurer wants to be relieved of liability, they must terminate the underlying contract. Whereas IA in default does not provide termination as a remedy, and the English insurer can be discharged of liability without termination.

#### *2.3.4. Contracting out*

According to s 17 IA, ss 10 and 11 can be contractually excluded in non-consumer contracts provided that the transparency requirements are satisfied. The insurer will achieve that by taking sufficient steps to draw any disadvantageous term to the insured's attention before the contract is entered into, unless the insured or their agent had actual knowledge of it. The term must also be clear and unambiguous as to its effect. On the other hand, under Art. 1452(3) TCC, Art. 1449 cannot be amended to the detriment of the policyholder, insured, or beneficiary.

As such, for example, although it would be possible for the parties to agree that the insurer will be relieved from liability automatically upon a breach of any warranty, regardless of any connection between the breach and loss under English law; such provision shall be void under Turkish law.

#### *2.3.5. Mandatory use of Turkish language in commercial contracts*

Further to the distinctions between the two regimes, a more general issue to be considered in respect of potential mismatches between the covers is the languages of the contracts.

Art. 11(5) TIA requires insurance contracts to be drafted in Turkish and disallows the use of foreign words. Likewise, Art. 1 of the Law Numbered 805 on the Mandatory Use of Turkish in Commercial Enterprises[135] provides more generally that all private law contracts concluded in Turkey by Turkish entities shall be drafted in Turkish. The violation of the said requirements may cause the whole contract or a certain provision (such as the contractual duty) to be void, or such provision may be construed to the detriment of the insurer. As the reinsurance contracts will commonly be drafted in English, such

[135] *İktisadi Müesseselerde Mecburi Türkçe Kullanılması Hakkında Kanun.*

restrictions will cause further difficulty in phrasing the contractual duty or warranty provisions in the same way and achieving matching effects under both contracts.

The said restrictions on language are highly criticised as they contradict the commercial reality of insurance business, which often contains English language terms[136] especially in respect of fronting arrangements[137] where the terms of insurance are set by the foreign reinsurer who assumes the risks. In this respect, some previous Supreme Court judgments found that reference made to non-Turkish standard clauses shall not be deemed in violation of the said provisions where the referred clauses are commonly used in practice,[138] or where the insurer has duly informed the policyholder as to the conditions of the cover.[139] This approach would also be in line with Art. 19 of the Turkish Code of Obligations,[140] which provides that contracts shall be construed by giving weight to the parties' actual intentions over the contract's language. However, in the face of the current legislation, the matter remains controversial and the said restrictions can still cause a mismatch in the covers of the contracts governed by Turkish law and English law.

Overall, a clause setting out a warranty or contractual duty, although phrased very similarly or even in the same way, can have different consequences for its breach under Turkish and English laws. Where Turkish law applies to the underlying contract and English law to the reinsurance contract, this may cause mismatches in the respective covers. In that scenario, whether the insurer's liability against the policyholder under the Turkish law-governed policy will be covered under the English law-governed reinsurance contract in full, shall depend on the construction of the reinsurance contracts, which will be discussed below.

## 3. Reinsurance implications of the differences between the regimes

### *3.1. Function and nature of reinsurance*

English law lacks a statutory definition for reinsurance as for insurance contracts in general.[141] In very simple terms, it has been described as "insuring insurers".[142] Accordingly, the elements of insurance contracts set out by Channel J[143] are found in reinsurance contracts: the reinsured pays a premium to the reinsurer as consideration, the reinsurer undertakes to indemnify the reinsured upon the happening of an uncertain event, and the reinsured shall have an interest in the subject matter which is adversely affected

[136] Ünan *Judgments* (n 110) 428, 429.
[137] Samim Ünan, 'Sigorta Genel Şartları ile İlgili Olarak Uygulamada Karşılaşılan Bazı Sorunlar' (Some Problems Encountered in Practice Regarding the Insurance General Conditions) in *Prof. Dr. Rayegan Kender'e Saygı Günü: Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu*, (Filiz 2020) 177, 187.
[138] 1977/1651 M. 1977/2245 J. dated 3 May 1977, 11th Civil Chamber of the Supreme Court.
[139] 2014/10970 M. 2014/18507 J. dated 27 October 2014, 11th Civil Chamber of the Supreme Court; see the dissenting opinion in the same dispute 2015/9154 M. 2016/2703 J. dated 10 March 2016, 11th Civil Chamber of the Supreme Court.
[140] *Türk Borçlar Kanunu* (Turkish Code of Obligations) numbered 6098.
[141] *MacGillivray* (n 27) 33-006.
[142] Robert Kiln and Stephen Kiln, *Reinsurance in Practice*, (Witherby & Co Ltd, 4th edn, 2001) 1; Gürses *Reinsuring Clauses* (n 14) 1.01.
[143] *Prudential* (n 24) 662, 663.

