T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE USE OF ALTERNATIVE DISPUTE RESOLUTION TO SETTLE INSURANCE DISPUTES IN THE EUROPEAN UNION AND TURKEY

YÜKSEK LİSANS TEZİ

Ece BURÇ

İSTANBUL – 2010

T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE USE OF ALTERNATIVE DISPUTE RESOLUTION TO SETTLE INSURANCE DISPUTES IN THE EUROPEAN UNION AND TURKEY

YÜKSEK LİSANS TEZİ

Ece BURÇ

Danışman: Prof. Dr. Merih Kemal OMAĞ

İSTANBUL – 2010

T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Ece BURÇ'un "***THE USE OF ALTERNATIVE DISPUTE RESOLUTION TO SETTLE INSURANCE DISPUTES IN THE EUROPEAN UNION AND TURKEY***" konulu tez çalışması **30 Mart 2010** tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğu~~ ile başarılı bulunmuştur.

Onaylayan:

Prof. Dr. Merih Kemal OMAĞ	Danışman	.....
Prof. Dr. Sibel ÖZEL	Jüri Üyesi	.....
Doç. Dr. Murat ALIŞKAN	Jüri Üyesi	.....

Onay Tarihi

Prof. Dr. Muzaffer DARTAN
Müdür

.....tarih ve ..... Sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

ABSTRACT

Procedures for settling disputes by means other than litigation are called alternative dispute resolution (ADR). ADR methods are considered quick, simple and economical, whereas the litigation settlement is lengthy, complex and expensive.

At present, when examples in the world are examined, it is seen that the interest in the settlement of consumer disputes by out-of-court methods in a quick and economical manner is growing. Within this framework, also the need for alternative methods and systems to settle disputes arising between the insurers and the insured parties is increasing. It is expected that ADR mechanisms will assume a growing importance in the forthcoming period. Indeed, the European Union is clearly interested in developing the use of ADR. Also the Turkish legislator took this tendency towards ADR mechanisms into consideration when it was preparing the Insurance Law No. 5684 and introduced an arbitration scheme to the Turkish insurance sector.

This study has been conducted for the purpose of investigating European and Turkish ADR practices in insurance disputes. In the first chapter, the consept of alternative dispute resolution, the definitions of its terminology, its advantages and its various types have generally been introduced. In the second chapter, the evolution of ADR in the European Union has been traced and the different ADR mechanisms used for the resolution of insurance disputes by Member States have been examined. Finally, in the third chapter, the out-of-court dispute resolution mechanisms in the Turkish insurance law have been reviewed. The arbitration procedure introduced by the Insurance Law No. 5684, its organizational principles and legal procedures have been examined in detail because of their importance.

Today, the parties who are in dispute over an insurance matter are offered the ADR opportunities of voluntary arbitration, arbitration committees for consumer problems and insurance arbitration. The Insurance Law No. 5684 has proved praiseworthy because it has regulated a modern system which becomes increasingly widespread in developed countries. However, ADR can only be fully accepted in the Turkish insurance sector, if the insured parties trust the impartiality of these practices.

ÖZET

Uyuşmazlıkların çözümü için mahkemede dava açmak dışındaki usullere alternatif uyuşmazlık çözümü (ADR) adı verilmektedir. Mahkeme çözümü uzun, karmaşık ve pahalı iken, ADR yöntemleri hızlı, basit ve ekonomik olarak değerlendirilmektedir.

Günümüzde, dünyadaki örnekler incelendiğinde, tüketici uyuşmazlıklarının mahkeme dışı yöntemlerle hızlı ve ucuz şekilde çözümüne yönelik ilginin arttığı görülmektedir. Bu çerçevede, sigortacılar ile sigortalılar arasında doğan uyuşmazlıkların çözümü için alternatif yöntem ve sistemlere duyulan ihtiyaç da artmaktadır. ADR mekanizmalarının önümüzdeki dönemde giderek artan bir önem kazanacağı beklenmektedir. Gerçekten de, Avrupa Birliği ADR kullanımının geliştirilmesi ile açıkça ilgilenmektedir. Türk yasa koyucu da 5684 sayılı Sigortacılık Kanununun hazırlık çalışmaları sırasında ADR'ye yönelik bu eğilimi dikkate almış ve Türk sigorta sektörüne tahkim düzenini getirmiştir.

Bu çalışma, sigorta uyuşmazlıklarında Avrupa ve Türk ADR uygulamalarının araştırılması amacıyla yapılmıştır. İlk bölümde, alternatif uyuşmazlık çözümü kavramı, terminolojisine ilişkin tanımlar, yararları ve değişik türleri genel olarak tanıtılmıştır. İkinci bölümde, ADR'nin Avrupa Birliği'ndeki gelişimi izlenmiş ve üye ülkeler tarafından sigorta uyuşmazlıklarının çözümünde kullanılan farklı ADR mekanizmaları incelenmiştir. Son olarak, üçüncü bölümde, Türk sigorta hukukundaki mahkeme dışı uyuşmazlık çözüm mekanizmaları gözden geçirilmiştir. 5684 sayılı Sigortacılık Kanunu ile getirilen tahkim usulü, örgütlenme esasları ve hukuki prosedürleri önemlerinden dolayı detaylı olarak incelenmiştir.

Bugün, bir sigorta meselesi ile ilgili olarak ihtilafa düşen taraflara, ihtiyari tahkim, tüketici sorunları hakem heyetleri ve sigorta tahkimi ADR imkanları sunulmaktadır. 5684 sayılı Sigortacılık Kanunu, gelişmiş ülkelerde giderek yaygınlaşan modern bir sistemi düzenlemiş olmakla övgüye layık olduğunu göstermiştir. Ama yine de, ADR ancak sigortalıların bu uygulamaların tarafsızlığına güvenmeleri durumunda Türk sigorta sektöründe tamamen kabul görebilecektir.

TABLE OF CONTENTS

Page No.

ALTERNATIVE DISPUTE RESOLUTION IN TURKISH INSURANCE LAW

LIST OF TABLES

Page No.

LIST OF FIGURES

Page No.

ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADRs	ADR schemes
Art.	Article
EC	Council of the European Union
EDR	Electronic Dispute Resolution
e.g.	for example
etc.	and the others
et sequa.	and the following
EU	European Union
i.a.	among other things
i.e.	that is
No.	Number
ODR	Online Dispute Resolution
O.J.	Official Journal of the European Union
ONP	Open Network Provision
per cent	for each one hundred
subpar.	subparagraph

INTRODUCTION

Whenever a dispute cannot be resolved within a short period of time, this situation always paves the way for irreparable damage. If a lawsuit over a dispute about insurance, for example, is brought to state courts, at least three months will elapse until the first hearing and the case may be decided in two years just at the lower court. A possible appeal of the judgement will extend this process significantly. Moreover, longer waiting periods at the courts increase the legal costs. The preamble to Art. 30 of the Insurance Law also accepts that the litigation process takes a long time and is very costly. It states that the insured parties are therefore wronged and as the compensation of the damage takes a long time, this situation is completely contrary to the primary purpose of insurance. For these reasons, the insured parties are left no choice but to accept the indemnity offered by the parties who undertake the risk, even if the amount of the indemnity is unfair.

Another reason for why the resolution of disputes should be fast and economical is that the emergence of the single European market has increased the movement of goods and people across the European Union. Unfortunately, it also has increased the number of disputes involving nationals of different Member States. These cross-border disputes add another dimension of complexity to already complicated issues. In this context, ADR schemes (ADRs) are regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level[1].

The European Union is very interested in Alternative Dispute Resolution[2]. Especially, the European Commission has been active in promoting the development of Alternative Dispute Resolution, thereby encouraging the Member States to develop ADRs. As these out-of-court mechanisms are more quicker, cheaper, flexible and informal than going to court, they are expected to facilitate the access to justice of European citizens. According to the Commission's view, encouraging the use of

---

1 European Commission, *Settling out of Court – Developing Alternative Methods to Resolve Civil and Commercial Disputes in the European Union*, http://ec.europa.eu/justice_home/fsj/civil/dispute/fsj_civil_dispute_en.htm (25 January 2010), p.1.

2 European Commission, *Alternative Dispute Resolution – Community Law*, http://ec.europa.eu/civiljustice/adr/ adr_ec_en.htm (15 January 2010), p.1.

Mediation and other forms of ADR assists in the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation and so assists citizens in a real way to secure their legal rights[3].

As Turkey is a candidate country for EU membership, the Turkish legislator took this tendency towards ADR mechanisms into consideration when it was preparing the Insurance Law No. 5684. In order to avoid the abovementioned disadvantages of court litigation and to ensure that proceedings are conducted by insurance experts, an arbitration procedure has been adopted in Turkey and sui generis procedure rules have been established to regulate this procedure.

It is the wish of all people seeking justice that their disputes are resolved by experts in a quick manner. As well as to obtain a fair judgement, it is important to obtain an enforceable judgement. At the end of lengthy court proceedings, a case may be won but the subject matter of the dispute can have been lost. Another problem is that going to court means that the parties will start fighting. However, as accepted by all lawyers, the best resolution is the peaceful settlement. In the world, ADR practices are developed so that the parties are not harmed during the proceedings, the relationships are not destroyed completely and the disputes are resolved in a peaceful way. Although the arbitration process is an adjudicatory process where a third person imposes the resolution on the parties, it is also a resolution process where the conclusion can quickly be reached at the end of the proceedings conducted by experts.

This study consists of three chapters. In the first chapter, the consept of alternative dispute resolution, the definitions of its terminology, its advantages and its various types are introduced generally. In the second chapter, the evolution of ADR in the European Union is traced and the different ADR mechanisms used for the resolution of insurance disputes by Member States are examined. Finally, in the third chapter, the out-of-court dispute resolution mechanisms in the Turkish insurance law are reviewed. The arbitration procedure introduced by the Insurance Law No. 5684, the organizational principles of this new system and the legal procedures which should be followed in the settlement of disputes are examined in detail because of their importance.

[3] *Alternative Dispute Resolution – Community Law*, p.1.

INSTITUTION OF ALTERNATIVE DISPUTE RESOLUTION: DEFINITIONS AND CONCEPTS, ADVANTAGES AND TYPES

I. DEFINITIONS AND CONCEPTS

In the concept of "alternative dispute resolution", what does the word "dispute" mean? What does the word "resolution" signify? And it is an alternative to what?

The dictionary definition of a dispute is ***"an argument or disagreement between people or groups"***[4]. It is human nature to enter into disputes because people believe that they are always absolutely right. A dispute does not occur until one party (the claimant) makes a claim against another (the respondent) to end the disagreement between them. A claim is not just an expression which shows that the claimant is dissatisfied with a particular matter but also asserts that the respondent has a duty to do something to meet the claim of the claimant. Therefore, not all claims produce disputes. A dispute arises between the parties when the claimant's claim is rejected by the respondent[5].

When a dispute arises, the claimant initiates an activity to resolve the dispute. The resolution of a dispute means the final solving of it. Accordingly, there are various sorts of activity a claimant can initiate to resolve the dispute finally. The claimant may attack and kill the respondent, for example, or conduct litigation against the respondent or apply to some alternative processes for dispute resolution.

Litigation is the process by which courts of law decide cases. However, alternative dispute resolution (ADR) includes all legally-permitted processes of dispute resolution other than litigation[6]. As is seen, there are two major processes of dispute resolution. The first of these is the traditional dispute resolution process before the

---

4 **Collins Cobuild English Dictionary for Advanced Learners**, "Dispute", Glasgow: HarperCollins Publishers, 2001, p.442.

5 Stephen J. Ware, **Alternative Dispute Resolution**, 1st Reprint, Minnesota: West Group, 2003, p.3.

6 Ware, p.5.

courts of law. This process is also called "litigation" or "judicial procedures". The second is the ADR process[7].

The litigation process is assumed to be the appropriate means of resolving disputes. Especially for lawyers, the unique dispute resolution process has been to conduct litigation and obtain a final judgement from the court. The judicial process entails a socially recognized authority with an institutional character to intervene in the dispute resolution. In this stage, the character of the dispute resolution process changes from private to public. In judicial processes, the parties request that a judgement is given according to the positive law after their advocates have discussed the controversial issues before the judge (or jury). The judgement given in the end determines who is right and who is wrong and is based on the win-lose mentality. The judge whose authority is socially recognized gives a judgement with a binding and enforceable character. Thus the parties lose control over the result but obtain a judgement which is based on legal norms and enforced by government[8].

