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RESEARCH ARTICLE

Incorporation of Standard Risk Exclusion Clauses into Insurance Contract (A Comparative Analysis with the Provisions of PEICL and Turkish Law)

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Abstract

The construction of the insurance coverage as set out in the standard insurance terms can furnish complexities for the policyholder to grasp the scope of the risks covered. If the insurer does not provide full information about the risks covered and excluded before the conclusion of the insurance contract, the policyholder may find out at a later stage that the event that occurred was not covered by the policy. In such cases, the policyholder may claim that those risk exclusions are not valid under Article 1423 of the Turkish Commercial Code, which bestows upon the insurer a duty to inform before the conclusion of the contract. In order to determine the validity of the incorporation of standard risk exclusion clauses in an insurance contract and their interplay with the provisions of the Turkish Code of Obligations, the validity of boilerplate clauses must be analysed within the frame of the so-called operability test.

Keywords

Duty to Inform, The Duty of Advice, Incorporation of Standard Insurance Terms, Policyholder's Right of Objection, Surprising Terms

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Introduction

Insurance contracts primarily consist of standard insurance terms previously formulated by the insurer.[1,2] The primary rationale of such terms is to describe the insurance coverage and concretise its scope. Therefore, standard insurance terms usually provide a list of the main risks covered by the insurance contract and then include the specific risk exclusions to clarify which events do not enjoy the policy coverage.[3] It is also likely that standard tertiary risk re-inclusions be added within the insurance coverage.[4]

Such a mazed description of the included or excluded risks jeopardises a clear construction of the insurance coverage by the policyholder before the conclusion of the contract.[5] This ambiguity gives rise to legal conflicts, almost always after the occurrence of the risk, when the insurer rejects to pay the insurance money by claiming that the occurred event does not fall into the ambit of the insurance contract.

It is worth noting that most of the legal precedent in Turkey is related to claims brought against the insurers, which are generally ruled in favour. The reasoning behind this tendency is typically linked with the insurer's breach of the duty to inform and grounded in the legal consequence attached to its violation under Turkish Commercial Code[6] (TCC) Article 1423(2).

1 In Turkey, insurance contracts include general terms and special terms of insurance. Although general terms are subject to the approval of a supervisory authority, namely the Sigortacılık ve Özel Emeklilik Düzenleme ve Denetleme Kurumu (Insurance and Private Pension Regulation and Supervision Agency), special terms are exempt from such an approval. As a landmark of the Turkish insurance practice, the Turkish supervisory authority, not only approves the general terms, but also directly draws up those terms. However, the fact that the general insurance terms are not drafted by the insurer, does not prevent the legal nature of those terms to be qualified as standard contract terms or boilerplate clauses, which are subject to judicial review. See Emine Yazıcıoğlu and Zehra Şeker Öğüz, *Sigorta Hukuku* (4th edn, Filiz 2021) 14; Yeşim Atamer and Samim Ünan, 'Control of General and Special Conditions of Insurance Under Turkish Law with Special Regard to the Transparency Requirement' in Manfred Wandt and Samim Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 69; Melda Taşkın, *Krediye Bağlı Hayat Sigortası Sözleşmesi* (Onikilevha 2019) 80; Mehmet Bahtiyar, 'Sigorta Poliçesi Genel Koşulları' (1997) 19(2) Banka ve Ticaret Hukuku Dergisi 89, 92; Merih Kemal Omağ, 'Özel Sigorta Hukukunda Sigorta Ettirenlerin Korunması/Himayesi' in *Özel Sigorta Hukukuna Hakim İlke ve Kurumlar (1975-2016) Makaleler - Tebliğler* (Onikilevha 2019) 405; Samim Ünan, 'Sigorta Genel Şartları ile İlgili Olarak Uygulamada Karşılaşılan Bazı Sorunlar' *Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 177; Aslıhan Sevinç Kuyucu, 'Sigorta Genel Şartlarının Hukuki Niteliği ve Uygulanacak Hükümlerin Belirlenmesine İlişkin Esaslar', *Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 21. See for the opposite view Tekin Memiş, *Sigorta Sözleşmesi Şartlarının Yargısal Denetimi* (Onikilevha 2016) 32-40; Ecehan Yeşilova Aras, 'Sigorta Sözleşmelerinde Genel İşlem Şartlarının Kullanılması' (2015) 80(3) İzmir Barosu Dergisi, 458. Likewise, the special insurance terms, prepared by the insurer are also - argumentum a fortiori - considered as standard contract terms subject to judicial review. See Atamer and Ünan (n 1) 68; Memiş (n 1) 134.

2 In this study, the term 'standard insurance terms' stands for both the general insurance terms and the special insurance terms because based on the type of the insurance, the risk exclusion clauses can be set out either in the general or the special insurance terms, which are pre-formulated before the conclusion of the insurance contract.

3 Manfred Wandt, 'Transparency in the Insurance Contract Law of Germany' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 68. Also see Emine Yazıcıoğlu, 'Zarar Sigortalarında Sigorta Himayesinin Sınırlandırılması ve Davranış Yükümlülüklerinin Teminat Şartı ya da İstisna Olarak Öngörülmesi Sorunu', 1186.

4 Wandt (n 3) 64.

5 Wandt (n 3) 64. See also Aslıhan Erbaş Açıkel, 'İngilizce Sözleşme Koşullarının Sigorta Sözleşmesi İçeriğine Dahil Edilmesi' "*Prof. Dr. Rayegân Kender'e Saygı Günü" Sigorta Genel Şartlarının Düzenlenmesi, Denetlenmesi ve Uygulamada Ortaya Çıkan Sorunlar Sempozyumu* (Filiz 2020) 52-55.

6 Türk Ticaret Kanunu, Kanun Numarası: 6102, Kabul Tarihi: 13.1.2011, RG 14.2.2011/27846.

According to this provision, "*If an information explanation is not given, the contract shall be deemed as having been concluded in accordance with the terms written in the policy, unless the policyholder objects to the conclusion of the contract within fourteen days*". As will be seen below, among the Turkish scholars the meaning of this provision and particularly the legal qualification of the term "objection" are highly debatable. Different views, such as revocation, termination and avoidance, have been expressed in this regard. However, according to the author, neither the aforementioned norm – which does not explicitly address the issue - nor the said opinions are helpful in solving the problem of the validity of the risk exclusion clauses against the policyholder in case of a lack of objection.

Taking into account the aforementioned background, the purpose of this study is to examine the meaning of Article 1432(2) of the TCC under the principles of general contract law. Such a quest is primarily due to the fact that standard insurance terms containing the risk exclusion clauses are indeed pre-formulated and not individually negotiated, and therefore their incorporation into the insurance contract places their validity within the realm of the general contract law, laying the path to judicial review mechanisms set out for standard contract terms or boilerplate clauses.

The very first prong of the judicial review is to analyse whether the standard terms are incorporated into the contract and become part of it. It is generally accepted that in order to be incorporated into the contract, the standard contract terms must be handed over to the other party of the contract so that the latter is informed of the standard terms. It is also required that the insurer inform the prospective policyholder of the standard insurance terms so that he or she can make a conscious decision about whether or not to conclude the contract under insurance law. However, the duty to inform stipulated by the general contract law and the insurance law are different regarding their scope and timing, and this variation requires a closer examination of the incorporation of standard insurance terms.

Therefore, instead of determining the legal qualification of Article 1423(2) of the TCC as a distinct, isolated provision of insurance law, the author will endeavour to construe it under the principles of general contract law on the conclusion of contracts and incorporation of standard contract terms. Meanwhile, the author will also strive to conduct a comparative study between Turkish law and the Principles of European Insurance Contract Law (PEICL) [7], which also provides legal consequences for the breach of the insurer's duty to inform.

7 PEICL has been prepared by the Project Group of Restatement of European Insurance Contract Law by taking into account the different legal provisions of European countries and constitutes an important model law for Member States. See Jürgen Basedow, John Birds, Malcolm Clarke, Herman Cousy, Helmut Heiss and Leander Loacker, *Principles of European Insurance Contract Law (PEICL)* (2nd edn, Ottoschmidt 2016) 5.

To this end, in Section I of this analysis, the pre-contractual information duties of the insurer under the PEICL and Turkish law will be highlighted. This preliminary information will lead to a review of the interaction of the rules of general contract law with insurance law on the incorporation of general contract terms in Section II. Therefore, the incorporation of standard insurance terms under PEICL will be analysed in conjunction with the Principles of European Contract Law (PECL)[8], whereas the provisions of TCC will be analysed in connection with the principles of the Turkish Code of Obligations[9] (TCO). Different views expressed by legal scholars in relation to the legal nature of TCC Article 1423(2) and the author's own critique thereon will be dealt with in this part as well. Then in Section III, from a more specific perspective, the validity of 'surprising' risk exclusion clauses will be put under scrutiny. Finally, the outcomes of the previous sections will be used to review the protection provided to the policyholder under Turkish law.

I. Pre-Contractual Information Duties of the Insurer

Information duties oblige the insurer to provide the policyholder with specific information, which is necessary for better evaluation of decisions and prevent the insurer from abusing its superior bargaining position.[10] Only after having been well-informed, can the policyholder be deemed to have understood the consequences of his choices about the insurance product that he wants to purchase.[11]

In modern insurance law, the pre-contractual information duties of the insurer can basically be divided into two categories: the duty to inform about the insurance contract and the duty to advise in respect of the policy holder's individual requirements of insurance.[12] The distinction between informing and advising lies in the fact that information relates to providing standard and abstract info about the insurance product, while advice relates to the ascertainment of the concrete needs of the policyholder[13] and is linked with the policyholder's decision process.[14] There is also a duty to highlight, which entails the clarification of certain issues and warning

8 PECL is a set of model rules drawn up by the Commission on European Contract Law, which aims to harmonise the contract law of the Member States of the European Union. See Ole Lando and Hugh Beale (eds), *Principles of European Contract Law (Part I and II)* (Wolters Kluwer 2000) xxiv.