by the uncertain event. Reinsurance also involves the transfer of risk like insurance[144] and the spreading or sharing of risks.[145] The reinsured transfers the risk they have underwritten in part or in whole to the reinsurer.[146] By transferring the risk, the reinsured can increase their capacity to underwrite risks, promote financial stability and strengthen their solvency.[147]

Another common use of reinsurance is through fronting arrangements, where although the foreign reinsurer is essentially underwriting the risks as the direct insurer, they do so through a local insurer.[148] Under Art. 15 TIA, (except for some limited statutory exceptions) the insurable interests of the people residing in Turkey must be insured by the insurance companies that operate in Turkey and cannot be insured abroad. Thus, fronting arrangements are common in the Turkish market, especially as facultative reinsurance for large projects with high-risk capacity.[149]

With the contribution of the lack of definition, the nature of reinsurance and its relationship with insurance have been subject to jurisprudential discussions under English law. Mainly, the courts have adopted two different views for describing reinsurance:[150] as the insurance of the liabilities incurred by the insurer in writing his insurance risks (liability view);[151] and most recently, as the (re)insurance of the original risks underwritten by the insurer (further insurance).[152] The position taken in this respect influences the scope of the reinsurer's liability and the benefit the reinsured can get from the arrangement.

### *3.2. Matching the covers*

This section will specifically focus on proportional facultative reinsurance, where the reinsurer usually assumes the single risk originally undertaken by the reinsured in full or in part. Especially where the reinsured aims to transfer the risk in higher percentages in proportional facultative reinsurance, the parties usually aim to match the cover of the reinsurance with the underlying insurance and thereby avoid any coverage gaps. On the reinsured's side, this reduces the basis risk by matching the assumed risk with the transferred risk, whereas the reinsurer benefits from the alignment of interest.[153]

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[144] O'Neill (n 18) 1-004.
[145] ibid 1-006.
[146] ibid 1-004.
[147] ibid 1-005.
[148] ibid 1-014; Robert Merkin and Kyriaki Noussia, 'Reinsurance under Insurance Act 2015' BILA Journal 134 (2021) 8.
[149] Aysel Korkmaz Yatkın and others 'The Insurance and Reinsurance Law Review: Turkey' (2020) The Law Reviews, https://thelawreviews.co.uk/title/the-insurance-and-reinsurance-law-review/turkey accessed 24.08.2022.
[150] O'Neill (n 18) 4-003.
[151] *Vesta* (n 22) 892, 908; *Groupama* (n 22).
[152] *Wasa International Insurance v Lexington Insurance* [2009] UKHL 40 [33].
[153] Arnold-Dwyer, Franziska, 'Reinsurance: an overview' (Practice Note, Practical Law) <uk.practicallaw.thomsonreuters.com> accessed 22.05.2023.

### *3.2.1. Incorporation of the underlying insurance contract*

To achieve matching cover, the reinsurance contracts often incorporate the terms of the underlying contract,[154] through the so-called 'full reinsurance' clauses, some examples of which are: "Subject to the same terms and conditions as the original policy",[155] "being a reinsurance of and warranted same gross rate and terms and conditions",[156] or simply "as original".[157] That said, as per Rix LJ in *HIH,* only the terms which cumulatively fulfil the following tests are incorporated:[158] "Is the clause in question germane to the reinsurance, or merely collateral? Does it make sense without undue manipulation?[159] Is it consistent with the express terms of the reinsurance? Is it apposite for inclusion in the reinsurance?"