The term "Alternative Dispute Resolution" refers to procedures for settling disputes by means other than litigation, eg mediation, arbitration, and mini-trials. In civil cases, rather than take their disputes to court, some people prefer to use these quicker, less complicated, and less expensive methods to resolve disputes[9].

ADR is an umbrella term that refers generally to alternatives to the court adjudication of disputes. It is also known as "appropriate dispute resolution" and in some international contexts such as the International Chamber of Commerce, it is called "amicable dispute resolution"[10].

The concepts used in ADR are dissimilar to the concepts used in litigation. The meanings of ADR concepts are sometimes broader and sometimes distinctly different from judicial concepts. In ADR, there is no judgement because the objective is to

---

7 Mustafa Özbek, **Alternatif Uyuşmazlık Çözümü**, Ankara: Yaklaşım Yayınları, 2004, p.61.

8 Christopher W. Moore, **The Mediation Process Practical Strategies For Resolving Conflict**, Third Edition, San Francisco: Jossey-Bass, 2003, p.10; Özbek, p.66.

9 Gordon W. Brown, **Legal Terminology**, Fifth Edition, New Jersey: Pearson Prentice Hall, 2008, p.7.

10 Jacqueline M. Nolan-Haley, **Alternative Dispute Resolution In A Nutshell**, Third Edition, Minnesota: Thomson West, 2008, p.2.

achieve a resolution which will be embraced by the parties. There is no judge but a third person who is expected to be impartial will intervene in the dispute. The key objective of ADR is to achieve creative resolutions by making people more active in the dispute resolution process. During this activity, it is intended that the dispute is resolved without breaking off from the world of the parties, or rather with direct participation of them[11].

ADR includes processes whereby disputes are resolved with the help of a neutral third party, applications are voluntary and the settlement is non-binding in principle[12]. ADR originally intends to put the parties together so they may agree on a settlement before the litigation stage. These processes intend to reach a win-win settlement by making the matters underlying the dispute understood with the help of a neutral third party and lead the parties to adopt a dispute resolving approach[13].

ADR is developed to increase the efficiency of judicial systems, facilitate the access to justice and obtain more satisfactory results at the end of dispute resolution process. These processes have arisen from countries which apply the Anglo-American common law system, like USA, Canada and Australia, and gradually spread to the Far East countries. The Continental Europe has also come under the influence of ADR and made various legal arrangements accordingly.

In order to use the ADR processes, the parties may insert an ADR clause to the contract they will make during the negotiation stage of this contract before the dispute arises, or they may decide to apply to ADR after a dispute has arisen. In this context, ADR is used based on a contract made by the parties for the resolution of the dispute outside the framework of the civil procedure. The parties can assign anyone as a resolution person or apply to relevant institutions providing ADR. It is voluntary both to participate in ADR processes and comply with the settlement which is based on mutual compromise. If these processes fail, the dispute can still be submitted to litigation (or arbitration)[14].

---

[11] Gülgün Ildır, **Alternatif Uyuşmazlık Çözümü (Medeni Yargıya Alternatif Yöntemler)**, Ankara: Seçkin Yayıncılık, 2003, p.179.
[12] Ildır, p.30.
[13] Özbek p.114.
[14] Özbek, p.155; Ildır, p.179-180.

In its historical evolution, ADR has been applied to a variety of disputes such as disputes which are small in quantity and value, indemnity claims, labour disputes, consumer disputes, disputes between neighbours and spouses. Especially the smallness of the claim is an important factor to head towards ADR processes. Indeed, starting from this point of view, small claims have been considered as simple and unimportant and a special procedure known as Small Claims Courts for use in dealing with small claims was introduced in England and Wales in the year 1973[15]. Currently, ADR is widely used for resolution of commercial disputes.

ADR is not a new born idea about private resolution processes of disputes. Negotiation, mediation and arbitration, for example, have been practised for hundreds of years. What is new is the institutionalization of ADR practice[16]. ADR is a new institution or a whole of institutions and will be firmly embedded in the course of time. As known, new recognized institutions need time to become embedded. On this matter, there is a special need for habits, experiences, education and new culture creation[17]. The development of ADR not only depends on making necessary legislative changes but it is also based on a culture change in the society.

II. ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

A. TIME SAVINGS

One of the greatest problems with the traditional dispute resolution process is delay, much of it caused by the enormous number of pending cases. In Turkey, for example, it is a common complaint that justice is delayed, cases are extended and courts cannot cope with the excessive workload[18]. Also, the use of expert evidence usually

---

[15] John Baldwin, **Small Claims in the County Courts in England and Wales: The Bargain Basement of Civil Justice?**, New York: Oxford University Press, 1997, p.5-6; Özbek, p.114-115.

[16] Özbek, p.85.

[17] Ejder Yılmaz, "Önsöz", **Alternatif Uyuşmazlık Çözümü**, Mustafa Özbek, Ankara: Yaklaşım Yayınları, 2004.

[18] In the year 2008, the average litigation period was 434 days in commercial courts of first instance, 305 days in civil courts of first instance, 471 days in labour courts, 106 days in enforcement courts, 110 days in civil courts of peace, 503 days in land registry courts, 246 days in consumer courts, 164 days in family courts, 618 days in intellectual property courts and 424 days in maritime courts. The average litigation period was generally 209 days in Turkish civil courts in the year 2008. www.adli-sicil.gov.tr (27 December 2009).

causes the reasonable time to be exceeded[19]. In the civil trial area, besides the excessive workload of state courts, various problems exist because of the limited number of specified courts, although a significant part of disputes need expert opinion, the insufficiency of institutional experting, and the lack of a different trial process for small claims[20]. ADR reduces delays by escaping the judicial process and its backlogs. A dispute can often be settled much sooner with ADR.

As a rule, the legal power is used by the judge but the expert evidence application is completely embraced by our judiciary culture. In practice, almost all cases are submitted to the experts and judgments given by the courts are based on these expert reports. The "workload stress" gives rise to this result. The application of expert evidence not only delays the exercise of right, it also burdens the parties with additional litigation costs[21]. However, the expert evidence application is a must for the resolution of some disputes. In case the resolution depends on the results of high-level scientific examinations and expert opinions, the neutral third parties assigned to resolve the dispute are already expert persons in ADR. It thus makes it unnecessary to apply to the expert evidence and prevents the waste of time that the neutral third parties are persons who are informed of ADR methods, have the capability to think practically and are experts in the dispute subject at the same time[22].

It is also possible that participants experienced in ADR procedures change their minds in the direction of these expert persons' opinions[23]. Disputed parties are usually reluctant to agree to an advantageous resolution due to the possibility of being considered to accept an embarrassing surrender and criticized by their managers. In ADR, the experts examine the positions of the parties separately and generally give the parties a lot of advice. After such support, there will be no possibility for the managers to criticize the company representatives[24]. Indeed, business managers should make every effort to analyse their position in the dispute before they incur all the expenses

---

19 Ildır, p.53-54.
20 Ildır, p.18.
21 Ildır, p.126.
22 Ildır, p.64.
23 John H. Wilkinson, "Advantages and Obstacles to ADR", D**onovan Leisure, Newton & Irvine ADR Practice Book** (11-29), New York: Wiley Law Pubns, 1990, p.14; Ildır, p.64; Özbek, p.159.
24 Wilkinson, p.19; Özbek, p.173.

which may rise to considerable amounts and waste lots of precious time. If these efforts succeed, an early resolution can be achieved approximately always[25]. The expert neutrals in ADR ensure business managers to reconsider their position in the dispute carefully, thereby reducing the time spent during the resolution process.

Moreover, even if a resolution cannot be achieved, thanks to the use of ADR methods, disputed parties can focus on facts which form the basis of their dispute and this facilitates a quicker resolution to be achieved when the dispute is taken to the courthouse[26]. ADR procedures ensure the parties to look at disputed issues from every possible angle by making them focus on fundamental subjects and prepare them for the litigation process by facilitating them to understand the conflicts which form the basis of their dispute. If the parties have been unsuccessful in achieving resolution, although ADR procedures have been used, it means that disputed matters between the parties have been reduced. When the parties start the litigation process, they will not deal with unnecessary matters, they will deal with matters which form the basis of their dispute and also be more willing to resolve the dispute[27].

In ADR, the parties should reply to the events they have witnessed immediately because the time is not sufficient to do anything and the process goes fast. Consequently, since the parties are discussing as experts in their fields, ADR processes require less time from participants than litigation, which demands many hours for preparation and adversarial proceedings[28].

Stitt states that ***"for every minute that an employee spends in an unproductive attempt to resolve conflict, that employee is not working to achieve the organization's goals (whether they be to make a profit, or some other objective)"***[29]. ADR processes are more effective in saving both costs and time than litigation. ADR prevents the

---

[25] Wilkinson, p.18; Özbek, p.171.

[26] Constance E. Bagley, **Managers and the Legal Environment**, West Publishing Company, 1991, p.75; Ildır, p.23-24.

[27] Wilkinson, p.18; The General Council of the Bar and the Law Society, "Alternative Dispute Resolution (ADR)", **The Arbitration and Dispute Resolution Law Journal**, Vol.3 (1994), p.84; Özbek, p.173.

[28] Özbek, p.170.

[29] Alan J. Stitt, **Alternative Dispute Resolution For Organizations: How To Design A System For Effective Conflict Resolution**, Ontario: John Wiley & Sons Canada Limited, 1998, p.11.

business from being thrown into disorder by the court case and reduces the time business managers have to spend tediously[30].

B. COST SAVINGS

ADR also saves costs for parties involved in disputes. The time savings described above directly correlate with cost savings. The costs of a short and non-formal resolution mechanism are also low[31]. When disputes are resolved more quickly, parties pay relatively lower costs and save on necessary litigation fees, costs of procedural transactions such as witnesses, expert evidence and survey, and lawyer and consultancy fees.

Expenditures generated by disputes are one of the main factors which cause the costs of commercial organizations to increase. Gradual increase of these costs will be inevitable, if methods used for dispute resolution do not work efficiently. In this environment, the most beneficial dispute resolution method is the one which manages a conflict and thus reduces the expenditures of parties to a minimum[32].

ADR firstly ensures that parties to the dispute save on many costs. If parties can resolve the dispute between themselves within a six-month or shorter period contrary to the litigation method which lasts for long years, litigation expenditures and other relevant costs will reduce considerably. How soon a dispute is resolved, parties or the Legal Aid Fund save on so much costs[33].

For most of the plaintiffs, delays to the case mean that additional costs are incurred. When the court decision is issued, litigation fees and costs are fixed to be paid by the losing party. In addition to the risk of losing the case in the end, the compulsion to pay high litigation costs is preventing people from exercising their freedom to claim

---

30 Özbek, p.157.
31 Ildır, p.64.
32 Johannes Warbeck, "Alternative Dispute Resolution in the World of Business: A Comparative Analysis of the Use of ADR in the United Kingdom and in Germany", **The Arbitration and Dispute Resolution Law Journal**, Vol.2 (1998), p.108; Özbek, p.50.
33 The General Council of the Bar and the Law Society, p.84; Özbek, p.156.

rights by applying to courts[34]. So, poor people cannot achieve justice duly and claim their rights. This inequality created between people who are economically powerful and those who are weak in terms of achieving justice and freedom to claim rights is also contrary to the social state governed by the rule of law principle of the Turkish Constitution (Article 2 of the Turkish Constitution)[35]. High litigation costs make it very difficult for poor people to claim their rights but the application of ADR procedures saves on costs and time, thereby facilitating the "access to justice".

As well as high litigation costs, the ability of the economically powerful party to let him/herself be represented by a lawyer who better knows the legal procedure can put the other party, who should use the right of defence on his/her own or is not sure whether his/her claims and defences will be effectively expressed even though he/she receives legal aid, in a disadvantaged position. However, although most ADR methods allow representation by lawyer, if no lawyer is appointed, this may not cause any loss of right because the main purpose of ADR methods are that the parties attend sessions in person, their real motives are examined and these are satisfied[36]. It is another purpose of and preference reason for ADR that the will of the parties forms the resolution and is influential in methods[37].

C. GREATER PREDICTABILITY

ADR allows parties to decide how to resolve their dispute. The only way a dispute will settle in a voluntary ADR process is if both parties agree to an outcome they created themselves. On the contrary, parties give up this control when they turn their case over to a judge. Once a court process begins, the results are unpredictable.