9 Türk Borçlar Kanunu, Kanun Numarası: 6098, Kabul Tarihi: 11.1.2011, RG 4.2.2011/27836.

10 Marta Ostrowska, 'Information Duties Stemming from the Insurance Distribution Directive as an Example of Faulty Application of the Principle of Proportionality', in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 31.

11 Ostrowska (n 10) 31. See also Ana Keglević, 'Pre-contractual Information Duty and Unfair Contract Terms-Open Questions and Dilemmas' in Insurer's Precontractual Information Duty (Sigorta Hukuku Türk Derneği 2013) 77, 79.

12 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 125.

13 Erich Prölls, Anton Martin and Mathis Rudy 'VVG § 6 Beratung des Versicherungsnehmers' in *Prölls/Möller Versicherungsvertragsgesetz* (31st edn CHBeck 2021) Rn 1.

14 Matthias Beenken, 'Beratungspflichten nach der IDD und Ihre Umsetzung ins deutsche Recht' (2017) Rechts und Schaden 44 (12) 617, 618.

the policyholder who is mistaken about the insurance coverage, provided that it is reasonable to expect the insurer to point out such a mistake.[15]

The Insurance Distribution Directive[16] ("IDD"), which entered into force on 2 February 2016, stipulates both the duty to inform and advice in Article 20.[17] Recital 44 of the IDD explains that to avoid any mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. If the insurer breaches its obligation under Article 20, sanctions, which are mostly administrative in nature, will be applied (Article 33/2).

A. Pre-contractual Duties of the Insurer under PEICL

PEICL lists three pre-contractual duties of the insurer in its Section Two: i) *to provide pre-contractual documents* (Article 2:201); ii) *to warn about the inconsistencies in the cover* (Article 2:202); iii) *to warn about commencement cover* (Article 2:203). The author will not deal with Article 2:203, which is deemed as a special case of the general duty of the insurer to warn the applicant as stipulated in Article 2:202 and, therefore, leads to the same sanctions.[18]

1. Duty to Provide Pre-Contractual Documents

PEICL Article 2:201(1) requires that "*The insurer shall provide the applicant with a copy of the proposed contract terms as well as a document which includes the following information if relevant: (a) the name and address of the contracting parties, in particular of the head office and the legal form of the insurer and, where appropriate, of the branch concluding the contract or granting the cover; (b) the name and address of the insured and, in the case of life insurance, the beneficiary and the person at risk; (c) the name and the address of the insurance agent; (d) the subject matter of the insurance and the risks covered; (e) the sum insured and any deductibles; (f) the amount of the premium and the method of calculating it; (g) when the premium falls due as well as the place and the mode of payment; (h) the contract period, including the method of terminating the contract, and the liability period; (i) the right to revoke the application or avoid the contract in accordance*

15 For the meaning of 'informing' and 'highlighting', see: Emine Yazıcıoğlu, 'Sigortacının Bilgilendirme (Aydınlatma) Yükümlülüğü' in Samim Ünan and Emine Yazıcıoğlu (eds), *Sigorta Hukuku Sempozyumları* (Onikilevha 2018) 391. See also, for the differences between information (Information), highlight (Aufklärung) and advice (Beratung): Beenken (n 14) 618.

16 Council Directive 2016/97/EC of 20 January 2016 on insurance distribution OJ L26/19.

17 The objective of the revision to the Insurance Mediation Directive was designed to ensure consistency of terms between all participants involved in the sale of insurance products and to increase customer protection. See: Christian Bo Kolding-Krøger and Regitze Aalykke Hansen and Amelie Brofeldt, 'The Reality of the Promised Increase in Customer Protection Under the Insurance Distribution Directive' in Pierpaolo Marano and Kyriaki Noussia (eds), *Insurance Distribution Directive* (Springer 2021) 398.

18 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 127.

with Article 2:303 in the case of non-life insurance and with Article 17:203 in the case of life insurance; (j) that the contract is subject to PEICL; (k) the existence of an opt-out-court complaint and redress mechanism for the applicant and the methods of having access to it; (l) the existence of guarantee funds or other compensation arrangements."

a. Scope

As the first step of the insurer's pre-contractual duties, this provision ensures that the standard and abstract info about the insurance is given to the prospective policyholder by means of providing the pre-contractual documents. Those documents help to ensure transparency for the prospective policyholders and put them in a position to check the content of the contract and reach an informed decision.[19]

Under PEICL Article 2:201(1), the pre-contractual documents to be provided by the insurer are the 'proposed contract terms', which embrace the insurer's standard insurance terms[20] and a 'document' including the information of listed issues. With regard to 'risk exclusion clauses', which are the focus of attention of this paper, it is worth noting that PEICL Article 2:201(1)(d) only mentions *the subject matter of the insurance and the risks covered*. However, it is assumed that, as part of the proposed contract terms, they fall within the scope of information to be given to the prospective policyholder.

By mentioning a 'copy' of the proposed contract terms and a 'document' including the relevant information, PEICL secures that the abstract information about the insurance will be provided in written form. Besides, that written information must be 'given' to the prospective policyholder. Therefore, it is not sufficient to emphasise the place where those terms can be found. Consequently, statements such as "*For insurer's proposed terms see the following webpage*" would not be sufficient to perform the duty of providing pre-contractual documents.

b. Time

PEICL Article 2:201(2) requires that "*If possible, this information shall be provided in sufficient time to enable the applicant to consider whether or not to conclude the contract.*" The time frame requested in this provision hints that the PEICL prefers the 'offer model'[21] in the contract conclusion so that the prospective policyholder has been enabled to read and consider all the proposed terms of the insurer, including the risk exclusions, before expressing its binding intention to conclude the contract.

19 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 119.

20 See Keglević (n 11) 80.

21 See, for the meaning of 'offer model': Samim Ünan 'Insurer's Pre-contractual Duties to Inform and Warn/Advice' in Insurer's Precontractual Information Duty (Sigorta Hukuku Türk Derneği 2013) 9, 13.

However, the prescribed time period in this provision is only applied when it is 'possible'. What is meant by '*if possible*' is not explained in PEICL. In its Commentary, Finnish Insurance Contracts Act s. 5 para 1 is annotated, which provides that the information does not need to be provided if the policyholder does not want it or if giving such information "would pose excessive inconvenience".[22]

A similar provision is set out in the German Insurance Contract Act § 7 para 1 sentence 3, which provides that "*If, upon the request of the policyholder, the contract is concluded by telephone or using another means of communication which does not permit the information to be provided in writing prior to the policyholder's contractual acceptance, that information must be provided without undue delay after the contract is made; this shall also apply if the policyholder explicitly waives the right to information by a separate written declaration prior to submitting his contractual acceptance*."

Therefore, at least in cases where the insurance contract has been concluded by means of remote communication, one may assume that it was impossible for the insurer to provide its contract terms within a sufficient period of time to enable the applicant to consider its content. In such cases, the insurer would not be in breach of its duty to provide pre-contractual documents. But due attention should be given because not breaching the duty to inform under insurance law may not be sufficient to incorporate the standard insurance terms into the contract under general contract law. It is also important to note that PEICL does not provide a legal sanction in case the insurer does not provide the pre-contractual documents sufficiently in advance, even if otherwise was possible.

2. Duty to Warn About Inconsistencies in the Cover

PEICL Article 2:202(1) stipulates that "*When concluding the contract, the insurer shall warn the applicant of any inconsistencies between the cover offered and the applicant's requirements of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting and, in particular, whether the applicant was assisted by an independent intermediary*".

This provision obliges the insurer to warn the applicant about aspects of the proposed risk not covered by the policy. However, it is limited to situations where the gaps in the cover would be deemed to be in the know of the insurer, especially if the actual risk of the applicant was apparent to the insurer or such a gap should reasonably have been anticipated by the insurer.[23]

22 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 120. See also, Salla Hyvönen, 'Information Obligations and Disinformation of Consumers: Finnish Law Report', in Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer 2019) 423.

23 Basedow, Birds, Clarke, Cousy, Heiss,and Loacker (n 7) 123.

It seems that the duty to warn about the inconsistencies in the cover offered and the applicant's requirements is less comprehensive than the duty of advice as stipulated in the IDD.[24] It is clear that the duty of advice as included in the IDD requires the identification of the demands and needs of the customer and to inform him objectively about the insurance product. Commentary of the PEICL also explains that Article 2:202 reflects a compromising solution between the extremes[25] and aims at establishing a general pre-contractual duty on the part of the insurer to assist the applicant by providing information relevant to the applicant's choice of cover.[26]

In case of a breach, PEICL Article 2:202(2)(a) entitles the policyholder to claim damages. The insurer will have to pay the policyholder the amount of money that will put the policyholder in the position he would have been in, had he been duly warned by the insurer.[27] In addition to claiming damages, Article 2:202(2)(b) gives the policyholder a right to terminate the contract.

B. Pre-contractual Duties of the Insurer under Turkish Law

1. Duty to Inform

Turkish insurance law neither stipulates a duty of warning nor a duty of advice on the insurer. It simply provides a duty to inform in TCC Article 1423(1): "*Before the conclusion of the contract and sufficiently in advance for due consideration, the insurer and its agent shall inform in writing the policyholder of all matters related to the insurance contract, the insured's rights, the provisions to which the insured has to pay special attention, notification duties that may arise in the course of the insurance cover*."[28]

a. Scope

The wording of this provision with respect to the scope of information to be given to the policyholder is, albeit contrary to the enumeration technique of PEICL, widely formulated. It is generally accepted that the scope of insurance coverage, its exceptions, premium and insurance amount are included within the scope of the insurer's duty to inform.[29] Insurer's standard insurance terms are also contained within the scope of the duty to inform.[30]

24 According to Keglević, duty to advise is explicitly prescribed in PEICL Article 2:202. See Keglević (n 11) 82. Ostrowska states that "… *the PEICL do not provide a standard insurer duty to advise, which is common for European insurance regulations. However … the insurer's duty to warn the applicant of any inconsistencies between the cover offered and his requirements give reasonable grounds to state that the PEICL fulfil the purpose of the duty to advise at least partially*." See Ostrowska (n 10) 287.