Risk control clauses are likely to fulfil the tests set out by Rix LJ. For example, in *Vesta,*[160] the insurance contract contained the warranty that a 24-hour watch would be kept in the insured fish farm at all times. The said warranty is germane and apposite to reinsurance as it is directly relevant to the scope of the coverage and the liability of the reinsurer, which also makes sense in the reinsurance context without any manipulation. Additionally, the warranty wording was also included in the reinsurance contract as an express term. Thus, the said warranty fulfils the aforementioned tests. Indeed, the warranty was accepted to be duly incorporated in the reinsurance contract in *Vesta*. That said, even where underlying policy terms are fully incorporated into the reinsurance contract, whether the contracts provide matching cover is a matter of construction, which was also the issue in question in *Vesta*.[161]

### *3.2.2. Construction of reinsurance contracts*

In English law, general rules of construction apply to reinsurance contracts,[162] which are concerned with:

> "…the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[163]

Briefly, for the construction of the contract, the courts shall first look at the language of the contract, presuming that the word was used in its ordinary meaning;[164] unless the term is used as technical jargon.[165] Where the language is ambiguous, the courts have adopted different approaches to

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[154] Özlem Gürses, 'Construction of Terms of Facultative Reinsurance Contracts: Is Wasa v Lexington the Exception or the Rule' (2010) 73 Mod L Rev 119, 120.
[155] O'Neill (n 18) 4-004; *HIH* (n 57).
[156] *Wasa* (n 152); *Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2004] EWCA Civ 622.
[157] *Wasa* (n 152).
[158] *HIH* (n 57) 101.
[159] Some manipulation can be accepted: *CNA International Reinsurance Ltd v Tranquilidade SA* [1999] Lloyd's Re IR 288
[160] *Vesta* (n 22).
[161] ibid.
[162] O'Neill (n 18) 4-053.
[163] *ICS* (n 59) 912.
[164] *Arnold* (n 57) 15.
[165] O'Neill (n 18) 4-067.

construction.[166] In some cases, where the wording had two different possible interpretations, the courts have adopted a contextual approach, giving regard to the commercial common sense and interpreting the wording in the commercial context of the contract.[167] On the other hand, in other cases, it was held that where the words have obvious meanings, the construction should be literal, and commercial common sense should not be invoked, especially with hindsight.[168] Also, where the drafting is of higher quality, the courts will not tend to depart from the natural meaning of the words.[169] In the reinsurance context, the principles above were summarised in *Randgold*[170]*and Wasa*.[171]

Another principle of construction of reinsurance contracts is the notion of back-to-back cover, which provides that the wording of the reinsurance contracts shall be construed consistent with the underlying policy.[172]

### *3.2.3. Debates on the back-to-back presumption*

There are contradictory judicial views on whether there is a presumption of a back-to-back cover in reinsurance. Some favour such presumption,[173] some reject it,[174] while others distinguish between proportional and non-proportional reinsurance[175] and parties' intentions.[176] In some cases, the courts showed that they will go as far as necessary to hold matching cover, whereas in others, they set out the limits to such presumption.[177]

In the past, English courts utilised the back-to-back presumption to prevent coverage gaps arising from the different effects warranties have under the laws governing the underlying contract and the reinsurance contract. In *Vesta*,[178] the underlying insurance was governed by Norwegian law and the reinsurance contract by English law. Through an "as original" clause, the reinsurance contract incorporated the terms of the underlying insurance including a certain warranty. However, warranties had different effects in Norwegian and English law. Like Turkish law, Norwegian law did not provide a remedy to the insurer unless the breach was causative of the loss. Therefore, due to the absence of causality, although the warranty was breached, the reinsured was not relieved from liability against its insured. Whereas, under s 33 MIA, the reinsurer would be discharged automatically and in full upon the breach. This would have

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[166] David McLauchlan, 'Some Fallacies Concerning the Law of Contract Interpretation' [2017] LMCLQ 507.
[167] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50*; Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [14]; ICS (n 59).
[168] *Arnold* (n 57) 19; McLauchlan (n 162) 528.
[169] *Arnold* (n 57) 17; *Wood* (n 57) 11.
[170] *Randgold Resources Ltd v Santam Ltd* [2018] EWHC 2493 (Comm), [2019] Lloyd's Rep. I.R. 467 [17].
[171] *Wasa* (n 152) 56.
[172] Merkin *Guide* (n 20).
[173] *Vesta* (n 22); *Groupama* (n 22).
[174] *Wasa* (n 152).
[175] *AXA Reinsurance (UK) Ltd v Field* [1996] 2 Lloyd's Rep 233,238; *Munich Re Capital Limited v Ascot Corporate Name Limited* [2019] EWHC 2768 (Comm)
[176] *Munich Re* (n 175).
[177] O'Neill (n 18) 4-001.
[178] *Vesta* (n 22).