Adjudication can be surprisingly uncertain. One possible reason for this unpredictability is that judges appear not always to see or understand the targets which are wanted to be achieved with the help of the case. As a result, the parties may face a

---

[34] Ejder Yılmaz, "Yargılama Giderlerinin İşlevi ve Sosyal Hukuk Devleti", **Ankara Barosu Dergisi**, 1984/2, p.201; Ejder Yılmaz, "Medeni Yargıda İnsan Hakları", **Türkiye Barolar Birliği Dergisi**, 1996/2, p.154; Özbek, p.156.

[35] Yılmaz, *Yargılama Giderlerinin İşlevi ve Sosyal Hukuk Devleti*, p.205; Özbek, p.156.

[36] Joanna H. Goss, "ADR – Mediation: How It Works", http://www.wwlia.org/adr2.htm (18 February 1998), p.2; Ildır, p.51.

judgment which does not comply with the main purpose of the case or satisfy their central claim. However, it is impossible to meet such a condition in ADR procedures. In many ADR procedures, the dispute is examined by a board consisting of people who are experts on the dispute subject or at least know the dispute subject very well. Thanks to this opportunity, the above problem which has become the nightmare of many plaintiffs is overcome[38].

D. INCREASED CONTROL OVER THE RESOLUTION PROCESS

Parties find ADR to be a more satisfying process than litigation, which silences the parties with rigid processes that require their lawyers to take the lead. ADR, in contrast, gives the parties a voice in resolving their own disputes. Litigation forces parties into combat with each other, while ADR allows them to work collaboratively. Not surprisingly, it is the dispute resolution method parties prefer.

Adversarial procedures allow the parties the possibility for participating in the trial indirectly. The parties can communicate with each other and with the judge only through their lawyers. The complexity of the trial procedure brings about a process which is usually incomprehensible for the clients. The lack of control over these procedures causes the parties to be nervous and impatient. Threat, bluff and exaggeration are rewarded in adversarial procedures. The parties take a negative stand with the help of their lawyers because it is difficult to withdraw without losing their honour. Such behaviour increases the feelings of deception and revenge between the parties, causes negative feelings to be developed and the parties to become exhausted. In brief, the communication between the lawyers and the communication between the parties are prevented seriously[39].

When the dispute resolution procedures are not binding, there are two voluntary matters. Both participating in the procedure and accepting the decision to be taken at the end of that procedure are left to the free will of the parties. Thus, the parties

---

37 Ildır, p.51.
38 Özbek, p.158-159.
39 George W. Adams and Naomi L. Bussin, "Alternative dispute resolution and the Canadian courts: a time for change", **The Arbitration and Dispute Resolution Law Journal**, Vol.4, (1995), p.251; Özbek, p.159.

are made to support the dispute resolution method and this is a big factor for the parties in getting satisfaction from resolutions provided by alternative methods at a high level. Also, thanks to their voluntary nature, if the parties have reached an agreement on a certain resolution method, the outcomes achieved by voluntary procedures are generally abided by, compared with binding procedures[40].

ADR ensures that flexible resolutions are produced for highly creative parties and their lawyers, and gives the parties the opportunity to answer the following questions freely[41]:

- Which ADR method is to be applied?
- Will the decision to be taken at the end of the ADR procedure be binding on the parties?
- Will trade information, documents and secrets be disclosed or if they are going to be disclosed, to what extent will they be disclosed?
- Will evidence rules or provisions determined by the substantive law be applied?
- Will the opinion of a neutral third party be acquired?
- Will some appeal procedures be used?

The greatest benefit of resolving disputes by alternative methods appears when the parties to the dispute understand which method is the most appropriate to their needs and how they can use these methods most correctly[42]. When the appropriate dispute resolution method is chosen, the parties can shape these methods according to their personalities and needs. An informal order and environment ensures the effective communication each of the parties needs for the agreement between them[43].

---

40 Christian Bühring-Uhle, **Arbitration and Mediation in International Business**, Second Edition, The Netherlands: Kluwer Law International BV, 2006, p.174; Stitt, p.12-13; Özbek, p.159-160.

41 Özbek, p.160.

42 Moore, p.6-14; Ildır, p.62.

43 Jean Claude Goldsmith, "Report by the Working Group on Means of Alternative Dispute Resolution", **ICC Working Group Report on ADR**, Paris, 1994, p.4; Ildır, p.62-63.

E. SELF-DETERMINATION OF THE OUTCOME

ADR aims to produce resolutions that will be welcomed by the parties and secure a real agreement. As a result, the purpose of ADR is not to achieve the substantive or procedural reality because in the basis of civil law disputes, relations are between equals and mostly depend on the free will[44]. Also in the law of trials, it is not aimed to give a fair judgement first but to ensure that the dispute between the parties is resolved amicably. This is because amicable settlement is more economical, more practical and more lasting. No matter how fair a court judgement is, it does not provide results which are as satisfying and lasting as the results of amicable settlement for the parties[45]. In the law of procedure, "dispute resolution" is also accepted as an ever more important target[46].

Alternative resolution methods base on the wish of disputed parties for controlling the methods of searching and inspecting resolutions. The resolution of the dispute is produced by the parties. This resolution may not be in accordance with the parties' rights based on the substantive law. However, this resolution provides the parties to the dispute with much greater satisfaction than they would feel if they were viewers to the decision of litigation mechanisms[47].

The parties entering into a dispute achieve the resolution easier when they direct their attention to the conflict between themselves. There is a complex interaction between rights and interests. To achieve resolutions which are more satisfying and more effective and based on mutual interests, the focal point is changed from rights to interests[48]. In place of "rights-based resolutions", ADR offers "interest-based resolutions"[49]. The trial process furthers the aim of finding the reality and protecting the rights. In procedural processes, legal situations or principles are taken as basis, whereas

---

44 Henckel Wolfram, "Yargılama Hukuku Kurallarının Adalet Değeri Üzerine", Ergun Önen (translator), **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Vol.35, No.1, p.242; Ildır, p.22.

45 Hakan Pekcanıtez, "Yargının Hızlandırılmasına Ilişkin Avrupa Usul Hukukundaki Gelişmeler", **Yargı Reformu 2000 Sempozyumu**, Izmir 2000, p.65; Özbek, p.94.

46 Özbek, p.95.

47 Richard H. McLaren and John P. Sanderson, **Innovative Dispute Resolution: The Alternative**, Ontario: Carswell Legal Pubns, 1994, p.1-13; Ildır, p.63.

48 Özbek, p.169-170.

49 Özbek, p.179.

parties' interests are taken as basis in ADR. A big part of ADR procedures aims to achieve a win-win outcome with the intention of protecting parties' financial interests and keeping them away from the strict and rigid structure of the trial procedure[50].

ADR is a procedure which is directed towards providing a win-win result in comparison with adjudicative procedures like court and arbitration. Therefore, ADR is not interested in who is rightful or who is not, or who will win or who will lose after the dispute is resolved. Instead of this, ADR aims to provide a resolution which will comply with the requirements of disputed parties and be agreed to and be implemented by the parties themselves. Thus, ADR is very profitable for both of the parties. This is called a win-win outcome[51].

Because the outcome achieved at the end of the ADR process is a resolution which is not dictated to the parties by a third person and is agreed to by the parties themselves in the direction of their own wishes, its implementation ability is generally more higher than court decisions[52].

F. GREATER CREATIVITY

Courts are limited in the relief they can award. In many disputes, a court can only offer money to a party. When plaintiffs can get only money from a case, they simply ask for as much as possible, and more creative options are not explored. In contrast, the parties in ADR are not made to put a monetary value on every situation, so they have the freedom to construct their own solutions. Furthermore, they understand their needs better than anyone else, and they know what would satisfy them best. They are free to develop options which may be worth much more to one party than they cost the other to provide. Sometimes they can create solutions which put both of the parties in a more pleasant or suitable situation.

If the parties entering into a dispute choose one of the alternative resolution methods instead of taking legal action or going to arbitration to settle their problems,

---

[50] Özbek, p.172.
[51] Jay Folberg and Alison Taylor, **Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation**, San Francisco: Proquest Info & Learning, 1984, p.10; Özbek, p.48.
[52] Özbek, p.190.

they are considered to choose an environment which is more friendly and based on more collaboration[53]. Otherwise, the parties are left no choice but to accept a win-lose war which is led by the strategies decided by lawyers whose educations and practices concentrate on methods based on hostility[54]. In alternative resolution methods, however, the parties have the opportunity to participate in the resolution and to meet face-to-face. They can together explore their main interests and find a common ground which can form a basis for creative and innovative resolutions[55].

As a consequence of the control of the parties over the dispute resolution process, ADR offers the parties freedom in creating methods appropriate to the characteristics and qualities of the dispute and in establishing a procedure assumed to be appropriate by the parties. There is no limit on exploring creative preferences. The parties and their lawyers are free to discover new dispute resolution types and they can also continue with the practice by modifying these types[56].

It is one of the most desirable characteristics of ADR that it can offer the parties creative preferences in the resolution of disputes. Instead of being imprisoned in the "one size fits all"[57] mentality of the litigation, the parties and their lawyers find the opportunity to choose the dispute resolution methods that are appropriate to their needs and suitable as if these were a tailor-made dress for their particular requirements[58].

G. PRIVACY

The principle of publicity of hearings applies in cases brought to state courts. The principle of publicity regulated both in Article 141 of the Turkish Constitution and in Article 149 of the Turkish Code of Civil Procedure (in the same way, in Article 182 and the following provisions of the Turkish Code of Criminal Procedure) is a fundamental principle established to ensure the legality in the judicial process, increase

---

53 McLaren and Sanderson, p.1-8; Ildır, p.61-62.

54 Debra E. Zusman, "Mediation and Other Alternative Dispute Resolution Methods: An Analysis", **UMI Dissertation Services**, Ann Arbor, Michigan 1998, p.16; Ildır, p.62.

55 Ildır, p.62.

56 Özbek, p.160.

57 Victoria A. Cundiff, "Companies Are Seeking Litigation Alternatives: They Say ADR Can Be Effective in Intellectual Property Disputes", **The National Law Journal**, 1993, p.211; Nolan-Haley, p.1; Ildır, p.62.

the public confidence in the judicial system and prevent the courts from exercising discretion in judicial proceedings[59]. The principle of publicity also regulated in Article 6 of the European Convention on Human Rights as a basic element of the right to fair trial is valid both in courts of first instance and supreme courts[60].

However, in spite of these positive aspects, the principle of publicity may also produce some negative results in practice because of the operational defects in the judicial system. Particularly, in cases brought with bad intention, both personal and professional secrets as well as confidential information of the parties can be disclosed and even made public by the media unlimitedly, which causes the principle of publicity actually aiming to ensure the legal security, to become a negative principle, even if it is not the real intention. The privacy and the inviolability of the private life of the parties and witnesses (Article 20 of the Turkish Constitution, Article 8/1 of the European Convention on Human Rights, Article 12 of the Universal Declaration of Human Rights) may be exposed to danger or violated due to the publicity[61]. This is more important in disputes especially arising from family law and business relationships[62]. Likewise, in the doctrine, there are opinions asserting that the principle of publicity is not appropriate to the times[63].

On the contrary, an important characteristic of alternative methods is that they can offer the parties to the dispute the resolution in an environment which is not open to the public. This becomes a very important characteristic when the dispute is based on problems arising from family or trade disputes[64]. For example, companies who do not

---

58 Goss, p.2; Ildır, p.62.

59 S. Şakir Ansay, **Hukuk Yargılama Usulleri**, Ankara, 1960, p.56; Saim Üstündağ, **Medeni Yargılama Hukuku**, C. I-II, İstanbul, 2000, p.259; İlhan Postacıoğlu, **Medeni Usul Hukuku Dersleri**, İstanbul, 1975, p.370; Hakan Pekcanıtez, "Medeni Usul Hukukunda Aleniyet İlkesi", **İzmir Barosu Dergisi**, No.4 (1999), p.23; Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, **Medeni Usul Hukuku**, Ankara, 2001, p.241; Baki Kuru, **Hukuk Muhakemeleri Usulü**, Vol.1, İstanbul, 2001, p.147; Özbek, p.161.

60 Hakan Pekcanıtez, "Medeni Yargıda Adil Yargılama", **İzmir Barosu Dergisi**, No.2 (1997), p.44; Pekcanıtez, Atalay and Özekes, p.254; Feyyaz Gölcüklü, "Avrupa İnsan Hakları Sözleşmesinde Adil Yargılama", **Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi**, No.1-2 (1994), p.216; Özbek, p.161.