25 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 126.

26 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 122.

27 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 124.

28 Translation is taken from Ecehan Yeşilova Aras, 'Transparency in the Insurance Contract Law of Turkey' in Pierpaolo Marano and Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 472.

29 Kübra Yetiş Samlı, 'Sigortacının Aydınlatma Yükümlülüğünü Düzenleyen TTK m. 1423 Hükmüne İlişkin Bazı Değerlendirmeler' (2016) 22 (3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 2987.

30 Samim Ünan, Türk Ticaret Kanunu Şerhi Altıncı Kitap Sigorta Hukuku Cilt 1 Genel Hükümler (Madde 1401-1452) (Onikilevha 2016) 229.

Besides, Regulation on the Information in Insurance Contracts ("Regulation on Information") [31] includes a provision, which contains the minimum amount of information to be included in the information form.[32] According to Article 8 of this Regulation, the information form must include: *a) the title and the contact information of the insurer and its agent, b) General warnings about the contract to be concluded, c) insurance coverage given by the contract, ç) exclusions of the insurance coverage and values, risks, which are based on each insurance type outside the coverage but can be included in the coverage by an additional contract provided that they are mentioned in the policy, or special terms and clauses that can be added in the contract, d) general rules on insurance payment, e) objection and information requests and information on arbitration membership, f) all other information and documents requested by the Ministry.*

As viewed above, insurance coverage and its exclusions are specifically mentioned among the information to be included in the information form. It is further possible to infer from the phrase "*the provisions to which the insured has to pay special attention*" that the 'risks covered and excluded' in the insurance contract are covered with TCC Article 1423(1).

TCC Article 1423(1) requires that the insurer must perform its duty to inform in written form. Other than this, the TCC does not prescribe a duty to provide pre-contractual documents as provided in PEICL and the information form prescribed by the Regulation on Information is only a document of evidence that the insurer has performed its duty to inform.[33] The written form as prescribed in TCC Article 1423(1) is criticised by legal scholars since it does not take into account the insurance contracts concluded by means of distance communication instruments.[34] It is interesting to note that Regulation on Information allows an oral form in cases of contract conclusion through a call centre or telephone.[35] However, its validity under TCC Article 1423(1) is strongly rejected among scholars.[36]

b. Time

According to TCC Article 1423(1), the duty to inform must be performed before the conclusion of the contract and by providing sufficient time for consideration. This

31 Sigorta Sözleşmelerinde Bilgilendirmeye İlişkin Yönetmelik, RG 14.02.2020/31039.

32 According to Regulation on Information Art 4(1)b, an information form can be given to the prospective policyholder, which will include summary information on the scope of the insurance, procedures and rules on the payment of the insurance money.

33 Mehmet Özdamar, *Sigortacının Sözleşme Öncesi Aydınlatma Yükümlülüğü* (Yetkin 2009) 240; İrem Aral Eldeklioğlu, '6102 Sayılı Türk Ticaret Kanunu ve Sigortacılık Mevzuatı Uyarınca Sigortacının Aydınlatma Yükümlülüğü' 18 (1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 393.

34 Ünan (n 30) 235.

35 Regulation on Information Art 5(3): Information to be given by the insurer through the call center or telephone can be made orally, provided that the interview is recorded on magnetic or digital media.

36 Yetiş Samlı (n 29) 2990.

formulation is very similar to PEICL Article 2:201(2) and requires that the insurer informs the prospective policyholder before its offer or acceptance accordingly.[37] However, unlike PEICL, there is no restriction on this duty to provide the information by giving sufficient time only when "possible".

2. Duty to Highlight or Advise the Policyholder

TCC does not entail a specific duty to warn about the cover offered and the applicant's requirements which the insurer is aware of. Whether from TCC Article 1423(1), an obligation to enlighten the policyholder who is mistaken about the contract and its coverage can be extracted is not clear. Taking into account the content of TCC Article 1423(1), it has been argued by legal scholars that no obligation is imposed on the insurer beyond providing information,[38] such as the duty of warning about the inconsistencies of the cover offered and the policyholder's requirements combined with a right to claim damages. As will be seen below, this absence is the reason for divergent opinions regarding the legal consequence stipulated in TCC Article 1423(2).

It is further obscure whether such an obligation can be extracted from the general contract law and, in particular, from *culpa in contrahendo*. According to *Özdamar*, in addition to providing information, the insurer is under obligation to provide consultancy, guidance and advice to the addressee within the scope of Turkish Civil Code Article 2.[39] According to this provision, everyone has to comply with the rule of good faith while using their rights and performing their obligations. This obligation requires negotiating with serious intent to make a contract, not to engage in effective deceptive conduct, to give the necessary information to the other party and to warn if the other party falls at fault.[40]

It is true that *culpa in contrahendo* covers both the duty of giving information and also providing accurate and complete information.[41] Providing deficient or wrong information will diminish the expected benefits of the contract for the counterparty.[42]

37 See Ünan (n 30) 224; Yetiş Samlı (n 29) 2977, 2984

38 Yazıcıoğlu (n 15) 394; Yeşilova Aras (n 28) 459, 472.

39 Özdamar (n 33) 190.

40 Osman Gökhan Antalya, *Marmara Hukuku Yorumu Borçlar Hukuku Genel Hükümler Cilt V/1-1* (2nd ed, Seçkin 2019) 255; Rona Serozan, Başak Baysal and Kerem Cem Sanlı, *Serozan Borçlar Hukuku Genel Bölüm – İfa, İfa Engelleri, Haksız Zenginleşme* (8th ed, Onikilevha 2022) 347-348;Haluk Nami Nomer, *Borçlar Hukuku Genel Hükümler*, (17th ed, Beta 2020) 437-438; Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, (24th ed, Turhan 2020) 119-120; Yeşilova Aras (n 28) 473; Aylin Görener, 'Culpa In Contrahendo Sorumluluğu', (2019) 36 (2) İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 73-34; Kemal Şenocak, 'Sigorta Sözleşmesini Kurmaya Yönelik İcap Beyanının Kabulü veya Reddi Yönünde İrade Beyanı Açıklanmadan Önce Sigortacının, İcaba Bağlılık Süresi İçerisinde Gerçekleşen Riziko'dan Dolayı Culpa In Contrahendo Sorumluluğu Söz Konusu Olabilir Mi?' (2007) 1-2 (11) Gazi Üniversitesi Hukuk Fakültesi Dergisi 299; Mustafa Arıkan, 'Die Haftung aus Culpa in Contrahendo' (2009) 17 (1) Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 72.

41 Huriye Reyhan Demircioğlu, *Güven Esası Uyarınca Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan sorumluluk (Culpa in Contrahendo Sorumluluğu)*, (Yetkin 2009) 222.

42 Demircioğlu (n 41) 235. See also Fikret Eren, Borçlar Hukuku Genel Hükümler (17th ed, Yetkin 2014) 1135; Serozan, Baysal and Sanlı, (n 40) 358.

Hence, according to the author, in insurance contracts, although a duty to highlight the policyholder can arise from the doctrine of the *culpa in contrahendo* (not from the TCC Article 1423(1)), a duty of advice as understood by IDD cannot be endorsed either from *culpa in contrahendo* nor from TCC Article 1423(1). Conducting a demands-and-needs test and determining the best suitable insurance coverage for the applicant is of high-level consumer protection. It would be better if such protection were specifically included in the TCC.

II. Incorporation of Standard Insurance Terms

III. A. Incorporation under PEICL

PEICL takes into account the fact that the standard insurance terms of the insurer have been drafted by one of the contract parties, and thus, they have the character of standard contract terms. PEICL deals with the validity of the unfair terms included in the standard contract terms, but other than imposing a duty to provide pre-contractual documents and to warn about the inconsistencies of the cover, it does not directly deal with the question of how and to what extent these standard terms are validly incorporated into the contract.

The only provision that seems to be relevant in this regard is PEICL Article 2:502, which provides that "*If the terms of the insurance policy differ from those in the policyholder's application or any prior agreement between the parties, such differences as have been highlighted in the policy shall be deemed to have been assented by the policyholder unless he objects within one month of receipt of the policy.*"

PEICL Article 1:105(2) provides that questions arising from insurance contracts that are not expressly settled in the PEICL are to be ascertained in conformity with the PECL. Therefore, in the following part, the role of PEICL Article 2:502 will be analysed by taking into account the related provisions of PECL on the incorporation of standard contract terms.

1. Incorporation under PECL

With regard to incorporation of general contract terms, PECL Article 2:104 provides that "*(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by mere reference to them in a contract document, even if that party signs the document*". [43]

43 PECL's regulation on incorporation, in a way, completes Directive 93/13/EEC on Unfair Contract Terms, which deals with the consequences of being an *unfair term* included in the standard contract terms but fails to determine whether and under which conditions those contract terms become part of the contract. In the absence of PECL, this question should be answered within the context of general contract law of the respective Member State. Some Member States, for example, Germany (BGB § 305/2), have extensive rules on unfair terms than the Directive's rules and describe the rules for the incorporation of the general contract conditions.

It is worth mentioning that PECL Article 2:104 does not mention or make reference to "pre-formulated" contract terms. Nevertheless, it covers standard terms prepared by one party, provided that they are not individually negotiated with the other party.[44] It is also worth noting that other than bringing the standard terms to the attention of the other party in a reasonable way, PECL does not require any advice or assistance duties of the party that uses such terms and does not oblige the user to bring the differences between the provisions of the standard contract terms and its actual demands and needs to the other party's attention. To read and consider whether these terms are in accordance with its needs or not is bestowed upon the other party.

In order to incorporate the user's standard contract terms, PECL requires that the user must get the other party's attention on such terms. According to the clear wording of its provision, a mere reference to the standard contract terms is not sufficient to incorporate them into the contract.[45] Thus, in addition to referencing the general terms, such terms must either be attached to the contract or available to the offeree in different ways.[46] In other words, the user of the standard terms is not obliged to provide the full content of the conditions, but at least the information on where to find the content of these conditions must be provided.