resulted in different outcomes for the breach of the same warranty under the original insurance and reinsurance; with the reinsured having to pay their insured, without getting any payment from their reinsurer. To overcome this coverage gap, the court held that the warranty incorporated in the reinsurance contract shall have the same effect as a warranty under Norwegian law, despite the reinsurance contract being subject to English law. The view of the court was:

> "In the ordinary course of business reinsurance is referred to as "back-to-back" with the insurance, which means that the reinsurer agrees that if the insurer is liable under the policy the reinsurer will accept liability to pay whatever percentage of the claim he has agreed to reinsure."[179]

Accordingly, the House of Lords (HL) held that "the reinsurance policy is a contract by the underwriters to indemnify Vesta against liability under the insurance policy"; thus, "a warranty must produce the same effect in each policy".[180] Thereby, HL acknowledged the back-to-back presumption. In *Groupama,* the court also accepted the presumption for proportional reinsurance on similar grounds where English law applied to the reinsurance contract and Venezuelan law to the underlying contract.

On the contrary, in *Wasa,* HL rejected such presumption. The reinsurance contract in question was subject to English law, whereas the law governing the underlying contract was identified as Pennsylvanian law only through lengthy litigation. It was held that under Pennsylvanian law, insurance "covers incremental damage to property that includes damage that occurred both before and after the period of cover, provided only that part of the damage occurred during the period of cover".[181] Whereas under English law, (re)insurance only covers damages caused during the period of the cover. HL adopted the view that a reinsurance contract is independent of the underlying contract and thus must be construed in its own terms and governing law. Consequently, unlike in *Vesta* and *Groupama,* HL construed the policy period under reinsurance in accordance with the English law, and not the governing law of the underlying policy, thereby concluding that the claims do not fall within the reinsurance cover. Thus, although the reinsured paid their insured for the loss which occurred outside the policy period, they could not be indemnified by their reinsurer.

Although the aforementioned cases are all concerned with the relationship between reinsurance and underlying insurance and the construction of reinsurance cover, in *Wasa,* HL neither followed nor overruled *Vesta* or *Groupama*. Instead, HL distinguished *Wasa* on the basis that when the reinsurance cover was placed, the law governing the underlying contract was not known or predictable; as opposed to *Vesta* and *Groupama*. Therefore, in *Wasa,* it was held that there was no identifiable governing law or legal dictionary which can be regarded as incorporated or applicable to the reinsurance contract and "no 'commercial context' to justify a deviation from the ordinary meaning of the reinsurance in the London insurance market".[182] Thus, the reinsurance contract was not constructed in line with the underlying

[179] ibid 895.
[180] ibid 892.
[181] *Wasa* (n 152) 3.
[182] O'Neill (n 18) 4-058.

contract. Distinguishing cases solely on this ground may lead to the conclusion that *Wasa* shall apply only when there the law governing the underlying insurance is not obvious.

Nonetheless, in fact, there is a more significant distinction between the reasonings of the courts which concerns the philosophical position taken on the nature of reinsurance contracts and their relationship with the underlying insurance.[183] In *Vesta,* HL adopted the view that what is covered under reinsurance is the reinsured's liability in the underlying insurance: "By the reinsurance policy, the underwriters promised that if Vesta became liable for a loss under the insurance policy, then the underwriters would make good 90 per cent. of the loss".[184] HL has thus construed the reinsurance contract back-to-back with the underlying contract, to ensure the reinsured is covered under the same terms as its insured under the original insurance. Whereas in *Wasa*, HL took the further insurance view:[185]

> "…under English law a contract of reinsurance in relation to property is a contract under which the reinsurers insure the property that is the subject of the primary insurance; it is not simply a contract under which the reinsurers agree to indemnify the insurers in relation to any liability that they may incur under the primary insurance."

Thereby, in *Wasa*, HL concluded that the reinsurance contract is independent of the underlying contract and shall be construed in itself. Thus, although the two contracts may use a similar wording, where such wording has different effects under the law governing the respective contract, the scope of the reinsurance coverage might not be the same as the underlying contract.