61 Pekcanıtez, *Medeni Yargıda Adil Yargılama*, p.45; Özbek, p.162.

62 Haluk Konuralp, "Alternatif Uyuşmazlık Çözüm Yolları ve Bilirkişilik", **Bilirkişilik Sempozyumu**, Samsun Barosu/Türkiye Barolar Birliği, 9-10 Kasım 2001, p.501; Özbek, p.162.

63 Pekcanıtez, *Medeni Yargıda Adil Yargılama*, p.44, fn.47; Özbek, p.162.

64 Konuralp, p.501; Özbek, p.162; Ildır, p.63.

prefer that the reputation of an image or brand acquired in years will be damaged due to the publicity, or people who wants the privacy and protection of private life can prefer the ADR methods just for this reason[65].

The privacy of ADR sessions also makes it possible that the parties behave more open to find a resolution to the dispute. This is because the parties are sure that the information they disclose will not go out and later be used against them in such a resolution method[66]. It is stated that the privacy helps the parties to achieve the resolution easier by encouraging them to disclose matters which are important to achieve the resolution but not disclosed because the parties think that these will be used against them in court[67].

In most of the disputes, the reason for using ADR is the privacy. The parties preferring ADR to avoid the negative aspects of the publicity will find the opportunity to resolve their disputes in a more secure environment. Thanks to this, people will not have to share the information relating to their private lives and personal spaces with other people. Actually, the violation of personal rights of the disputed parties to ensure the application of the principle of publicity does not comply with the original aim of the principle of publicity as well[68].

ADR methods used to overcome the disadvantages of the principle of publicity offer the following advantages[69]:

- The problems which may arise from the publicization of the debates are avoided.
- The danger of the publicization of the information relating to the company, and of trade secrets which may interest the rivals is avoided.
- As the statements and confessions previously made by the parties are binding on the parties, the disadvantage for the parties is that they cannot

---

65 Ildır, p.49.
66 McLaren and Sanderson, p.4-20; Ildır, p.63.
67 Ersan Şen, **Devlet ve Kitle İletişim Araçları Karşısında Özel Hayatın Gizliliği ve Korunması**, İstanbul: Kazancı Hukuk Yayınevi, 1996, p.175; Ildır, p.49.
68 Pekcanıtez, *Medeni Yargıda Adil Yargılama*, p.39; Özbek, p.162.
69 Özbek, p.162.

act contrary to these statements and confessions afterwards; this disadvantage is avoided.

- The statements and confessions likely to be made are considered invalid.
- The elements causing shyness and embarrassment in matters relating to the dispute are removed.
- Compared to a trial which will be held in a courtroom publicly, witness statements, claims and defences can be set forth and examined directly and more sincerely.

H. IMPROVED RELATIONSHIPS

It is no wonder that the litigation destroys relationships completely. The litigation process makes people attack each other's opinions and prove that they are right and the other side is wrong. Almost all parties leave trials with negative feelings towards each other. In many cases, this result can be particularly harmful. ADR allows the parties to preserve their relationships by working together to resolve their disputes. The process creates a collaborative feeling because the goal is agreement, not victory or defeat. Many times, parties may find that participation in ADR is the start of a significant improvement in their relationship.

Central aims of the application of ADR procedures are to save on costs and time and remove the hostility aroused by the adversarial system[70].

Main damaging effects of the disputes are the costs paid to resolve them. Relevant costs are the fees paid to legal advisers and lawyers to have the disputes resolved, etc. Secondary damaging effects of the disputes are the results produced by the dispute itself. These results generally refer to psychological damage which cannot be measured for money. The most important negative effect of disputes is the damage caused to the companies and the business relationships. It is impossible to measure its economic (monetary) dimension. Due to the conflict between the parties, the environment of confidence and the credit relationship, both which the parties will need for their future business relationships, are negatively influenced. Another damage which

[70] Özbek, p.155.

cannot be measured for money is that the parties to the dispute must endure the waste of effort and the difficulties both caused by the dispute. Finally, legal mechanisms used for the resolution of disputes and financed by taxpayers' money show the damage of disputes to the society on a macroeconomic level[71].

Applications to the court are usually made without thinking the likely results of the case. However, before making an application to the court, everyone (especially the ones in business relationships) should consider the following questions[72]:

- To what extent does the litigation process affect the relationship between the parties?
- Can the costs of the court case be recovered with the requested relief?
- In case of a judgment against the defendant, how is his/her ability to pay?
- Are there any counter-claims the defendant may file?
- What are the effects of filing a court case on third parties, e.g. customers, suppliers, etc?

If the court case seems inevitable, the plaintiff may gain some benefits but the parties should always consider the option of resolving the conflict by agreement. Thus, the parties can minimize the waste of time, the costs and the hostile feelings caused by the court case[73].

Bühring-Uhle states that[74]:

> *Alternative procedures are usually conducted in a less adversarial atmosphere than litigation. Their consensual nature and the focus on the parties' underlying interests make it possible to go to the roots of a conflict while avoiding unnecessary harm to, or even improving, the relationship between the disputants.*

The main idea behind ADR is the importance of the relationship between the parties. Applebey states that ***"where the relationship is to continue, then a solution brought about or agreed by the parties themselves is thought to be more likely to be***

[71] Özbek, p.49-50.
[72] Bagley, p.71; Ildır, p.68.
[73] Ildır, p.68.
[74] Bühring-Uhle, p.175.

acceptable then one imposed by a court of law"[75]. Even if the parties do not intend to maintain the relationship between themselves, thanks to alternative processes which produce more beneficial results, the factors in the source of the disagreement are removed or softened instead of being emphasized and the parties are encouraged to restructure their relationship[76].

ADR is especially effective when there is a probability that business relationships between the parties will continue. For example, when a disagreement arises between a manufacturer and a wholesaler, a retailer and an important customer or a franchiser and a franchisee, there are more reasons to move towards ADR. This is because it is intended to protect business relationships between these people. In such cases, instead of starting a damaging litigation process which will last for years, if these companies that will continue their business relationship and fruitful collaboration prefer to apply to ADR, ADR will be very effective in the dispute because it will offer the parties a more sensitive process[77]. Extremely fragile and important business relationships can only be protected by using ADR procedures. This is because agreements reached through ADR are considered by the parties to be fair and right in many cases[78]. Besides protecting current relationships, ADR will also allow the parties to improve rather than simply maintain their relationships. Stitt states that ***"if, in the context of resolving the dispute, the disputants learn information that will allow them to work more effectively in the future, they will be able to move forward after the dispute in a more productive way"***[79].

One of the most important benefits offered by ADR is that the application by the parties to any alternative resolution method shows that they are willing to resolve

---

[75] George Applebey, "Alternative Dispute Resolution and the Civil Justice System", **A Handbook of Dispute Resolution: ADR in Action**, Karl J. Mackie, New York: Routledge, 1991, p.26.

[76] Stephen B. Goldberg, Frank E. A. Sander and Eric D. Green, **Dispute Resolution**, Boston: Wolters Kluwer Law & Business, 1985, p.10; Özbek, p.114.

[77] Wilkinson, p.19; Kimberlee Kovach, "Overview of ADR", **Handbook of Alternative Dispute Resolution**, State Bar of Texas, Austin, 1990, p.7; Özbek, p.174.

[78] Warbeck, p.112; Martin Hunter, Jan Paulsson, Nigel Rawding and Alan Redfern, **The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts**, Deventer, 1993, p.73; Özbek, p.174.

[79] Stitt, p.12.

the disagreement between themselves amicably[80]. The probability of the parties accepting the terms of an agreement which is concluded between themselves, even if with the help of a third person, is obviously higher than a judgment which is imposed on them forcibly. As conditions change, the parties who have reached an agreement between themselves before, may also be more willing to make a bargain for a new agreement. At the end of a constructive effort and as an expression of satisfaction felt from the outcome, it is only possible to protect current relations and maintain business relationships by means of alternative resolution methods[81].

III. TYPES OF ALTERNATIVE DISPUTE RESOLUTION

A. NEGOTIATION

Negotiation may generally be defined as a consensual bargaining process in which the parties attempt to reach an agreement on a disputed matter. Negotiation differs from other methods of dispute resolution in the degree of autonomy experienced by the disputing parties. In negotiation, the parties attempt to reach an agreement without the intervention of third parties such as judges, arbitrators or mediators. Negotiation involves only the parties and their agents such as their lawyers. The parties also have the power to decide process rules in negotiation[82].

There are two principle negotiation theories and strategic approaches to negotiation[83]:

- Adversarial or competitive or value-claiming or position-based
- Problem-solving or collaborative or value-creating or interest-based

While there may be some connection between these negotiation approaches

---

80 Moore, p.6; Ildır, p.63.

81 Ildır, p.63.

82 Nolan-Haley, p.16-17; Özbek, p.72-73; Şule Şahin Ceylan, **Geleneksel Toplumdan Modern Topluma Alternatif Uyuşmazlık Çözümü**, 1. Baskı, İstanbul: On İki Levha Yayıncılık, 2009, p.296-297.

83 Nolan-Haley, p.23; Özbek, p.76; Şahin Ceylan, p.297-298; James Melamed, Frequently Asked Questions about Mediation and Negotiation, http://www.mediate.com/articles/Mediationfaq.cfm# (26 December 2009), p.1; Suna Oksay and Tolga Ceylantepe, **Sigorta Konusunda Ortaya Çıkan Uyuşmazlıkların Alternatif Yöntemlerle Çözümü (ADR): Avrupa Uygulamaları**, İstanbul: TSRSB Sigorta Araştırma ve İnceleme Yayınları, 2006, p.15.

and the personality style of negotiators, they should be distinguished from each other. A good negotiator must have both sets of skills. This is because to be effective, both of the approaches should be used together depending on what the negotiator believes will work best with a particular negotiating partner, depending on the specific issue being negotiated and depending on the nature of the overall negotiating relationship[84].

In adversarial negotiation, manipulative approaches are used in an intimidating manner so that the other party lose confidence in the case and accept the offer. Negotiators using this strategy open the negotiation with high demands. They use threats and try to put the other party under pressure. They stick to their positions and stretch the facts in favour of their clients' positions. They are usually tight lipped and want a clear victory. This negotiation process is viewed as a zero-sum game, at the end of which there will be a winner and a loser[85].

Although adversarial negotiation is effective in claiming an already defined value, this approach also involves certain risks such as damage to the negotiating relationship and a lessened propability of reaching an agreement. Also, the future relationships between the parties are affected negatively[86].

In problem-solving negotiation, instead of applying an egocentric approach, negotiators use a different approach which involves joint problem-solving and focuses on responding to the parties' underlying needs and interests. In this negotiation process, gains are not viewed as at the expense of the other party[87].

The biggest disadvantage of this approach is if one party is unwilling to participate in problem-solving negotiation, the more collaborative negotiator may be at risk. In this case, the negotiator will be forced to either give up or apply an adversarial approach. If the other party does not arrive at agreement, the problem-solving negotiator may sustain damage. Besides, problem-solving requires good faith by both parties to the negotiation. If this element is missing, the negotiator will be at risk in honestly

---

84 Melamed, p.1; Nolan-Haley, p.23.
85 Melamed, p.1-2; Oksay and Ceylantepe, p.15; Nolan-Haley, p.23-25; Özbek, p.78.
86 Melamed, p.1-2; Oksay and Ceylantepe, p.15.
87 Melamed, p.2; Oksay and Ceylantepe, p.15-16; Nolan-Haley, p.25-27; Özbek, p.76-78.

disclosing information. Problem-solving negotiators have value creating approaches, whereas adversarial negotiators use value claiming strategies[88].

B. MEDIATION

Mediation is a further extension of the negotiation process where the parties who have been unable to resolve a dispute use an impartial third party to assist them in reaching a resolution[89].

Mediation is a voluntary, private, flexible and informal process in which a neutral third person, called a mediator, listens to both sides and makes suggestions for reaching a solution[90]. In this method, the mediator and disputing parties work together to find a solution that is acceptable to everyone. The parties to the mediation process are the dispute owners, their lawyers or representatives, if any, and the mediator[91]. The parties themselves decide on the terms of their agreement[92].