2. Interaction of PECL with PEICL Regarding Incorporation

a. Scope of Information

It is obvious that by requiring to provide a 'copy' of the proposed contract terms, the standard required by PEICL Article 2:201 with regard to the scope of information is higher than PECL, according to which it is sufficient to inform the other party where to find the standard contract terms. Therefore, should the insurer furnish the contract terms in a timely manner, the standard insurance terms would be incorporated under PECL Article 2:104.

It should be pointed out that in addition to providing the standard terms, PEICL also requires a warning about inconsistencies. Therefore, the incorporation of standard insurance terms under PEICL Article 2:201 in connection with PECL Article 2:104 does not hinder the application of PEICL Article 2:202. Thus, if the insurer does not warn the applicant about the inconsistencies between the cover offered in the

44 See Lando and Beale (n 8)149. For a similar approach expressed regarding Article(s) 7 and 70 of CESL (Draft Regulation on a Common European Sales Law) see Sonja A Kruisinga, 'Incorporation of Standard Terms According to the CISG and the CESL: Will These Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transaction' (2013) 24 (3) European Business Law Review 341, 353. According to Magnus, the Commentary to Article 2:209 PECL implies that standard terms are prepared in advance by one of the parties without any influence from the other party. See Ulrich Magnus, 'Incorporation of Standard Terms' in Larry DiMatteo, Andre Janssen, Ulrich Magnus and Reiner Schulze (eds), *International Sales Law* (CH Beck, Hart, Nomos 2016) 251.

45 Lando and Beale (n 8) 149, Magnus (n 44) 251.

46 Magnus (n 44) 251, Kruisinga (n 44) 354.

proposed contract terms and the applicant's requirements (which the insurer became aware of upon receiving the applicant's invitation for an offer), he might be liable to pay damages under Article 2:202; although such inconsistent terms validly became part of the contract.

b. Time of Information

According to PECL Article 2:104, standard contract terms should be brought to the attention of the other party before or when the contract is concluded. However, as we have seen above, under PEICL, the information does not have to be provided sufficiently in advance in cases where it is not possible to do so. In this respect, different scenarios must be taken into account as regards the way of concluding the insurance contract.

1. Before Contract Conclusion

In the most ideal way of contract conclusion, upon receiving the applicant's invitation to offer, the insurer provides its standard terms together with its questionnaire to be filled out by the applicant.[47] This would enable the applicant sufficient time to consider the content and decide whether or not to make an offer to the insurer. This way of contract conclusion comprises the 'offer model' and best suits the interests of the policyholder because the applicant only makes an offer after considering the standard terms. In this case, there would be no doubt that the standard insurance terms would become part of the insurance contract upon acceptance of the insurer.

2. At Contract Conclusion

If the prospective policyholder triggers the contractual relationship by making an offer through a means of real-time communication, for example, by telephone, it may not be possible for the insurer to provide its insurance terms in due time through the same means of communication. In such a way, the acceptance by the insurer might be given through a letter by post.[48] This type of contract conclusion is known as the 'policy model' in which the informative documents are delivered simultaneously with the policy at the moment when the contract is entered into.[49] The submission of the relevant information at the last moment is obviously too late for an informed decision, and it is highly questionable whether the terms included in those documents have been incorporated into the insurance contract or whether the insurance contract has been concluded at all.

47 According to PEICL Article 2:101(1), the applicant's pre-contractual information is dependent on the insurer's questionnaire.

48 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 129.

49 Ünan (n 21) 13.

In this scenario, by sending its proposed contract terms with its acceptance, the insurer has indeed modified the offer. Therefore, such an acceptance would be considered a modified acceptance under general contract law and be subject to PECL 2:208.[50] According to this provision "*(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer. (2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. (3) However, such a reply will be* treated *as a rejection of the offer if ... (c) the offeror objects to the additional or different terms without delay*."

Under PECL Art 2:208, which is almost identical to CISG Art 19, a reply containing the terms which materially alter the terms of the offer is tantamount to rejection and a new offer.[51] Only additional or different terms which do not materially alter the terms of the offer become part of the contract.[52] In such a case, the offeror can object to them if he finds it worthwhile to express his disagreement.[53] Thus, the determination of what constitutes 'material terms' and whether the risk exclusion clauses can be qualified as material alterations are crucial to understanding the fate and content of the insurance contract.

According to the *Commentary* of the PECL, '*A term is material if the offeree knew or as a reasonable person in the same position as the offeree should have known that the offeror would be influenced in its decision as to whether to contract or as to the terms on which to contract*'.[54] Unlike CISG 19(3), the PECL does not provide a list of material terms. Nevertheless, the *Commentary,* for illustrative purposes, mentions the same terms of CISG, such as the price, payment, quality and quantity of the goods, place and time of delivery, and the extent of one party's liability to the other.[55]

Following the above explanations, the author believes that risk exclusion clauses and any condition restricting the coverage and the insurer's liability against the policyholder must be deemed a material alteration to the offer. The acceptance of the insurer, including such material alterations must be considered as a new offer, which requires the approval of the policyholder. Consequently, in the absence of the

50 Lando and Beale (n 8) 150.

51 Lando and Beale (n 8) 178. This provision recognises the so-called mirror image rule of offer and acceptance exactly matching each other. See Michael Greenhalgh Bridge, *The International Sale of Goods* (3rd ed, Oxford University Press 2013) 536.

52 Lando and Beale (n 8) 178. In departing from the mirror image rule for non-material changes, this rule significantly deviates from the English law, according to which a purported acceptance containing additional or different terms would be regarded as a counter-offer, whether those terms were material or not. See Bridge (n 51) 537.

53 Lando and Beale (n 8) 178.

54 Lando and Beale (n 8) 178.

55 See Lando and Beale (n 8) 178.

policyholder's acceptance, the contract will not be concluded.[56] In this regard, it is also important to note that according to PECL Article 2:204(2), silence or inactivity does not amount to acceptance.

In the light of the previous remarks, the meaning of PEICL Article 2:502 clearly crystallises, especially when one reads the explanation given as the rationale for this provision:

> "*Under general contract law such changes could even lead to an absence of agreement that might affect the whole contract and leave the policyholder unprotected*".[57]

It seems that the drafters of the PEICL delineate the probability of the insurance contract being not concluded if the insurer makes material changes in its acceptance. Thus, thanks to PEICL Article 2:502, in insurance contracts, regardless of being material or not, any differentiation from the offer would be deemed accepted when not objected by the policyholder within one month. In this way, PEICL Article 2:502 operates as permission to consider a modified acceptance/new offer as an 'acceptance' even for material alterations. It provides a ground that the insurer can rely on the silence of the policyholder by granting a right of objection within one month.

3. After Contract Conclusion

PECL strictly requires that the other party's attention be drawn at the latest by the contract conclusion. After the conclusion of the contract, any subsequent attempt to inform the other party would not be sufficient to incorporate the general insurance conditions.[58] However, the drafters of PEICL considered the different alternative scenarios of the contract conclusion under Article 2:502. This said provision is explained by the *Commentary* as follows: "*Often the insurer will intentionally issue the policy with new or modified terms as a consequence of a risk evaluation. It is the interest of lowering transaction costs in the insurance sector to allow an insurer to issue the policy on different terms*."[59]

Therefore, under PEICL, the constitutive effect of the policy also occurs when the insurer sends its policy after contract conclusion to modify the already concluded contract. It is worth noting that the obligation to issue a policy is independent of the duty to provide the pre-contractual documents. No legal sanction is attached to the violation of the duty to provide those pre-contractual documents. Hence failing to provide pre-contractual documents in due time does not hinder the constitutive effect

56 Ünan states that "In case the standard insurance terms are not provided to the prospective policyholder sufficiently in advance for consideration and negotiation, they will not have a binding effect on it." See Ünan (n 21) 17.

57 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 160.

58 Lando and Beale (n 8) 150; Magnus (n 44) 250.

59 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 160.

of the policy. All these together seem to be consistent because PEICL allows that *the terms of the insurance policy may differ from any prior agreement between the parties.* The wording of '*any prior agreement*' aims to provide for this result.

c. Special Protection

As seen above, due to specific characteristics of insurance practice, the rules of PEICL deviate significantly from the general principles of PECL in relation to contract conclusion and incorporation of standard terms. However, to provide a fair balance between the contractual parties, such deviation is subject to certain conditions set out in PEICL Article 2:502(1), according to which i) the policyholder has been highlighted about every variation of the policy from the application or prior agreement, ii) the policyholder has not objected to the variation within one month of the receipt of the policy, and iii) the insurer has informed the policyholder in writing and in bold print about the right of objection to the variations.[60]

It seems that PEICL establishes a balanced solution between the needs of the insurance sector and the protection of the insurance consumer. On one side, it facilitates the incorporation of different terms through the policy, and on the other side, it subjects the incorporation to certain conditions. However, the function of the objection after the conclusion of the contract is vague. In this regard, one may question whether the insurer should be allowed to assert that he would not have concluded the insurance contract without the subject contract terms.

As a final remark, it is doubtful whether the duty of "warning" under PEICL Article 2:202 is more comprehensive than the requirement of "highlighting" under PEICL Article 2:502. But according to the author, both provisions serve different purposes, and it seems logical to assert that an insurer who tacitly accepts the applicant's offer by sending its policy would be deemed to have violated Article 2:202 if he does not warn of the inconsistencies between the cover he offered and the policyholder's requirements.

C. Incorporation under Turkish Law

1. Incorporation under TCO

With regard to the incorporation of standard contract terms, TCO Article 21 provides that "*General contract terms detrimental to the contractual partner of the user shall become part of the contract only when concluding the contract if the other party was informed about their existence and was given the opportunity to learn their content and upon acceptance of the other party*."

60 Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) 161.