As such, there are two different views on the back-to-back presumption where the insurance and reinsurance contracts are subject to different governing laws. In *Vesta* and *Groupama*, the warranties under the reinsurance contracts which were subject to English law were construed as per the foreign law, and back-to-back cover was established. In contrast, in *Wasa,* the term of the reinsurance contract which was subject to English law was construed as per English law and back-to-back cover was rejected.[186] Criticisms were therefore raised to HL for not clarifying the law and causing doubt on the scope and applicability of the back-to-back presumption[187] and distinguishing *Wasa* on technical grounds (i.e. lack of an ascertainable law governing the underlying insurance) despite the significant distinction in their reasoning regarding the relationship between the insurance and reinsurance contracts (i.e. indemnity view vs further insurance view).[188]

It has been argued that the view adopted in *Wasa* sets out a correct legal principle that "[i]f the reinsurance contract is governed by a law other than the law of the insurance contract, it should be construed in accordance with that law as a separate contract";[189] therefore, that *Wasa* should have rendered the

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[183] ibid 4-025.
[184] *Vesta* (n 22) 891.
[185] *Wasa* (n 152) 2.
[186] Gürses *Construction* (n 154) 127.
[187] Gürses *Construction* (n 154) 129; Robert Merkin, 'Wasa International Insurance Co Ltd v Lexington Insurance Co: commercial certainty in the reinsurance market' LQR (2010) 126(Jan) 27.
[188] O'Neill (n 18) 4-025.
[189] ibid.

approach in *Vesta* and *Groupama* inapplicable in more general terms and not solely where the governing law is not identifiable.[190] Building on this argument, could this principle be applicable also in respect of the construction of incorporated warranties?

Even after the dismissal of a back-to-back presumption in *Wasa*, it has been argued that an incorporated warranty should be construed consistently with the underlying contract, even if they are subject to different governing laws, per *Vesta* and *Groupama*.[191] This is because while distinguishing *Wasa* from *Vesta* and *Groupama,* Lord Mance emphasised that those cases were on warranties which were "an area where English law has long been recognised as unduly stringent and in need of review".[192] Some scholars, however, have questioned whether the back-to-back presumption would still be applicable where the law governing the underlying contract was not identifiable as in *Wasa*, but where, the term in question is a warranty.[193]

As discussed in the previous section, IA has significantly reformed English law insurance warranties. It was argued by some scholars that since English law on insurance warranties is less harsh now and closer to other jurisdictions where a causal link is required, and the difficulties arising from the mismatch will be less significant.[194] This author argues that the reforms under the IA on warranties could perhaps encourage the courts to start dismissing the back-to-back presumption as in *Wasa*, also where warranties are concerned.

However, in that scenario, although English law is indeed not as rigid as before; there are still nuances between the Turkish and English laws, as discussed in the previous section, which may result in coverage gaps. Thus, in any case, it would be sensible for the parties to take additional measures to prevent coverage gaps and show their intention more clearly for matching the covers; instead of imprudently relying on the application of the back-to-back presumption by the courts.

#### *3.2.4. Recommendations on how to ensure matching covers*[195]

As suggested in *Wasa*, an obvious way to achieve matching covers would be to "ensure that insurance and reinsurance are subject to one and the same identifiable or predictable governing law".[196] However, as discussed above, the Turkish insurance law does not separately regulate reinsurance contracts, and Turkish law-governed reinsurance contracts are generally accepted to be subject to all the overriding mandatory provisions of TCC, which mainly aim to safeguard the interests of the ordinary policyholders.[197] The English reinsurer may also have other legal and commercial concerns to prefer

[190] ibid.
[191] Merkin and Noussia (n 148) 26, 27.
[192] Gürses *Reinsuring Clauses* (n 14) 2.120; *Wasa* (n 152) 50.
[193] Gürses *Reinsuring Clauses* (n 14) 2.127.
[194] Merkin and Noussia (n 148) 29.
[195] for similar discussions *see* Kao, M. Bob (2020) 'A Decade Later: Re-Examining the Presumption of Back-to-Back Cover in English Insurance Law' JIBL Vol. 19(2) 227.
[196] *Wasa* (n 152) 51; O'Neill (n 18) 4-025; Gürses *Reinsuring Clauses* (n 14) 2.121.
[197] Ünan *Private International Law* (n 11) 67.

English law over Turkish law to govern their contract;[198] and the parties cannot opt out of Turkish law for the underlying insurance in most cases.