Unlike the arbitration process, where an arbitrator imposes a decision, no such compulsion exists in mediation. The mediator helps the parties in reaching a consensus by facilitating their communications and negotiations but it is the parties themselves who make their agreement. Thus, mediation is at all times a consensual process. This is the most important characteristic which distinguishes mediation from arbitration[93].

Mediators have no power to make decision. Their roles include meeting with the parties and helping them to define the reasons of their dispute, managing the

---

88 Melamed, p.2; Oksay and Ceylantepe, p.16; Nolan-Haley, p.27.
89 Nolan-Haley, p.68; Ildır, p.88-89; Özbek, p.207; Şahin Ceylan, p.301.
90 Brown, p.7; Oksay and Ceylantepe, p.16.
91 National Arbitration Forum, Mediating and Arbitrating Insurance Disputes: Includes Practical Tips and Model ADR Language, January 2005, http://www.adrforum.com/users/naf/resources/InsuranceWP.pdf (26 December 2009), p.2; Oksay and Ceylantepe, p.16; Ildır, p.89.
92 British Columbia Mediator Roster Society, *The Mediation Process*, http://www.mediator-roster.bc.ca/public/mediation/mediationinbc_process.aspx (26 December 2009), p.1; Oksay and Ceylantepe, p.16.
93 Nolan-Haley, p.70; Oksay and Ceylantepe, p.16; Özbek, p.201-202; Şahin Ceylan, p.298.

mediation process, helping the parties to communicate their interests clearly and helping them to reach an agreement[94].

When a dispute owner wants to use the mediation process, he/she should first talk to his/her lawyer, if any, about mediation and then find out if the other party is willing to try mediation as well. Also, choosing a mediator is one of the most important steps in the mediation process because it is essential for the process to work effectively that both of the parties have confidence in the chosen mediator[95]. The parties choose the mediator themselves and they are also free to follow the guidance of their chosen mediator[96].

The most important qualities of mediators and the mediation process are as follows[97]:

- The mediator is neither a counsellor nor a judge. Mediators are expert people who have necessary information and experience so that disputes are resolved in the direction of the parties' needs and interests.
- The mediator acts as a bridge between the parties so that results satisfactory in meeting the parties' needs are produced.
- A mediator may be asked to state his/her opinion about the value of any case, however, his/her primary duty is to help the parties to find voluntary solutions meeting their individual or mutual needs.
- The mediator has analytical thought and the ability to establish communication in order to help the parties to focus on real issues between them.
- The mediator is a real representative, a problem definer or just a supporter who ensures that the parties can come to decision so that they can fulfil the needs and aims described by themselves.

---

94 *The Mediation Process*, p.1; Oksay and Ceylantepe, p.17; Goss, p.1; Ildır, p.90; Özbek, p.210; Şahin Ceylan, p.298-299.
95 *The Mediation Process*, p.1-2; Oksay and Ceylantepe, p.17.
96 Oksay and Ceylantepe, p.18; Özbek, p.213.
97 Oksay and Ceylantepe, p.17-18; Özbek, p.206-222.

- The mediator defines the boundaries of constructive suggestions likely to be accepted by the parties and facilitates discussions and negotiations.
- The mediator provides the parties with the opportunities necessary to seek realistic solutions for their dispute and resolve disagreements.

C. ARBITRATION

In recent years, there is a growing trend towards considering arbitration out of ADR procedures[98]. Indeed, in the year 2002, arbitration was not considered among ADR methods in the Green Paper relating to the application of ADR procedures and taking stock of the current situation, published by the Commission of the European Communities[99]. Nevertheless, considering that it is also an out-of-court resolution method, arbitration is to be examined within ADR procedures in the scope of this thesis[100].

Contrary to mediation, arbitration is a method of settling disputes in which one or more neutral third persons, called arbitrators or arbitration panel, make a decision, called an arbitration award, after hearing the arguments on both sides[101]. In the arbitration process, arbitrators' powers are similar to those of judges in most of the applications. If necessary, they can hold hearings, ask the parties to submit their evidence and hear the witnesses. The arbitrators inform the parties of their award relating to how to resolve the dispute at the end of the trial. Arbitrators' power to render

---

98 Ildır, p.27, 60; Özbek, p.99-103; Oksay and Ceylantepe, p.13.

99 "Alternative methods of dispute resolution, for the purposes of this green paper, are defined as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper", in fn.2 "Arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions. Arbitration is the subject of a certain number of legislative instruments in the Member States and at international level, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Decisions http://www.uncitral.org/en-index.htm, or, within the framework of the Council of Europe, the 1966 European Convention providing a Uniform Law on Arbitration http://conventions.coe.int/Treaty/EN/cadreprincipal.htm". Commission of the European Communities, **Green Paper on Alternative Dispute Resolution in Civil and Commercial Law**, COM (2002) 196 Final, Brussels, 19.04.2002, p.6; Oksay and Ceylantepe, p.13-14.

100 Özbek states that arbitration is an adjudicatory procedure as regards its functioning and outcome. On the other hand, in the arbitration procedure, the decision is made, not by the court having jurisdiction to resolve the basis of the dispute, but by the arbitrators who are determined by the parties or by the court, if the will of the parties is uncertain on this matter (Art. 520 of the Turkish Code of Civil Procedure). Arbitration is therefore an alternative dispute resolution method as regards its characteristic. The functioning of arbitrators is adjudicatory but it does not count as an adjudicatory activity as regards the organs. Özbek, p.100.

a decision on the resolution of the dispute is the most important characteristic of arbitration which distinguishes it from other out-of-court dispute resolution methods[102].

Today, arbitration is the most important and formalized alternative to the court adjudication of disputes[103]. As legislatures support arbitration as the preferred process in resolving a wide range of disputes, arbitration has been transformed into a flexible adjudicatory process, operating both in the mandatory context, as well as in voluntary settings[104].

According to whether the parties are required to submit their dispute to arbitration or not, the arbitration procedure is divided in two[105]:

1. Voluntary arbitration

It is the traditional model of arbitration which foresees a voluntary process where the parties submit their dispute to a neutral person for a decision. Voluntary arbitration results from a contractual arrangement in which the parties agree in advance of a dispute, or after a dispute has arisen, that arbitration will substitute for formal judicial proceedings[106]. Voluntary arbitration comes up when the dispute resolution by arbitration depends on the mutual consent of both parties. A contractual arbitration arrangement made in accordance with the free will of the parties points out voluntary arbitration. The contractual arrangement between the parties can be in the form of either an arbitration clause or arbitration agreement.

In voluntary arbitration, the parties can also decide if the arbitration award which will be rendered at the end of the arbitration process will be binding on them or

---

[101] Brown, p.7; Nolan-Haley, p.153.
[102] Oksay and Ceylantepe, p.20; Şahin Ceylan, p.303-304.
[103] Nolan-Haley, p.153; Ildır, p.31.
[104] Nolan-Haley, p.153.
[105] Nolan-Haley, p.159-164; Üstündağ, p.937; Kemal Dayınlarlı, **HUMK'da Düzenlenen İhtiyari İç Tahkim (m. 516 – 536)**, (Gözden geçirilmiş, genişletilmiş ve Yargıtay Kararları ile güncelleştirilmiş) 2. Baskı, Ankara: Dayınlarlı Hukuk Yayınları, 2004, p.10-14; Kemal Dayınlarlı, **Domestic Arbitration Regulated in the Turkish Code of Civil Procedure (Art. 516 – 536)**, Ankara: Dayınlarlı Hukuk Yayınları, 2004, p.11-16; Şahin Ceylan, p.304-305; Erol Ulusoy, "Finans Hukukunda Tahkim", **II. Uluslararası Özel Hukuk Sempozyumu: Tahkim**, İstanbul: Tasarruf Mevduatı Sigorta Fonu and Marmara Üniversitesi Hukuk Fakültesi, 14.02.2009, p.239.
[106] Nolan-Haley, p.159; Şahin Ceylan, p.304.

not. If the parties agree in advance to binding arbitration, the decision of the arbitrator will prevail and must be followed. If, instead, the parties agree to nonbinding arbitration, the arbitrator's decision is simply a recommendation and need not be complied with[107].

2. Compulsory or mandatory arbitration

Arbitration that is required by law is called compulsory or mandatory arbitration[108]. In other words, compulsory or mandatory arbitration comes up when the dispute resolution by arbitration does not depend on the voluntary consent of the parties. In that case, the parties do not have the power of making a free choice to apply to arbitration.

Voluntary arbitration is the rule and compulsory arbitration is the exception. The parties cannot go to court for the resolution of disputes that are subject to compulsory arbitration. Otherwise, the court will, on its own initiative, issue a decision of lack of jurisdiction for the reason that it is compulsory for the dispute to be resolved by way of arbitration[109].

D. HYBRID DISPUTE RESOLUTION PROCEDURES

The continued growth of the ADR movement has resulted in several innovative combinations of negotiation, mediation and arbitration, all which are the primary dispute resolution processes. Facilitated negotiation combines with mediation in the "mini-trial". Mediation connects with arbitration in the "med-arb" process. The "conciliation" and "ombudsperson" procedures are not new but they are being used with much more frequency today than in the past. The role of conciliator and ombudsperson also involves aspects of mediation[110].

---

[107] Brown, p.7-8; Şahin Ceylan, p.304.
[108] Nolan-Haley, p.160-164; Brown, p.8; Üstündağ, p.937; Dayınlarlı, *HUMK'da Düzenlenen İhtiyari İç Tahkim (m. 516 – 536)*, p.10-13; Dayınlarlı, *Domestic Arbitration Regulated in the Turkish Code of Civil Procedure (Art. 516 – 536)*, p.11-14; Ulusoy, p.239.
[109] Üstündağ, p.947; Ulusoy, p.239.
[110] Nolan-Haley, p.246.

1. The Mini-Trial

An increasingly popular method of settling disputes is an informal trial, referred to as a mini-trial, run by a private organization established for the purpose of settling disputes out of court. Retired judges and lawyers are often used to hear the disputes, and the parties agree to be bound by the decision[111].

The mini-trial which is the most creative one among ADR methods incorporates components of negotiation, mediation and arbitration. It is a structured settlement process which may be tailored to meet individual needs of participants. The mini-trial has proved to be successful in complex civil cases where there are mixed questions of law and fact. It has been used successfully in cases involving patent infringement, government contracts, products liability, antitrust, construction and contract enforcement[112].

A mutually agreed neutral advisor usually manages the proceeding but it may also be conducted without a neutral advisor. The mini-trial has two phases. In the information exchange phase, counsel for each party make summary presentations of their cases to senior management executives with full settlement authority. Hearing these presentations helps the executives to understand the strengths and weaknesses of their own cases and the opponents' cases. Following the information exchange between counsel, in the settlement negotiation phase, the business executives discuss settlement. Settlement discussions following a mini-trial differ from negotiation because the discussions are more focused after a mini-trial. The parties have a much better sense of the strengths and weaknesses of their cases and more realistic dialogue is therefore possible. If the senior executives are unable to settle the dispute, the neutral advisor will render an advisory opinion as to the likely outcome of the case if it were litigated in a court of law. If the parties are still unable to settle the dispute on their own, the neutral advisor will finally make a recommendation for settlement based on the written offers

[111] Brown, p.8.
[112] Nolan-Haley, p.246-250; Şahin Ceylan, p.309.

submitted by the parties. The parties may accept or reject this recommendation. The mini-trial process is fully private and voluntary[113].

2. Med-Arb

The med-arb process is a combination of mediation and arbitration. The third party neutral begins the process as a mediator and if the mediation process does not result in an agreement, the neutral will shift roles and become an arbitrator who may ultimately make a decision in the case[114].

In the med-arb process, disputes that cannot be resolved by way of mediation are tried to be resolved through the arbitration method in a following process where the same neutral assumes the role of an arbitrator. Before this process takes place, the parties decide that the dispute is discussed in the presence of a mediator who can also become an arbitrator, if the settlement fails. In that case, the mediator assumes the role of an arbitrator and gives a binding decision on disputed matters. An advantage of the med-arb process is that the dispute is resolved certainly, either by agreement or by force[115].

The advantages of the med-arb process are that in the mediation phase of the med-arb method, the convincing power of the mediator is higher than it is in the process when mediation is applied alone. The parties may therefore display a more conciliatory attitude. This is because, they are aware that the mediator can make a decision about the dispute as an arbitrator in the last phase of the process. So, they may be more willing to achieve a resolution before they go to arbitration. Moreover, if the mediation process does not result in an agreement, it will take less time for the arbitrator to get information about the case and thus, the parties can save on time, resources and costs in the second phase[116].