Under this provision, standard contract terms will be incorporated into the contract subject to the fulfilment of three conditions. Firstly, the user of the standard terms must inform the other party that the contract will be subject to standard terms.[61] Secondly, the standard terms must be handed over to the other party, who was given the opportunity of reading them.[62] In harmony with PECL Article 2:104, it would not be sufficient to make a mere reference to the general contract terms in the contract, and the text must have been available to the other party to give a fair chance to read and think about their content.[63] Thirdly, such terms must be accepted by the other party either explicitly or impliedly.[64]

2. Interaction of TCO with TCC Regarding Incorporation

a. Scope of Information

Under TCC Article 1423(1), the scope of information duty is broader than in TCO Article 21. Thus, if the insurer provides the information form or gives the related information in another written form, this would satisfy the condition of TCO Article 21 regarding incorporation.

b. Time of information

1. Before Contract Conclusion

According to Turkish law, the timing of the information is the latest moment of the conclusion of the contract. In line with PEICL, it can be concluded that if, before the applicant's offer, the insurer provides its standard insurance terms together with its questionnaire, it would suffice for incorporation of those terms into an insurance contract.

It is also possible that, since Turkish law does not mandatorily require a question list to be submitted to the applicant before contract conclusion, the insurer may (regardless of whether it received an invitation to offer or not) make an offer to the applicant. If the insurer provides its standard insurance terms with its offer, the applicant will be able to consider their content before accepting them. So, if the applicant accepts the offer, those terms will be incorporated into the contract.

61 The warning about the usage of the standard terms can be oral or in writing. See Ayşe Havutçu, 'Genel İşlem Şartlarının Sözleşme ile İlişkilendirilmesinde Düzenleyen (GİŞ Kullanan) İçin Getirilen Külfetler' (2015) 80(3) İzmir Barosu Dergisi, 246.

62 Atamer and Ünan (n 1) 70.

63 Atamer and Ünan (n 1) 70; Havutçu (n 61) 250.

64 Yeşim Atamer, *Sözleşme Özgürlüğünün sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi* (2. Ed, Beta 2001) 99.

2. At Contract Conclusion

i. In General

If the prospective policyholder makes an offer without a previous invitation from the insurer, the insurer must hand over the standard insurance terms by the latest with his so-called acceptance. As explained above, such a so-called acceptance might be considered a new offer.[65] In this regard, it is worth noting that Turkish law does not stipulate a similar provision of PECL 2:208, which sets the conditions of a new offer to operate as an acceptance, and the question must be analysed under the general principles of contract conclusion.

In relation to the conclusion of the contract, TCO Article 2 provides that "*Where the parties have agreed on the essential terms, it is assumed that the contract shall be deemed to be concluded even if secondary terms are not mentioned*". Based on the *favour contractus* principle, this provision provides a legal assumption that agreement on the essential terms is considered evidence that the contract has been concluded.

In order to have a true understanding of this provision, the meaning of the 'essential terms' must be clarified. Essential terms primarily include the *essentialia negotii*, which constitute the minimum content of the concrete contract (objectively essential terms).[66]

Essential terms also include points, which constitute a condictio sine qua non for one of the parties and which the other party knows the importance of for the counterparty.[67] Here we can detect a remarkable similarity between the 'material' terms of PECL and 'subjectively essential' terms of Turkish law, without consensus on which the contract cannot be deemed as concluded. All other terms of a contract constitute secondary terms, which can be considered as 'non-material terms'.

Thus, there will be no doubt that if the deviation in the acceptance relates to objectively essential terms of the contract, it would be considered a rejection or a new offer.[68] For instance, if upon receiving the prospective policyholder's offer for life insurance the insurer impliedly accepts this offer by sending a policy for health insurance, this acceptance would not cause the conclusion of the contract because both parties' expressions of intent do not comply with the essential terms.

However, if the deviations do not relate to objectively essential terms of the contract, it would not be so easy to come to the same solution. This situation would

65 Mustafa Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler C. I* (17. Ed, Vedat 2019) 68; Atamer (n 64) 89. See also Rayegan Kender, *Türkiye'de Hususi Sigorta Hukuku* (17th ed, Onikilevha 2021) 193; Bahtiyar (n 1) 90.

66 Eren (n 42) 234; Oğuzman and Öz (n 65) 75; Antalya (n 40) 298.

67 Eren (n 42) 235; Oğuzman and Öz (n 65) 76; Antalya (n 40) 299.

68 Eren (n 42) 255; Antalya (n 40) 331-332.

occur, for example, when the insurer sends a policy for life insurance which includes restrictions on the insurance coverage as a response to the prospective policyholder who had applied for life insurance.

In this context, it should be pointed out that TCO Article 2 requires agreement on both objectively essential terms and also subjectively essential terms.[69] Therefore if the deviations in the modified acceptance relate to subjectively essential terms, such acceptance would be considered as a new offer, and without the acceptance of the counter-offeree, the contract would not be concluded.[70]

It can be deduced that Turkish law and the PECL reach similar outcomes with respect to contract conclusion in terms of a modified acceptance, which include alterations on 'subjectively essential terms' or 'material terms' respectively.[71]

In light of these explanations governing the general contract law, we can come to the conclusion that if the insurer declares its acceptance firstly by sending the policy, which albeit being in harmony with the offer as to the main coverage, nonetheless includes risk exclusions or restrictions, such acceptance might be treated as a new offer and unless accepted by the policyholder no contract would be concluded.

In this regard, it can be questioned whether the silence of the policyholder can be considered as an implied acceptance under TCO Art 6. This provision stipulates that "*Unless the offeror is obliged to await an explicit acceptance according to law, the nature of the transaction or the circumstances, the contract is presumed to have been concluded if the offer is not rejected within a reasonable time"*. Under Turkish law, silence, in principle, does not constitute an expression of intention. However, within the context of trust theory, under exceptional circumstances, silence can be construed as a declaration of intent.

69 Andreas von Tuhr, *Borçlar Hukukunun Umumi Kısmı Cilt: 1-2* (Çeviren Cevat Edege) (2nd ed, Olgaç Matbaası 1983) 184; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, *Tekinay Borçlar Hukuku Genel Hükümler* (7th ed, Filiz 1993) 76; Eren (n) 236; Oğuzman and Öz (n 65) 76; Antalya (n 40) 300. See, for a contrary view, Necip Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş Hukuki İşlem Sözleşme* (7. Ed, Filiz 2017) 176; Sanem Aksoy Dursun, *Borçlar Hukukunda Hakimin Sözleşmeyi Tamamlaması* (Onikilevha 2008) 43. According to this latter view, in order to refute the presumption that the contract has been established, the party claiming that the contract has not been established must prove that the term assumed to be reserved is not an objective secondary term, but a subjective essential term; in other words, it must demonstrate that it is not in a position to conclude the contract without agreement on the issue in question. Aksoy Dursun (n 69); Andreas Furrer, Markus Muller Chen and Bilgehan Çetiner, Borçlar Hukuku Genel Hükümler (Onikilevha 2021) 90, 91. In this regard it was also stated that it will not be fair to put the burden on the offeror to prove that the deviations expressed for the first time in the acceptation are essential from his side. Instead of putting the burden of proof on the offeror, a right of objection can be granted to him. CISG 19/b(2), which is almost the same as PECL 2:208, is proposed as a solution in this respect and it is suggested that TCO Article 6 should be applied in such cases. Kocayusufpaşaoğlu (n) 205.

70 Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel Hükümler Cilt 1* (2nd ed, İstanbul Üniversitesi Yayınları 1976) 89; Antalya (n 40) 332. Within this context it has been also argued that all issues included in the offer, even if they do not relate to objective essential terms, are prima facie evidence of being subjectively essential terms from perspective of the offeror. Tekinay, Akman, Burcuoğlu and Altop (n 69) 80.

71 Differenciation of Turkish law and PECL arises with respect to secondary terms, which can be deemed as 'non-material' terms under PECL. According to PECL, such non-material deviations in the acceptance will hinder the conclusion of the contract if the offeror objects within reasonable time. In the absence of such an explicit provision, under Turkish law, the non material additions to acceptation will not hinder the contract conclusion. Non-agreed terms will be completed by the judge.

Thus, with regard to the standard contract terms, which have been submitted firstly with an acceptance, silence of the other party could not be considered as an acceptance. However, although such a party was silent against the counteroffer, he performs his contractual obligations, the user of the standard contract terms can be found justified to believe that the other party has agreed to its terms.[72] Therefore, if the policyholder receives the insurer's standard insurance terms firstly with its acceptance, his silence will not be considered an implied acceptance as long as he does not pay the premium or otherwise perform its obligations.

ii. Meaning of TCC Article 1423(2)

At this stage, it is time to analyse this general contract law structure under the outcomes of insurance law in relation to the insurer's breach of duty to inform. According to TCC Article 1423(2), "*If the information explanation is not given, the contract shall be deemed as having been concluded in accordance with the terms written in the policy, unless the policyholder objects to the conclusion of the contract within fourteen days*".

The first remark on the meaning of this provision is that it is criticised by legal scholars because it only covers the cases where the information explanation is not given. According to legal scholars, with an extensive interpretation, this provision also covers both the deficient and misinformation.[73]

Secondly, Regulation on Information also contains a legal sanction in case the duty to inform is violated. According to Article 7(1) of the Regulation on Information, "*During the conclusion and continuation of the insurance contract, if the duty to inform is not duly fulfilled, or misleading information has been given about the insurer, or the information in the Information Text has been prepared incorrectly and any of these circumstances has been effective in the decision of the policyholder, the policyholder may terminate the insurance contract and may demand compensation for the loss, if any*." It is alleged that the right(s) conferred under Regulation on Information and TCC Article 1472(2) are conflicting.[74]

Thirdly, different views have been expressed as to the legal meaning of the "objection". Some authors argue that the objection ends the insurance contract *ab initio*.[75] Others argue that the objection means termination, which will end the

72 Atamer (n 64) 89.

73 Ünan (n 30) 239; Yetiş Samlı (n 29) 2991.