Where the contracts have different governing laws, whether the reinsurance cover matches that of the underlying insurance concerns the construction of the reinsurance contract. The reinsurance contract shall be construed based on the parties' intentions, objectively ascertained.[199] In any case, it would be advisable for the parties to clearly reflect their intentions when drafting the policies where a back-to-back cover is intended. For such measures in drafting, based on the guidance of the view and presumptions of HL in *Wasa*,[200] the parties can explicitly draft the reinsurance as liability cover, clarifying that what is covered is the liability of the reinsured under the direct insurance.[201] Alternatively, the parties can provide under the choice of law clause that "the questions of construction are governed by the law chosen to govern the direct policy",[202] which may however be problematic in itself.[203]

In terms of warranties, the parties may also contract out of the default regime under the IA expressly. For example, a clear causality requirement can be introduced instead of the tests under s 11; negligence of the insured may be required for breach; or instead of automatic suspension, 'discharge by termination' may be adopted as in Turkish law. In doing so, the transparency requirements under s 17 IA must be followed. However, per s 17(4), the requirements will be tested in consideration that the reinsured has already contracted the underlying contract on the same terms, thus they should be expected to be aware of the terms and their effects.[204]

Parties may also use follow-the-settlement clauses, through which the reinsurer agrees to indemnify the reinsured provided that the claim is covered under the reinsurance policy as a matter of law, and in settling the claim the reinsured had acted honestly and taken all proper and business-like steps.[205] The operation of such clauses is also a matter of construction of the reinsurance contract. Also, as held in *Wasa*, they do not "have the effect of bringing within the cover of a policy of reinsurance risks that, on the true interpretation of the policy, would not otherwise be covered by it".[206] Still, using the follow-the-settlements or likewise, follow-the-fortune clauses may strengthen the position regarding the intention of matching cover along with other measures.

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[198] Merkin *Wasa* (n 187) 29; it is worth mentioning that, even where the parties validly choose English law to govern the reinsurance contract, where a dispute under the reinsurance contract is brought before the Turkish courts, the Turkish courts may still apply Turkish law to the contract where a provision of English law is explicitly contrary to Turkish public order per Art.5 of TPILL, or where a provision of the foreign law falls within the scope of directly applicable rules of Turkish law under Art. 6 of TPILL, in view of the mandatory terms applicable to the (re)insurance contracts, *see* ibid.
[199] *Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd* [2013] EWHC 3362 [46]; *Munich Re* (n 175) 51.
[200] *Wasa* (n 152) 51.
[201] Gürses *Construction* (n 154) 130.
[202] So-called 'conformity to statutes clauses' can be found in the reinsurance contracts obtained by Turkish cedants to this effect. I thank Prof. Samim Ünan for pointing this out from market practice.
[203] Merkin *Wasa* (n 187) 29.
[204] O'Neill (n 18) 4-028.
[205] *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312 [330].
[206] *Wasa* (n 152) 6.

On the other hand, the English reinsurers may not readily abandon the established forms in the London market.[207] Furthermore, even where all the above recommendations are adopted, the scope of the reinsurance cover will depend on its construction by the English courts. Thus, a certain ambiguity shall remain in any case. That said, showing a clear intention through drafting will indeed increase the possibility of achieving matching covers, especially against the ambiguities on the application of the back-to-back presumption posed by *Wasa*.

## 4. Conclusion

Due to various statutory restrictions and the limited capacity of local underwriters, the Turkish insurance market is highly reliant on foreign reinsurance. Thus, it is not uncommon to have arrangements where the reinsurance contract is governed by English law, whereas the underlying contract is subject to Turkish law.

This article has first comparatively analysed the English and Turkish insurance law regimes on risk control clauses; namely, warranties and contractual duties. Based on their distinctions, it was shown that although phrased similarly, a clause can have very different effects under the two regimes. Following on the differences between the regimes, this article then discussed the possibility of mismatches between the covers of an English law-governed reinsurance contract and a Turkish law-governed underlying contract. With reference to the judicial discussions on the presumption of back-to-back cover and the nature of reinsurance under English law, this article aimed to point out the risk of possible coverage gaps. Lastly, recommendations were made on how to enhance matching covers through drafting.

At least for the short term, foreign reinsurance remains a reality of the Turkish insurance market. Coverage gaps in reinsurance arrangements may deprive the reinsured of the expected benefits of risk transfer, despite paying the premium. Therefore, achieving matching covers is particularly important for Turkish reinsureds. On the other hand, although the English reinsurers may be unwilling to change their traditional wordings, having matching covers through clear drafting can also improve the legal certainty regarding the scope of liability of the English reinsurers. Additionally, promoting legal foreseeability can make the Turkish market more attractive for London-based reinsurers and increase business for both parties. And hopefully, the improvement of the reinsurance covers' quality can serve to advance the Turkish insurance market's capacity overall.

[207] Kao (n 195) 227.