---

[113] American Arbitration Association Dispute Resolution Services Worldwide, *Mini-Trial: Involving Senior Management*, 2007, http://www.adr.org/sp.asp?id=22007#procedures (28 December 2009), p.1-6; Nolan-Haley, p.246-253; Şahin Ceylan, p.310-311; Ildır, p.108-114.

[114] Nolan-Haley, p.255-257.

[115] Şahin Ceylan, p.308-309; Oksay and Ceylantepe, p.22-23; Ildır, p.100-101.

[116] Ildır, p.100-102; Nolan-Haley, p.255-256.

3. Ombudsman

The traditional notion of an ombudsman derives from the Scandinavian countries where a public official would be appointed to listen to the public's complaints and deal with them[117].

Today, the ombudsman process has evolved parallel to increasing needs and begun to be applied in private organizations in addition to public organizations. Within this framework, special kinds of ombudsman appear such as parliamentary ombudsman, local-government ombudsman, health-service ombudsman, financial ombudsman, insurance ombudsman and pensions ombudsman. Such practices are especially common in developed countries where sectoral ombudsman units have been formed with the aim of ensuring that relevant sectors serve more effective and productive. Also, for the purpose of increasing the service efficiency, the use of ombudsman has been started in companies and private organizations. In developed countries, private companies have ombudspersons or ombuds offices. In that case, an ombudsman is a neutral individual employed by an organization to hear complaints, engage in fact finding and generally promote the resolution of disputes through informal methods such as mediation and counseling. Although an ombudsman is legally not independent, the companies should ensure that ombudspersons work independently while fulfilling their functions[118].

Insurance ombudspersons are working towards out-of-court resolution of insurance disputes arisen between insurance companies and insured parties. Insurance ombudspersons can work in a public legal entity or sectoral mechanism. They can also operate as an office within the structures of insurance companies. The membership of insurance companies in insurance ombudsman offices may differ from country to country and be voluntary or compulsory. If the parties are unable to resolve the dispute on their own, complaints about companies that are members of such mechanism will be forwarded to the ombudsman so that reconciliation can be achieved. In the examination made by the ombudsman, if a wrong approach is determined, the ombudsman will come to a decision towards resolving the problem. It again differs according to country

[117] Nolan-Haley, p.259-260; Oksay and Ceylantepe, p.24-25; Şahin Ceylan, p.306.
[118] Nolan-Haley, p.259-260; Oksay and Ceylantepe, p.28-30.

practices whether this decision will be binding or not. In most practices, if the decision given by the ombudsman is accepted by the consumer in a determined time period, both the consumer and the company should abide by the decision. In other words, the decision will be binding on the parties. If the consumer rejects this decision, it will not be binding on both of the parties. In this case, there is no obstacle for the consumer to seek justice by applying to the court[119].

4. Conciliation

Conciliation is an informal process which is similar to mediation but less structured than the mediation process. In conciliation, a neutral third party, called a conciliator, intervenes in a conflict in order to assist the parties in arriving at a resolution. During conciliation, the conciliator is in an advisory position, rather than in a determining position. The parties are not required to accept the resolution offers made by the conciliator also in this process[120].

Conciliation is commonly used in high conflict situations where the parties are unable or unwilling to participate in negotiations. In conciliation, the parties rarely sit around the same table together with the conciliator. Generally, conciliators meet with the parties separately. The conciliator makes every effort to reduce tensions between the parties, improve communications, and understand and interpret issues and positions[121].

In the international commercial context, the term conciliation is used interchangeably with mediation[122].

5. Online Dispute Resolution

The dramatic growth of online commerce has given rise to increased interest in the development of online dispute resolution (ODR), also referred to as EDR (electronic dispute resolution). ODR includes traditional ADR processes that incorporate

[119] Oksay and Ceylantepe, p.29.
[120] Nolan-Haley, p.261; Oksay and Ceylantepe, p.19; Şahin Ceylan, p.308.
[121] Nolan-Haley, p.261; Oksay and Ceylantepe, p.19; Şahin Ceylan, p.308.
[122] United Nations, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, New York, 2004, http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (28 December 2009), p.1; Nolan-Haley, p.261.

information technology such as the Internet, websites, e-mail communications, and streaming media, as well as more innovative techniques such as "double-blind bidding"[123], "auctions" for determining the compensation, and "behind the screen" mediation conducted by an unseen moderator, either in real time or with sequential discussion. Disputes that may be appropriate for resolution through ODR include those that are created by the Internet such as domain names, as well as those related to commercial transactions that use the Internet. However, ODR can also be used to resolve disputes having nothing to do with the Internet such as automobile accidents[124].

ODR provides for virtual communications between parties on the Internet and thus eliminates the transaction costs of traditional dispute resolution, whether that means going to courts in different jurisdictions to initiate lawsuits or participating in traditional ADR with face-to-face meetings[125].

[123] Double-blind bidding is a patented process being used by the US company, Cybersettle. "Launched as a web-based system in 1998, it is claimed that Cybersettle has handled over 200,000 claims and settled more than US$1.5 billion worth. Most of the cases have been insurance or personal injury claims. How does it work? Using a patented process referred to as 'double-blind bidding', a claimant and defendant each submit the highest and lowest settlement figures that are acceptable to them. These figures are not actually disclosed to the other side. If the two ranges overlap, a settlement is achieved, the final figure usually being a split down the middle. If there is no overlap, the process can be repeated. The system is used mainly by claims professionals, lawyers, and insurance companies". Richard Suskind, **The End of Lawyers?: Rethinking the Nature of Legal Services**, First published, New York: Oxford University Press, 2008, p.220.

[124] Nolan-Haley, p.261; Carrie J. Menkel-Meadow, Lela Porter Love and Andrea Kupfer Schneider, **Mediation: Practice, Policy, and Ethics**, First Edition, New York: Aspen Publishers, 2006, p.410; Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider and Jean R. Sternlight, **Dispute Resolution: Beyond the Adversarial Model**, First published, New York: Aspen Publishers, 2005, p.628.

[125] Nolan-Haley, p.262.

ALTERNATIVE DISPUTE RESOLUTION USED TO RESOLVE INSURANCE DISPUTES IN EUROPEAN UNION

I. EVOLUTION OF ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN UNION

The mechanisms related to the out-of-court resolution of disputes have a long history in European countries. However, especially in recent years, there have been numerous developments in the resolution of disputes and determining thereof. With the increased number and complexity of legal regulations in Europe in recent years and on grounds of the increasing number of disputes, litigation has become a harder and more expensive method which is concluded in a longer period of time. After these developments, practical and cheaper ADR methods which are even cost free for consumers in most countries and which are concluded in a shorter period of time started to be preferred commonly. Especially, considerable studies have been carried out to regulate the developments in this system which increases the confidence of consumers in small and middle sized enterprises which operate by electronic commerce method[126].

A. BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN UNION

The need for offering out-of-court dispute resolution mechanisms to consumers in the European Union (EU) was emphasized clearly in the action plan, dated 1996, which aims at the resolution of disputes regarding consumers in the internal market (Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market)[127].

[126] Oksay and Ceylantepe, p.47.
[127] Oksay and Ceylantepe, p.47.

Following this development, the Commission issued two recommendations in 1998[128] and 2001[129] in order to determine the basic principles of the EU on the ADR issue. Basic principles, which should be complied during the resolution of disputes in alternative resolution procedures conducted out of courts, were determined in these recommendations. Basic principles determined within this framework are impartiality, transparency, effectiveness, legality and voluntary consent to abide by the decision (non-binding characteristic of decisions)[130].

On the other hand, following on from the Vienna Action Plan in 1998 and the European Summit held in Tampere in 1999, the Council called on the Commission to present the Green Paper on ADR methods in civil and commercial law other than arbitration and to bring the issue up for discussion. Within this period, besides taking stock of the current situation, the call for launching broad consultations on the measures to be taken aimed at developing these methods are also expressed. The aim of this undertaking was to lay down the general principles which would offer the minimum guarantees so that justice is done when out-of-court methods are used. On 19 April 2002, the Commission published the Green Paper on the application of ADR methods in civil and commercial law and for taking stock of the current situation[131].

After the publication of the Green Paper on ADR, in July 2004, the European Commission leaded the preparation of the code of conduct towards the mediators and it has been welcomed by various mediators in the course of time[132].

The Commission's work on developing ADR methods was not limited to these; the Commission also presented a draft directive on Mediators to the European Parliament and the Council[133].

---

[128] The Commission Recommendation of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-Of-Court Settlement of Consumer Disputes (98/257/EC), O.J. L 115, 17.4.1998, p.31-34.
[129] The Commission Recommendation of 4 April 2001 on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (2001/310/EC), O.J. L 109, 19.4.2001, p.56-61.
[130] Oksay and Ceylantepe, p.47.
[131] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.48.
[132] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.48.
[133] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.48.

Aforesaid Recommendations, The Green Paper, the Code of Conduct and the draft Directive all form an important part of the European Community's current work on establishing an area of freedom, security and justice. Substantially the idea underlying in the work on developing ADR methods is to facilitate people's access to justice[134].

In addition to the developments abovementioned briefly, introduction of ADR mechanisms or development of current ADR mechanisms are directly or indirectly recommended to member states in several documents in the EU legislation. Primary examples of such documents and recommendations are[135]:

- The Council Directive 2002/8/EC which was accepted on 27 January 2003 and aims at facilitating the access to justice in cross border disputes by determining the minimum common rules related to legal aid.
- The Council Regulation (EC) 2201/203 dated 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
- Directive 2000/31/EC on Electronic Commerce and a Joint Declaration by the Council and the Commission regarding consumer disputes in e-commerce and the role of ADR.
- Directive 98/10/EC of the European Parliament and the Council on the application of open network provision (ONP).
- Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communication networks and services.
- Directive recommendation of the Commission dated 13 March 2001 on electric and natural gas markets.

[134] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.48.
[135] *Alternative Dispute Resolution – Community Law*, p.3; Oksay and Ceylantepe, p.47-48.

Despite of all these developments, today there is not any harmonisation on the application of ADR mechanisms throughout the EU and it is only possible to mention the efforts to ensure minimum standards[136].

1. Recommendation Dated 30 March 1998

Recommendation of the Commission published on 30 March 1998 concerns particularly ADR methods in which a third party actually settles the dispute between the parties in a manner which may or may not be binding on them. This Recommendation is also valid in situations where arbitration in resolution of consumer disputes is in question. Basic principles concerning this Recommendation can be counted as independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation[137].

2. Recommendation Dated 4 April 2001

In the Recommendation issued on 4 April 2001, the Commission determined a certain number of principles concerning ADR methods in which third parties do not present an official resolution to the parties, to be applied in the settlement of out-of-court consumer disputes. Substantially, these principles concern ADR methods in which the third party does not express an official opinion on the solution but simply helps the parties and consequently parties find the solution that suits them best. Principles presented within this framework are impartiality, transparency, effectiveness and fairness[138].

3. The Green Paper

The Commission published the Green Paper on the application of ADR methods in civil and commercial law and for taking stock of the current situation[139].

The aim of the Green Paper is not to put forward ADR as a means of remedying deficiencies in the operation of the courts, but to help conflict and dispute

[136] Oksay and Ceylantepe, p.48.
[137] *Alternative Dispute Resolution – Community Law*, p.2; Oksay and Ceylantepe, p.49.
[138] *Alternative Dispute Resolution – Community Law*, p.2; Oksay and Ceylantepe, p.49-50.

resolution in a consensus-based form. It is believed that in many cases a resolution in this way would be more efficient than through the courts or by arbitration[140].

The Green Paper also provides information on different issues, thereby setting out to familiarize the largest possible number of people with this alternative. Within this framework, the Green Paper is directed in particular towards the parties to a dispute and the lawyers[141].

The main purpose of the Green Paper is to contribute to the balance to be achieved between the flexibility and the quality of results. The existing achievements of the EU and the Member States in this area are also included in the document. Another issue which needed to be mentioned within this framework is the Commission's intention to contribute to the formation of the most appropriate climate for the development of ADR by publishing the Green Paper[142].

4. European Code of Conduct for Mediators

The Commission prepared the Code of Conduct for Mediators in July 2004. The Code of Conduct sets out a series of norms which can be applied to the practice of Mediation and which can be followed by Mediation organisations. Organisations which are already conducting mediation activities and experienced mediators taking part in these activities have significant contributions in the preparation of the Code[143].