74 Eldeklioğlu (n 33) 398.

75 Ünan (n 30) 239; Zehra Şeker Öğüz and Aslıhan Sevinç Kuyucu, *Yeni Türk Ticaret Kanunu'nda Sigorta Hukuku* (Filiz 2011) 24; Eldeklioğlu (n 33)395. Within the context of this view, it was also stated that until the moment of the objection, the insurance contract would be valid; upon objection, the contract will be invalid with a retrospective effect. See Samim Ünan, Cüneyt Süzel and Melisa Konfidan 'Ankara Bölge Adliye Mahkemesi 14. Hukuk Dairesi Kararı (E. 2018/1751, K. 2020/45, T. 10.01.2020) Işığında Sigorta Sözleşmelerinde Sözleşme Öncesi Bilgilendirme Yükümlülüğünün İhlaline Bağlanan Yaptırım' 2022 (1) (1) Piri Reis Üniversitesi Deniz Hukuku Dergisi, 213.

contractual relationship starting from the objection.[76] According to the latter, the policyholder's non-objection within fourteen days would imply an assumption that the duty to inform has been performed. Therefore, it will not be possible for the policyholder to terminate the contract and claim damages under the Regulation on Information.[77]

A fourth view argues that the legal sanction of "objection" should be decided case by case by taking all circumstances of the case into consideration: [78] Accordingly, the objection will cause the invalidity of the terms included in the policy. If the objection is against the merits of the insurance contract, then it may result in causing the invalidity of the contract. The objection may also result in the end of the insurance contract with prospective effect, and finally, it may cause the mutual amendment of contract terms.

Another view[79] argues that in case the objection is for some contract terms (and not for the conclusion of the contract), then this objection would be subject to acceptance of the insurer: If the insurer finds the policyholder's objection rightful, then parties may agree on the amendment of the contract; but if the insurer considers this objection as unjust or even if it does not react to the objection promptly, then the policyholder might be able to seek compensation or terminate the contract under the Regulation on Information. Nevertheless, to claim damages or to terminate the contract, the policyholder must prove that he would not make the contract if he knew about the information which was not given to him before the contract conclusion. The policyholder must also use his termination right within a reasonable time. Otherwise, he would be understood to opt-out of continuing the contract with the existing conditions. If the objection relates to the contract conclusion, it will be either termination or avoidance depending on the circumstances, such as whether the insurance coverage has started or not. However, if the policyholder has not objected within fourteen days, then the policyholder will not be able to terminate the contract and claim damages under the Regulation on Information.

Finally, it is also argued that the 'objection' means avoidance of the contract under TCO Article 39.[80] According to this provision, "*Where the party who concluded the contract by mistake, fraud or duress, it is deemed that the contract has been ratified unless the party declares within one year beginning with the time when the mistake*

76 Özdamar (n 33) 366.

77 Özdamar (n 33) 366. In a later-dated study, Özdamar stipulates that it is not the intent of the law maker to exclude the policyholder's right to claim damages via TCC Art 1423/2. See Mehmet Özdamar, '6102 Sayılı Türk Ticaret Kanunu Bağlamında Sözleşme Öncesi Aydınlatma Yükümlülüğünü İhlal Eden Sigortacıya Uygulanacak Yaptırım Sorunu' (2013) 71(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 347, 357. Also, see Eldeklioğlu (n 33) 399.

78 Memiş (n 1) 148, 149.

79 Yazıcıoğlu (n 15) 413; Yazıcıoğlu and Şeker Öğüz (n 1) 114. For a similar view, see Hacı Kara, *Sigorta Hukuku* (Onikilevha 2021) 182.

80 Yetiş Samlı (n 29) 2994.

or fraud was discovered or the effect of duress ceased to exist, not to be bound by the contract or reclaims restitution for the performance made".[81] This view states that there is a similarity in terms of interests between the policyholder, who has not been informed at all or adequately about the issues that will affect his decision to enter into a contract with specific conditions on one side, and the wronged or deceived contracting party on the other. Objection to the conclusion of the insurance contract, as with the avoidance of the contract, will result in the final invalidation of the contract. However, since the retroactive effect of invalidity in contracts that create a permanent debt relationship is not considered appropriate on the grounds of the legal nature and justice of the business, it is accepted that the invalidity will not affect the validity of legal acts up to the moment of annulment. Accordingly, when the policyholder uses its right to object, the actions taken before the objection will not be affected.

iii. Author's View

All of the above-mentioned various views concerning the meaning of Article 1423(2) of the TCC illustrate very well how important it is to approach the matter meticulously. The above analysis regarding the PEICL and its related provisions sheds new light on the subject matter and allows another perspective to interpret the meaning and purpose of TCC Article 1423(2).

Consequently, it is the opinion of the author that the purpose of Article 1423(2) of the TCC is not to regulate the legal consequences of the breach of the duty to inform by closing the way to the remedies set out in the general provisions of the TCO. Rather, the aim of this provision is to establish a link between the general contract law on the incorporation of standard contract terms and the insurance law by taking into account the unique characteristics of contract conclusion in insurance practice.[82]

Hence in order not to leave the policyholder without insurance protection, it departs from the general contract law by allowing the insurer to rely on the silence of the policyholder, who received a modified acceptance even with substantially essential terms. Therefore, without additional performance, such as payment of the premium, the silence of the policyholder alone would be treated as an acceptance. Consequently, if the policyholder does not object to the insurer's counteroffer within 14 days, the policy will have a constitutive effect on the contract conclusion together with the standard insurance terms.[83]

81 See for the translation Çağlar Özel, *Turkish Code of Obligations* (2nd ed, Seçkin 2014) 103.

82 See, for a similar approach: Atamer and Ünan (n 1) 72; Taşkın (n 1) 90; Erbaş Açıkel (n 5) 84.

83 In case of non-objection, the wording of TCC Art 1423(2) is not clear as to the moment of the contract conclusion. On the question of whether the contract has been concluded ex nunc or ex tunc, different views had been expressed by German scholars with regard to VVG aF § 5a. See, for those views: Peter Schimikowski, 'Verbraucherinformation – Einbeziehung von AVB und Abschluß des Versicherungsvertrags' (1996) Rechts und Schaden 23(1), 4.

However, if the policyholder objects to the insurer's modified acceptance/ counteroffer within 14 days after receiving the policy, this objection will cause a rejection and the contract will not be concluded.[84] Therefore, the right of 'objection' included in Article 1423(2) of the TCC is neither termination nor avoidance of the insurance contract, and there is no justified reason to deem the policyholder's objection subject to the insurer's acceptance. The policyholder's right of objection is a tool to operate as an 'acceptance' (if not objected) or 'rejection' (if objected) against the insurer's counteroffer at the contract conclusion.

It should be noted that the old version of the German Insurance Contract Act dated 1908 (VVG aF) had a corresponding provision in Article 5a[85], which provided that "*If the insurer has not provided the policyholder with the insurance conditions when the application is made or has failed to provide consumer information in accordance with Section 10a of the Insurance Supervision Act, the contract is deemed to have been concluded on the basis of the insurance policy, the insurance conditions and other consumer information relevant to the content of the contract if the policyholder does not object within fourteen days after submission of the documents in text form*." This provision had been added to the VVG a.F. through the Third Implementing Act/ EEC for the VAG of 21.7.94 in order to maintain the practice hitherto implemented in Germany of sending the standard insurance terms (only) together with the insurance policy to the policyholder. [86] By allowing the policy model in the contract conclusion, this provision had a crucial role both in the inclusion of the standard insurance terms and in the conclusion of the contract.[87] During the modernisation studies of Turkish insurance contract law, instead of the new German VVG, which abandoned the policy model and provided extended duties on the insurer to inform and advise the policyholder, the VVG a.F. § 5a has been taken as a model law. Therefore, it is logical to approach TCC Article 1423(2) in the same way as accepted in German legal teaching as an instrument to incorporate the insurer's standard terms and conclude the contract.

In light of all these explanations, TCC Article 1423(2) should be read in conjunction with the rules of general contract law on contract conclusion and incorporation of standard contract terms. From this point of view, it can be concluded that the

84 According to the author, in such a case, the policyholder, who was not informed sufficiently in advance before the contract conclusion, can claim damages based on *culpa in contrahendo*, since the contract was not concluded due to a breach of the duty of information. See, for a supporting view: Demircioğlu (n 41) 227; Schmikowski (n 83) 4.

85 VVG a.F. § 5a: "*Hat der Versicherer dem Versicherungsnehmer bei Antragstellung die Versicherungsbedingungen nicht übergeben oder eine Verbraucherinformation nach § 10a des Versicherungsaufsichtsgesetzes unterlassen, so gilt der Vertrag auf der Grundlage des Versicherungsscheins, der Versicherungsbedingungen und der weiteren für den Vertragsinhalt maßgeblichen Verbraucherinformation als abgeschlossen, wenn der Versicherungsnehmer nicht innerhalb von vierzehn Tagen nach Überlassung der Unterlagen in Textform widerspricht.*"

86 Schmikowski (n 83) 3.

87 Schmikowski (n 83) 3. However, as a result of the modernisation of insurance law, this method of contract conclusion was abandoned with the new German Insurance Contract Act of 2008 (VVG).

construction of PEICL 2:502 and TCC 1423(2) seems almost to be the same with respect to the incorporation of risk exclusion clauses, which are sent firstly with the acceptance of the insurer. However, there are significant differences as well: Firstly, the one-month time period of objection provided in PEICL is longer than the 14-days period set out in TCC. Secondly and most importantly, in Turkish law, there is no specific duty imposed on the insurer to inform the policyholder about his right of objection and to highlight every variation from the offer combined with a right of compensation.