The Code was adopted in a meeting involving relevant experts in July 2004. The Commission expressed for several times its pleasure to be involved in and to contribute to this procedure[144].

[139] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.50.
[140] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.50.
[141] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.50.
[142] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.50.
[143] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.51.
[144] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.51.

5. The Proposal for a Directive on Mediation

A Proposal for a Directive on Mediation was prepared by the European Commission and presented to the European Parliament and the Council in October 2004[145].

The Proposal became clear following the Green Paper on ADR and after extensive consultation with those involved in the mediation system. Substantially, the preparation process of the directive proposal was not independent from the Code of Conduct for Mediation and those involved actively in both processes were parallel to each other. The Proposal for a Directive seeks to further the use of mediation by making certain legal rules available within the legal systems of the Member States[146].

Rules in the Proposal cover the areas of the privacy of the mediation process, the executability of agreements on the settlement of disputes, reached as a result of the mediation procedure, the reasons for the suspension of the running of periods, and the limitation of legal actions while mediation is in progress. The proposal encourages members of the EU to adopt norms to secure the quality of mediation throughout the EU[147].

In a latest development, the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters was published in the Official Journal of the EU on 24 May 2008. According to Art. 12 of the Directive, the date of transposal in Member States is 21 May 2011. Therefore, the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 21 May 2011[148].

[145] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.51.
[146] *Alternative Dispute Resolution – Community Law*, p.1; Oksay and Ceylantepe, p.51.
[147] *Alternative Dispute Resolution – Community Law*, p.1-2; Oksay and Ceylantepe, p.51-52.
[148] The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, O.J. L 136, 24.5.2008, p.3-8.

B. ALTERNATIVE DISPUTE RESOLUTION NETWORKS ESTABLISHED BY THE COMMISSION

Two networks, namely FIN-NET and ECC-Net, were established by the Commission and with these networks, it is aimed that already existed ADR mechanisms in the Member States are used more effectively[149].

1. FIN-NET Project (Consumer Complaints Network for Financial Services)

In 2001, the Commission established a network, called FIN-NET, with which consumers of financial services benefit best from ADR mechanisms in the origin country of the financial services provider against which they have a complaint. This established network serves three principle objectives[150]:

- Providing consumers with ADR mechanisms and information on these mechanisms easily in their cross-border problems,
- Actualizing effective and constant exchange of information between organizations which provide ADR services in different countries,
- Providing consumers with the minimum guarantee for ADR in each country.

Having numerous ADR mechanisms already devoted to financial services in the countries covered by this network facilitates the establishment of FIN-NET. Nevertheless, it should also be stated that there are great differences between the mechanisms used for resolution of consumer complaints in the member states and there is not any standardization. Currently, there are 46 member organizations within FIN-NET[151].

---

[149] *Alternative Dispute Resolution – Community Law*, p.2; Oksay and Ceylantepe, p.52.

[150] European Commission, *Welcome to FIN-NET*, http://ec.europa.eu/ internal_market/fin-net/index_en.htm (15 January 2010), p.1; Oksay and Ceylantepe, p.52.

[151] European Commission, *Members of FIN-NET*, http://ec.europa.eu/internal_market/fin-net/members_en.htm (15 January 2010), p.1; Oksay and Ceylantepe, p.52-53.

2. ECC-Net Project (European Consumer Centres Network)

The European Consumer Centres Network (ECC-Net) is a tool established by the European Commission together with the Member States of the EU to have better informed and educated consumers and also to help them in getting the appropriate redress in case of a violation of their rights as consumers in cross-border transactions[152].

The Network was created by merging two previously existing networks: the European Consumer Centres which provided information and assistance on cross-border issues and the European Extra-Judicial Network or "EEJ-Net" which helped consumers to resolve their disputes through ADRs using mediators or arbitrators[153].

ECC-Net aims at establishing a communication and support network between members and helping consumers to bring their complaints to related authorities by getting them to bring their complaints to national contact points, thereby overcoming the problems associated with the language difference and having insufficient information[154].

3. SOLVIT Project (On-Line Problem Solving Network)

SOLVIT is an on-line problem solving network in which EU Member States work together to solve without legal proceedings cross-border problems caused by the misapplication of Internal Market law by public authorities. Using SOLVIT is free of charge[155].

SOLVIT has been working since July 2002. The network is operated by the Member States. The European Commission just coordinates it, provides database facilities and helps to speed up the resolution of problems[156].

---

[152] European Commission, *The European Consumer Centres Network*, http://ec.europa.eu/consumers/redress_cons/index_en.htm (15 January 2010), p.1.
[153] *The European Consumer Centres Network*, p.1.
[154] *The European Consumer Centres Network*, p.1-2; Oksay and Ceylantepe, p.53.
[155] European Commission, *About SOLVIT*, http://ec.europa.eu/solvit/site/about/index_en.htm (15 January 2010), p.1.
[156] *About SOLVIT*, p.1.

In parallel with all these legislative activities in the EU, financial support is also provided for certain initiatives, in particular for the on-line settlement of disputes. Within this framework, ECODIR (Electronic Consumer Dispute Resolution Platform) which is supported financially by the Commission and is an electronic dispute resolution platform can be set as an example[157].

C. EUROPEAN OMBUDSMAN

The Ombudsman conducts inquiries usually after complaints but can also launch inquiries on his/her own initiative. The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the EU. The institutions include, among others, the European Commission, the Council of the EU and the European Parliament. The European Environment Agency and the European Agency for Safety and Health at Work are examples of Union bodies that the Ombudsman can investigate. Only the Court of Justice and the Court of First Instance (the General Court) acting in their judicial role are outside the control of the European Ombudsman[158].

The Ombudsman cannot investigate the complaints against national, regional or local authorities, even if the complaints are about EU matters. Examples of such authorities are government departments, state agencies and local councils. The Ombudsman is not an appeals body for decisions taken by national courts or ombudsmen. The Ombudsman cannot investigate complaints related with companies or private individuals[159].

The Ombudsman investigates cases resulting from poor or failed administration. Complaints brought to the Ombudsman are about administrative delay, lack of transparency, and refusal of access to information. Some issues are about the relationships between European organizations and their officials, employment of the

---

[157] *Alternative Dispute Resolution – Community Law*, p.3; Oksay and Ceylantepe, p.52.

[158] **The European Ombudsman**, "The European Ombudsman: Could He Help You? Complaint Guide and Form", [Brochure], June 2006, p.2; Oksay and Ceylantepe, p.53.

[159] The European Ombudsman: Could He Help You? Complaint Guide and Form, p.2; Oksay and Ceylantepe, p.53.

personnel and the operation of competition. Others are about contractual relationships between European organizations and private companies[160].

Citizens of any Member State of the EU and real or corporate entities who reside in a Member State or have a registered office in the EU can make a complaint by post, fax, or e-mail[161].

The Ombudsman may simply need to inform the institution concerned in a complaint in order to resolve the problem. If the case is not resolved satisfactorily during the course of his inquiries, the Ombudsman may try to find a friendly solution which corrects the maladministration and satisfies the complainant. If the attempt at conciliation fails, the Ombudsman can make recommendations to solve the case. If the institution does not accept his/her recommendations, the Ombudsman can inform the European Parliament by a report[162].

II. RESOLUTION OF INSURANCE DISPUTES BY ALTERNATIVE METHODS IN EUROPEAN UNION MEMBER STATES

A. ENGLAND

The Insurance Ombudsman Bureau which has a significant role at the resolution of insurance disputes in the UK was established in 1981 by the insurance companies which were operating in the sector. The establishment of the Financial Ombudsman Service according to the Financial Services and Markets Act dated 2000 caused the Insurance Ombudsman Bureau, just as other ombudsman offices and complaint bureaus, to transfer its authorities to this organization[163].

Within this framework, the Financial Ombudsman Service provides services not only for the resolution of insurance disputes sector specifically but also to the whole finance sector. The Financial Ombudsman Service is an independent organization,

---

[160] The European Ombudsman, p.2; Oksay and Ceylantepe, p.54.
[161] European Ombudsman, *The European Ombudsman at a Glance*, http://www.ombudsman.europa.eu/atyourservice/ataglance.faces (15 January 2010), p.2; Oksay and Ceylantepe, p.54.
[162] *The European Ombudsman at a Glance*, p.2; Oksay and Ceylantepe, p.54.

established according to the Financial Services and Markets Act dated 2000, and its main objective is to help the companies operating in the finance sector and the consumers with the settlement of disputes. With this feature, the Financial Ombudsman Service is neither a regulatory authority nor an organization which represents insurers or consumers[164].

Although the Financial Ombudsman Service is an institution based on law, the division administering this institution is established as a limited company (the Financial Ombudsman Service Limited). This administrative division is responsible for the appropriate functioning of the system; it does not have an active part in the settlement of disputes[165].

The administrative division consists of nine members who are appointed by a regulatory authority, namely the Financial Services Authority (FSA). Concerning these nine members, there is not a quota allocated for the representatives of the consumers or finance sector as in some countries. The members are elected from among experienced people such as academicians, people working in the finance sector, people with a background in consumer bodies or consultation services, etc. For the election of the president of the division, the approval of the Treasury is needed. Among the tasks of this administrative division are to elect the ombudsmen taking charge in the resolution of disputes within the Financial Ombudsman Service[166].

The Financial Ombudsman Service has gathered together eight separate organizations which existed before under one roof. These organisations were[167]:

- Banking Ombudsman,

---

[163] Suna Oksay, "Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü", **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını, No.4 (April-June 2006), p.11; Oksay and Ceylantepe, p.54.

[164] Financial Ombudsman Service, *Official Documents Underpinning Our Statutory Functions and Powers*, http://www.financial-ombudsman.org.uk/about/official-documents.html (29 January 2010), p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.11; Oksay and Ceylantepe, p.55.

[165] *Official Documents Underpinning Our Statutory Functions and Powers*, p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.11; Oksay and Ceylantepe, p.55.

[166] *Official Documents Underpinning Our Statutory Functions and Powers*, p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.11; Oksay and Ceylantepe, p.55.

[167] Oksay and Ceylantepe, p.55-56.

- Building Societies Ombudsman,
- Investment Ombudsman,
- Personal Investment Authority Ombudsman Bureau,
- Securities and Futures Authority Complaints Bureau and Arbitration Service,
- Financial Services Authority (FSA) Complaints Bureau,
- Insurance Ombudsman Bureau,
- Personal Insurance Arbitration Service.

Consumers have to make a complaint to the related company first, before they can make a complaint to the Financial Ombudsman Service. Other than exceptional circumstances, companies have to give a final response to complaints within eight weeks. Consumers have to attach the final response of the companies to their complaints to their applications in order to make a complaint to the Financial Ombudsman Service. Consequently, consumers have the right to make a complaint to the Financial Ombudsman Service only after they have this response. It is the duty of companies to inform consumers about this issue. On the other hand, it is also possible for consumers who have not got a response from the company to use their rights to make a complaint after this eight-week-period[168].

Consumer complaints are resolved by the Financial Ombudsman Service within six months as a rule. However, this period may be extended in cases where detailed investigations are needed[169]. The information on the consumer making a complaint to the Financial Ombudsman Service and the company against which the complaint is made, is not shared with third parties after the decision is made, as well as during the process[170].

---

[168] Financial Ombudsman Service, *Our Complaints Procedure and How to Complain*, http://www.financial-ombudsman.org.uk/consumer/complaints.htm (29 January 2010), p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.11-12; Oksay and Ceylantepe, p.56.

[169] Financial Ombudsman Service, *FAQs – Complaining to the Ombudsman, How Long Does It Take?*, http://www.financial-ombudsman.org.uk/faq/answers/complaints_a6.html (29 January 2010), p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12; Oksay and Ceylantepe, p.56.

[170] Oksay and Ceylantepe, p.56.

It is fundamental for the Financial Ombudsman Service to approach each complaint in its own circumstances. A significant result of this is that the Financial Ombudsman Service is independent from a decision or conclusion made for a similar application before and that it can come to a different conclusion in each circumstance. Thus, for the complaints made to the Financial Ombudsman Service, it is not possible to indicate any previous decisions as precedent[171].

In the UK, not every person or organization have the right to make a complaint to the Financial Ombudsman Service. Those who can make a complaint to the Financial Ombudsman Service include[172]:

- Personal customers,
- Companies with an annual turnover of less than one million sterling,
- Charities with an annual income of less than one million sterling,
- Trusts with a net worth of less than one million sterling.