Within this context, in the case of non-objection, the question of whether the policyholder may terminate the contract and/or claim damages should be answered within the spirit of the general provisions of the TCO. It is the opinion of the author that "non-objection" alone would not constitute an obstacle either for termination or claim damages and can never be construed as an assumption that the duty to inform has been performed and the policyholder will not resist if it was not performed. While answering this question, the scope and the extent of the duty to inform should be elaborately examined. So, to the extent it is possible to extract a warning or highlight obligations from the *culpa in contrahendo* in the concrete case, one may infer a right to claim damages.[88]

Furthermore, it is the opinion of the author that the wording of TCC Article 1423(2), which states that '*the information explanation is not given*', has a narrow meaning and does not entail deficient or wrong information[89], which may cause mistake or fraud. Although the author disagrees with the view that 'objection' means avoidance under TCO Article 39, it is still possible to apply this provision to the extent that its own conditions are satisfied. Consequently, if the insurer gives deficient or wrong information with the purpose of convincing the policyholder to conclude the contract and this action has caused the policyholder to make the contract, then the policyholder may declare that it is not bound by the contract within a one-year period beginning from the date of the discovery of the fraud. It is assumed that a similar conclusion can be attained within the context of the PEICL in connection with PECL Article 4:107 in the case of the insurer's fraud.

3. After Contract Conclusion

If, after the conclusion of the contract, the user sends its standard contract terms, any terms which have not been agreed upon previously by the parties must be considered as an offer to amend the existing contract, and the silence of the other party cannot be considered as an acceptance.[90] According to TCO Article 21, such

88 See Özdamar (n 33) 357; Ünan (n 21) 28; Taşkın (n 1) 194; Omağ (n 1) 409; Kara (n 79) 183.

89 See also Schimikowski (n 83) 5.

90 Ayşe Havutçu, Açık İçerik Denetimi Yoluyla Tüketicinin Genel İşlem Şartlarına Karşı Korunması (Güncel Hukuk Yayınları 2003) 121.

terms would not become part of the insurance contract since the policyholder was never informed about these terms.[91] Nevertheless, TCC Article 1423(2), in line with PEICL 2:502, plays a dual function regarding the terms of the insurance contract and allows the insurer to add its standard terms at a later stage through amendment of the contract. Thus, if the policyholder does not object in due time, the existing agreement would be deemed to have been amended with the standard insurance terms.

However, should the policyholder object within 14 days to the addition of standard terms in total or to any term (e.g., a risk exclusion), this objection would not be an objection to the conclusion of the contract; however, in connection with TCO Article 21, the objected terms would not become part of the insurance contract. So, the insurer, who did not perform its duty to inform in a timely manner, cannot benefit from its own failure and argue that it would not conclude the insurance contract without that risk exclusion or without applying additional premium for such risk. The insurer should bear the consequences of its failure.

a. Special Protection

As explained above, PEICL allows the incorporation of standard insurance terms sent with the acceptance of the insurer in its policy, provided that the differences from the offer have been highlighted and the policyholder has been informed about his right of objection. Although TCC Art. 1423/2 is lacking in such a protective condition, TCC Article 1425(2) restitutes this position with the special protection granted to the policyholder.

It provides that "*the terms against the policyholder would be invalid if the policy includes terms different than the (written) offer or parties' agreement"*. According to this provision, the terms against the policyholder would be invalid if the policy includes terms different from the written offer or parties' agreement even though they have been incorporated into the contract through TCC Art. 1423(2). Therefore, although the incorporation of standard insurance terms is simpler than the principle set out in PEICL, the invalidity of disadvantaged terms in spite of their incorporation makes Turkish law more policyholder friendly.

However, this result seems to be rigid and not in compliance with the needs of the insurer who wishes to modify its terms upon its risk evaluation. Therefore, according to the author, the solution of the PEICL is more flexible, which allows the incorporation of standard terms at or after the contract conclusion, provided that the policyholder has been highlighted every variation and a right of objection has been granted.

91 Atamer and Ünan (n 1) 72.

Nevertheless, it should be considered that TCC Article 1425(2) only applies to a 'written offer', and its protective scope is minimal. Besides, it would be very difficult for the policyholder to prove that the policy is different from the written offer if it consists of the application form and/or the questionnaire provided by the insurer and remains with the insurer throughout the insurance period.

In this regard, PEICL Article 2:201(3) provides a good protective measure for the policyholder, which states: "*When the applicant applies for insurance cover on the basis of an application form and/or a questionnaire provided by the insurer, the insurer shall supply the applicant with a copy of the completed forms*". PEICL considers those documents as decisive evidential value for ex-post determination of the contents of the concluded insurance contract.[92]

Therefore, since the special protection of TCC Article 1425(2) has a narrow scope of application and is hard to prove, the author considers that the mechanism of PEICL Art 2:502 to incorporate the standard insurance terms is more effective in protecting the policyholder and more suitable to the needs of the insurer.

III. Incorporation of 'Surprising' Risk Exclusion Clauses

A standard contract term can be incorporated into the contract in one of the ways described above. However, such incorporation does not change the fact that in practice, the contracting parties very rarely pay close attention to standard contract terms because either they do not read them at all or only read them very superficially.[93] Therefore, the binding effect of the terms, which, due to the overall circumstances, fall completely outside the range of reasonable expectations of the other contracting party, can be found highly unjustified.

Thus, a review of surprising contract terms aims to protect the legitimate expectations of the other party because the customer should, in any case, whether it has read the general terms or not, be able to rely on the individual terms that are chiefly within the framework of its evaluation and which can be expected under the circumstances at the conclusion of the contract.[94]

It should be noted that the Directive (93/13/EEC) does not include this type of review.[95] The courts have usually tended to reason their decisions with consideration

92 See Basedow, Birds, Clarke, Cousy, Heiss, Loacker (n 7) 120.

93 Hans Schulte-Nölke, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Schulze (ed), *Bürgerliches Gesetzbuch Handkommentar* (11th edn, Nomos 2022) Rn 1; Hayrünnisa Özdemir, 'Genel İşlem Şartlarında Şaşırtıcı ve Beklenmedik Şartlar TBK m 21/II' (2015) İzmir Barosu Dergisi 80(3) 394, 396.

94 Jürgen Basedow, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019) Rn 1; Nölke (n 93) Rn 2.

95 The reason might be that it is extremely difficult to distinguish between the "surprising" terms and the clauses that are unfair in terms of content. See Basedow (n 94) Rn 4; Astrid Stadler, 'BGB § 305c Überraschende und Mehrdeutige Klauseln' in R Stürner, C Berger, HP Mansel, C Budzikiewicz, A Stadler, A Teichman (eds), *Jauernig Bürgerliches Gesetzbuch* (18th edn, C.H.Beck 2021) Rn 1.

of content wherever they have described a contract term as surprising.[96] Nevertheless, there might be cases in which the unpredictable terms are not unfair at the same time.[97] Therefore, some Member States, such as Germany, provide a review of surprising clauses (*Überraschende Klauseln*) and the unfairness test of standard contract terms.[98]

In the insurance sector, this seems to be a significant benefit for the policyholder for two reasons: Firstly, under this review, a clause, which cannot be considered contrary to good faith, might still be deemed as surprising and non-binding. Secondly, it grants that non-binding effect to surprising terms which constitute the essential elements of the contract, whereas the unfairness test does not provide such a possibility to review the essentials of the contract.[99]

In order to perform this review, a contract term must have been already incorporated in the contract.[100] The assessment takes place in three steps:[101] First of all, it must be determined which ideas and expectations the customer had and was allowed to have regarding the content of the concluded contract under the circumstances. Second, the content of the contested general contract terms is to be determined. Third, the question has to be asked whether the discrepancy between the customer's ideas and the content of the general term is so significant that the assumption is justified that it is a "surprising" clause. It should be noted that the unusual expectations, which only the customer in question associates with the content of the contract due to special personal experiences or ideas, do not deserve the protection of legitimate expectations.[102] Thus it is the ideas and expectations of an honest customer with an average experience that should be taken into account during the review.[103]

As mentioned above, both PEICL and TCC have special provisions departing from general contract law, which simplify the incorporation of general contract terms in the way of modifying the offer. In such a way, they allow the incorporation of risk exclusions firstly introduced to the policyholder with or after the acceptance, even if they relate to material deviations of the offer.[104]

96 See Basedow (n 94) Rn 4.

97 Nölke (n 93) Rn 1. See, for the difference of 'surprising terms' and 'unfair terms': Özdemir (n 93) 405.

98 See BGB § 305c.

99 See BGB § 307(3). See, also, Wolfgang Wurmnest, 'BGB § 307 Inhaltskontrolle' in FJ Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum BGB Band 2* (8th edn, C.H.Beck 2019) Rn 21.

100 Basedow (n 94) Rn 4.

101 See Basedow (n 94) Rn 6.

102 See Basedow (n 94) Rn 7.

103 See Basedow (n 94) Rn 7; Nölke (n 93) Rn. 2; Özdemir (n 93) 401. See Bridge (n 51) 544 for the criticisim that the reasonable understanding of the user of the standard terms, not the other party, must be taken into account. The question to be asked is: *Does the other party's conduct or inactivity justify the belief of the user that the other party has consented to the standard terms*?

104 A user of the standard terms should not be in a position to rely merely upon the awareness of the terms by the other party when standard terms are made available to the other party when the contract has already been concluded. See Bridge (n 51) 544.

Therefore, according to the author, the review of the risk exclusions from the point of the review of the surprising terms and to determine whether they are beyond the expectations of the policyholder is very significant for the true protection of the policyholder.

A. Incorporation of Surprising Terms Under PEICL

PEICL does not have a specific regulation for the 'surprising' terms. Hence a surprising term can be incorporated into the insurance contract in accordance with the above-mentioned principles. Nevertheless, a surprising term may be considered abusive and unfair under PEICL Art. 2:304(1) if contrary to the requirements of good faith and fair dealing, it causes a significant imbalance for the rights and obligations of the policyholder. In such a case, the abusive term would not be binding on the policyholder.[105]

Besides, it should be remembered that under PEICL, in order to be incorporated, all differences from the application must have been highlighted by the insurer. This condition requires that risk exclusion clauses included in the standard terms have been specifically drawn to the attention of the policyholder. Therefore, if the insurer highlights that the standard terms include risk exclusions, which are not covered within the main coverage, those exclusions would not be considered surprising from the side of the policyholder. In those cases, the policyholder's silence justifies the belief of the insurer that the policyholder has consented to its standard terms. It seems that PEICL has found a good way to deal with the surprising risk exclusions hidden in the standard insurance terms.

B. Incorporation of Surprising Terms Under Turkish Law

Unlike PEICL, surprising terms of standard contract terms are subject to review under Turkish law. According to TCO Art. 21, "*General contract terms contrary to the character of the contract and business are deemed unwritten*". This provision allows the review of surprising contract terms which have been incorporated into the insurance contract in case the policyholder did not object within 14 days upon receiving the standard insurance terms.

This type of control is a vital tool for the policyholder arising from general contract law, especially for those who would not benefit from TCC Article 1425(2) if a written offer was not given to the insurer. But unfortunately, it is not common for the Turkish

105 Nevertheless, pursuant to PEICL Art. 2:304(3)(b), terms that state the 'essential description of the cover' granted will not be subject to the unfairness test. Whether 'risk exclusion clauses' fall within the essential description of the cover can cause different interpretations. For explanations with regard to this, see Basedow, Birds, Clarke, Cousy, Heiss and Loacker (n 7) Art. 2:304 C3. According to Brand, core terms in insurance policies include terms, which stipulate premium, describe the perils insured against and excluded. See Oliver Brand, 'Requirements Regarding the Transparency of Standard Terms' in M Wandt and S Ünan (eds), *Transparency in Insurance Law* (Sigorta Hukuku Türk Derneği 2012) 53, 57.

courts to review the risk exclusion clauses on their surprising character. However, if carefully analysed, it can be seen that in practice, many of the disputes with respect to risk exclusion clauses may relate to their unusual character.

For instance, in a case decided by the Supreme Court, an insurance policy was automatically issued by the Bank due to a loan agreement for a concrete pump machine.[106] It was claimed that the policyholder was not informed about the risk exclusion, which states the damages that may occur after a traffic accident during the movement of mobile machinery on highways. The Court denied the case without conducting further review of the unfairness or unusualness of the risk exclusion with the reasoning that since the policyholder has not objected within fourteen days, the policy is valid with all its terms.

In a similar dispute arising from a life insurance contract concluded by means of telephone, a risk exclusion of coronary artery disease included in the policy, which was sent via electronic e-mail after the conclusion of the contract, was deemed valid since the insured had not objected within fourteen days.[107]

In another case, the policyholder had concluded an overseas health insurance policy because he would participate in a motorcycle tour abroad. The policyholder had an accident during the motorcycle tour and was seriously injured. When he asked for insurance payment, the insurer refused to make the payment based on the policy clause, which excludes 'use of motorcycle'. Although the policyholder argued that the insurer had not informed him about such a risk exclusion and thereby violated his duty to inform, the Court refused this claim with the same reasoning that within fourteen days, no objection had been made.[108]

The last example can be given relating to theft insurance for jewellery. According to the policy, it was stated that the gold in the workplace would be kept in a safe box. Since the gold found in the shop window had been stolen, the insurer denied the payment of insurance money. Although, the policyholder argued that the insurer did not inform him about the risk exclusions, the Court refused the claim with the same reasoning.[109]

Apart from those decisions, a judgment of the Regional Court of Ankara attracts our attention which did not apply the above-mentioned established reasoning in a case between a car rental company and an insurer about Casco insurance.[110] In this

106 Yargıtay 11 HD 21 April 2021, E 2020/5927 K 2021/3918.

107 Yargıtay 17 HD 19 February 2020, E 2018/1213 K 2020/1723.

108 Yargıtay 17 HD 13 February 2020, E 2018/4329 K 2020/1351.

109 Yargıtay 17 HD 12 December 2018, E 2018/4599 K 2018/10438.

110 Ankara Regional Court 14 HD 10 January 2020, E 2018/1751 K 2020/45. See, for the analysis of this judgment: Ünan, Süzel and Konfidan, 189 vd.

case, one of the renters did not return the car, and when the policyholder asked for insurance payment, the insurer refused the payment since the policy excluded the risk of abuse of trust. One of the arguments of the policyholder was that he was not informed about that exclusion.

Very interestingly, the court in the first instance took consideration of this argument by stating that "…*although it may be considered that the conditions in the policy may be valid due to the fact that the policy between the parties is not objected within the 14-day period under Article 1423 of the TCC, the damage should remain within the insurance coverage since the will of the parties by making a rent a car Casco covers the theft by abuse of trust*" and decided that the insurer shall pay the price of the car.

Upon the appeal of the insurer, the Regional Court reversed the judgment of the first instance court but attained the same result with different reasonings. According to the Regional Court, "…*when the insurer did not highlight or inform the policyholder and where it is clear that the policyholder suffered losses due to this, it would be fair that the insurer compensates the resulting loss wholly or partially depending on the policyholder's contributory negligence*". It was also stated that "…*the theft of the car belonging to the policyholder, which is insured by the Casco insurance of the insurer by misuse of trust, remains within the insurance coverage*". With these admissions, the Regional Court decided that although the right of objection was not used within 14 days, the policyholder may require compensation due to non-compliance with the duty to inform.

Although the outcome of this decision was highly welcomed, it has been criticised by legal scholars. The main reason for this criticism is that it involved an inconsistency by stating that on one side, the risk is within the insurance coverage, and on the other side, the compensation should be paid due to the breach of the duty to inform.[111]

As seen from the decisions of the first instance court and the Regional Court, there has been a tendency to protect the policyholder as being the weak party of the insurance contract. However, the legal reasoning is self-contradictory and inconsistent and therefore was rightfully subject to academic criticism.

If one applies previous outcomes of this paper to this case, the same result would have been achieved without any inconsistency in the reasoning. Because as a matter of fact, the theft of the car might be deemed as a usual risk that falls on the car rental company[112], unlike the abuse of trust by a friend who borrowed a policyholder's car. Therefore, the exclusion of the risk of abuse of trust could be considered surprising for a car rental company, which may not be the case for other policyholders. If such

111 According to this view, if the risk is not within the coverage, the only remedy available to the policyholder should be the payment of compensation. See Ünan, Süzel and Konfidan, 205.

112 See also Ünan, Süzel and Konfidan, 208.

risk exclusion is found surprising, it would be deemed as unwritten, so that the policyholder would be able to ask for the insurance payment. If not found surprising, then it would be a valid risk exclusion, justifying the rejection of payment by the insurer. In that scenario, compensating the policyholder might be questioned under *culpa in contrahendo* by taking into account the *contributory negligence*[113] of the policyholder who did not read the policy. Such a perspective would provide the courts with stronger and more consistent legal reasoning.

IV. Conclusion: Is the Duty to Inform under TCC Article 1423(2) Protective or Punitive for the Policyholder

The outcome of this study shows that both Turkish law and the PEICL have significant departures from general contract law in terms of the incorporation of standard insurance terms into the contract. This deviation is justified when the special characteristics of the insurance practice have been taken into account. However, such departure requires special protection of the policyholder, and both TCC (through Article 1425(2)) and the PEICL (through Article 2:502) establish their own mechanisms to this end.

However, TCC Article 1425(2) has a limited scope of application, and it is difficult for the policyholder to prove that the terms are different from its offer or agreement. Therefore, the review of surprising risk exclusion clauses becomes crucial for the protection of policyholders. Unfortunately, Turkish practitioners are not familiar with the review of standard insurance terms under TCO, and a review of surprising risk exclusion clauses has not been conducted in favour of policyholders yet.

The above-mentioned decisions are good examples to illustrate that risk exclusion clauses should not be set aside from judicial review if not objected to within 14 days. It is not the purpose of the author to argue that each and every risk exclusion clause, about which the policyholder has not been informed before the contract conclusion, should be invalid.

It is only argued that, by taking into account the simplification of the incorporation process, the risk exclusion clauses need at least to be reviewed from the perspective of a reasonable policyholder regarding their surprising and unexpected nature. Since the TCC does not involve a specific duty on the insurer to highlight or warn the policyholder about the inconsistencies of the cover and the policyholder's requirements, the only legal instrument that would serve the policyholder seems to be a review of risk exclusion clauses on their surprising character together with the *culpa in contrahendo* liability.

113 According to Ünan, Süzel and Konfidan, in insurance contracts concluded with consumers, not reading the policy would never cause contributory negligence. Such contributory negligence may only ocur in commerical insurance contracts. See Ünan, Süzel and Konfidan, 215.

Therefore, this study suggests the application of a two-prong test approach in cases where the insurer has not fulfilled its duty to inform before the conclusion of the contract, and where the policyholder has not objected within 14 days after having received the policy. Under such circumstances, if the insurer refuses to make the insurance payment because of a risk exclusion clause, then the following stages can be followed: Firstly, the court may examine whether the exclusion of the specific risk could be qualified as unexpected. If it is found to be surprising, then the risk exclusion in the policy will be invalid, and the risk will be covered by the insurance policy. In this scenario, there will be no need to decide on compensation because the risk is deemed to be within the scope of the coverage due to the overriding of the risk exclusion clause. However, if the risk exclusion clause is not found surprising, the risk will be covered by the policy. Consequently, in the second stage, the court may examine whether the insurer violated its duty to inform under *culpa in contrahendo* liability. The consequence of such violation might be compensation by taking into account the facts in the legal dispute, such as the method pursued during the conclusion of the contract, whether the policyholder is a consumer or merchant, or whether an insurance agency has been involved in the contract conclusion or not.

To sum up, construing Article 1423(2) of the TCC as an independent sanction from the judicial review and overriding of the standard insurance terms, in the sense to incorporate all the standard terms, if no objection has been raised within 14 days, would turn the duty to inform into a tool punishing rather than protecting the policyholder. To eliminate this, the abovementioned two-prong test approach can be employed as an instrument to find a consistent and fair legal solution.

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