Other than the abovementioned persons and organizations, there are also other parties which can make a complaint to the Financial Ombudsman Service. The employers, for example, also have the right to make a complaint about group policies issued to employers, but covering employees[173].

However, consumers can only benefit this service concerning the companies of which they are a customer. Following a traffic accident, for example, it is not possible to make a complaint to the Financial Ombudsman Service against the insurance company of the other party[174].

---

[171] Oksay and Ceylantepe, p.56-57.

[172] Financial Ombudsman Service, *FAQs - Complaints from Businesses, Charities and Trusts*, http://www.financial-ombudsman.org.uk/faq/answers/complaints_a9.html (29 January 2010), p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12; Oksay and Ceylantepe, p.57.

[173] Financial Ombudsman Service, *FAQs - Complaints We Cover*, http://www.financial-ombudsman.org.uk/faq/ answers/complaints_a2.html (29 January 2010), p.1; Oksay and Ceylantepe, p.57.

[174] *FAQs - Complaints We Cover*, p.1; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12; Oksay and Ceylantepe, p.57.

Companies against which consumers can make a complaint to the Financial Ombudsman Service include[175]:

- All companies that provide personal services and that are subject to the regulations of the Financial Services Authority (FSA)[176],
- Companies against which it was possible to make a complaint to the ombudsman offices and complaint bureaus existing before the establishment of the Financial Ombudsman Service,
- Companies which are classified in neither of these categories but willing to voluntarily allow their customers to use the services of the Financial Ombudsman Service.

It is obligatory for companies which are included in the first two categories above to be a part of the complaint procedure within the Financial Ombudsman Service. However, voluntary participation is valid for companies included in the last category[177].

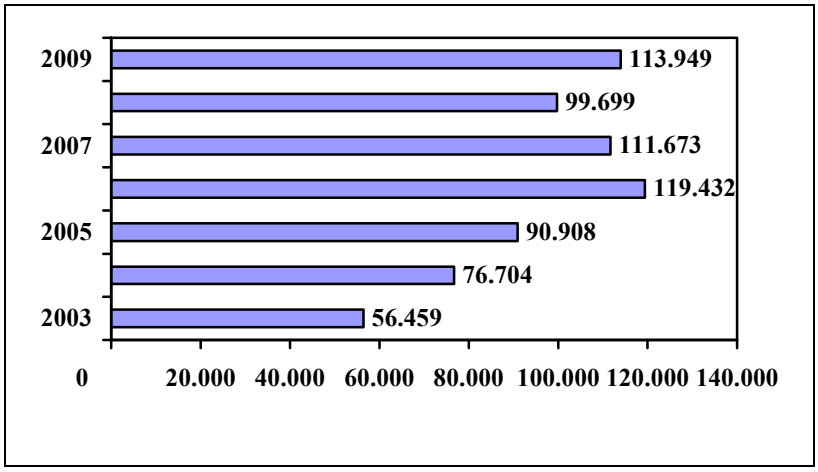

Figure 1. Number of Cases Resolved by the Financial Ombudsman Service as at the Financial Year Ended 31 March 2009.
Source: Financial Ombudsman Service, Annual Review, Financial Year 2008/09.

The number of disputes settled by the Financial Ombudsman Service in the UK are presented in Figure 1. When Figure 1 is reviewed, it will be seen that the number of

[175] Oksay and Ceylantepe, p.57-58.
[176] Within the scope of the implementation of the Insurance Intermediaries Directive 2002/92/EC, insurance intermediaries have also been made subject to FSA regulations as from 14 January 2005. Oksay and Ceylantepe, p.57.

cases has almost doubled since 2003. In the financial year 2008/09, a total of 113,949 disputes were settled by the Financial Ombudsman Service in the UK and the number of resolved cases increased by 14% compared to the previous year. Moreover, in the financial year 2008/09, the Financial Ombudsman Service resolved 30% of disputes within 3 months, 26% within 6 months, 21% within 9 months and 11% within 12 months. Only 12% of disputes could not be resolved during the financial year 2008/09[178].

The distribution of complaints made to the Financial Ombudsman Service according to their areas is shown in Figure 2. When Figure 2 is reviewed, it will be seen that complaints relating to insurance made up 39.5% of the total number of cases that the Financial Ombudsman Service received during the financial year 2008/09[179].

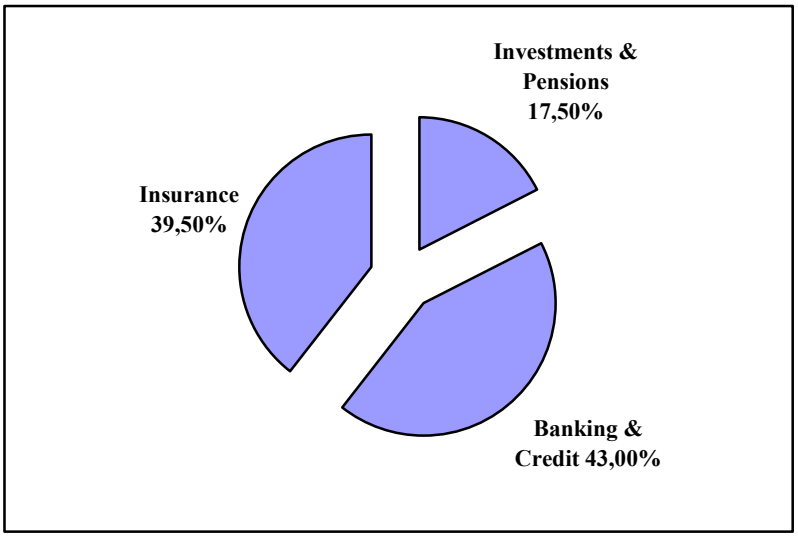

Figure 2. Cases at the Financial Ombudsman Service by Area of Complaint as at the Financial Year Ended 31 March 2009.
Source: Financial Ombudsman Service, Annual Review, Financial Year 2008/09.

On the other hand, the Financial Ombudsman Service deals with complaints only if they are made within the relevant time limits. Those making a complaint should submit their applications to the Financial Ombudsman Service within[180]:

[177] Oksay and Ceylantepe, p.58.
[178] Financial Ombudsman Service, **Annual Review, Financial Year 2008/09**, London, May 2009, p.60.
[179] *Annual Review, Financial Year 2008/09*, p.30.
[180] Oksay and Ceylantepe, p.59.

- six months after the final response letter of the relevant company to the complainant,
- six years from the date of the event complained about,
- three years from the date when the complainant knew, or should have known, that he/she had a cause for complaint.

The complaints to the Financial Ombudsman Service are firstly dealt with by the Customer-Contact Division of the Service and necessary information is given to the consumers. If the problem of the consumer cannot be solved at this stage, the problem will then be tried to be solved by unofficially helping the relevant company and the consumer to reach an agreement[181].

In the event that the problem cannot be solved by attempts to inform and reconcile the parties, the adjudicators within the Financial Ombudsman Service, who have the authority to make the first decision, deal with the relevant complaints and share their conclusions with the parties. The adjudicator prepares an official report covering the details and recommendations for resolution and sends it to the parties in complicated issues. If the parties find the resolution proposed by the adjudicator appropriate, the conflict will be resolved[182].

If the parties do not agree on the resolution proposed by the adjudicator who has the authority to make the first decision, both the consumer and the company has the right to request that an Ombudsman review the issue and make the final decision. Decisions made by the Ombudsman are final in terms of the complaints procedure of the Financial Ombudsman Service. It is not possible to object to these decisions on any unit of the Financial Ombudsman Service or to request the handling of the issue by another Ombudsman again[183].

---

[181] Financial Ombudsman Service, *Your Complaint and the Ombudsman - Our Consumer Leaflet*, http://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm (29 January 2010), p.3-4; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12; Oksay and Ceylantepe, p.60.

[182] *Your Complaint and the Ombudsman - Our Consumer Leaflet*, p.4; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12; Oksay and Ceylantepe, p.60.

[183] *Your Complaint and the Ombudsman - Our Consumer Leaflet*, p.4; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.12-13; Oksay and Ceylantepe, p.60-61.

If the decision made by the Ombudsman is accepted by the consumer in a given time, both the consumer and the company have to comply with this decision. In cases where this decision is not accepted by the consumer, it will not be binding on both sides. At this stage, the consumer can claim his/her rights by litigation[184].

In the decisions made by the Ombudsman, as well as it is possible that a compensation is awarded, the companies can also be shown the proper steps concerning the resolution. Within this framework, awarded compensations are binding on companies up to 100,000 sterling. If companies do not abide by a decision made by the Ombudsman and agreed by the consumer, the consumer has the right to request the enforcement of this decision from the Court[185].

Another important point for the effective and efficient functioning of the Ombudsman system is how the financing of the system will be met. Case fees paid by the companies against which a complaint has been made constitute the greatest financing source of the Financial Ombudsman Service. As at March 2009, the total amount of the case fees paid to the Financial Ombudsman Service was 46.1 million sterling (See Table 1). This amount constituted 70.1% of the total income of the Financial Ombudsman Service[186].

Another important income item of the Financial Ombudsman Service is annual contributions of the companies. When Table 1 is reviewed, it can be seen that the total annual levy paid by the companies was 19.3 million sterling as at March 2009. This amount constituted 29.3% of the total income[187].

Consumers do not pay any fees for making a complaint to the Financial Ombudsman Service and there is not any subsidy from the state budget to the system[188].

---

[184] *Your Complaint and the Ombudsman - Our Consumer Leaflet*, p.4; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.13; Oksay and Ceylantepe, p.61.

[185] *Your Complaint and the Ombudsman - Our Consumer Leaflet*, p.2; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.13; Oksay and Ceylantepe, p.61.

[186] *Annual Review, Financial Year 2008/09*, p.66.

[187] *Annual Review, Financial Year 2008/09*, p.66.

[188] Financial Ombudsman Service, *FAQs - Funding*, http://www.financial-ombudsman.org.uk/faq/answers/research_a5.html (29 January 2010), p.1-2; Oksay, *Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü*, p.13; Oksay and Ceylantepe, p.63.

Table 1

Income and Expenditure Summary of the Financial Ombudsman Service as at the Financial Year Ended 31 March 2009

	actual **year ended 31 March 2009**	actual **year ended 31 March 2008**	actual **year ended 31 March 2007**
income	£ million	£ million	£ million
annual levy	19.3	19.6	16.6
case fees	46.1	35.5	36.1
other income	0.4	0.4	0.4
total income	65.8	55.5	53.1
expenditure			
staff-related costs	47.8	41.2	42.5
other costs	8.7	10.0	9.7
financing charges	0.1	0.2	0.3
depreciation	1.4	1.7	2.5
total expenditure	58.0	53.1	55.0
exceptional costs	-	2.9	-
surplus/(deficit)	7.8	(0.5)	(1.7)

Source: Financial Ombudsman Service, Annual Review, Financial Year 2008/09.

B. IRELAND

The Insurance Ombudsman of Ireland was established in Ireland in 1992 by the companies which were operating in the insurance sector, for the resolution of disputes on life and non-life insurances. However, following the Central Bank and Financial Services Authority of Ireland Act enacted in 2004, in order to gather all finance sector under one roof, the Insurance Ombudsman of Ireland was superseded by the Financial Services Ombudsman Bureau established in 2005. The Financial Services Ombudsman Bureau, established pursuant to the relevant law, provides services not only for the resolution of disputes associated with insurance but also to the whole finance sector, similar to the UK example[189].

[189] Tolga Ceylantepe, "Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği", **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını, No.9 (July-September 2007), p.12; Oksay and Ceylantepe, p.63.

The Financial Services Ombudsman Bureau, starting its duty beginning from 1 April 2005 as a public organization, gathers all ombudsman bureaus existing before and working voluntarily under one roof. The Financial Services Ombudsman deals with disputes between consumers and financial services providers. The organization is completely independent when fulfilling its duty to resolve complaints made by the consumers[190].

Successful work of previous ombudsman bureaus serving sector specifically and approaches to make consumers benefit more from such services have been influential on the establishment of the Financial Services Ombudsman Bureau. Indeed, it is an indicator of the confidence in the Insurance Ombudsman Bureau established voluntarily by the sector and providing services for consumers that the previous Insurance Ombudsman Bureau together with its whole personnel has been adapted to this structure. Within this context, although this central structure can be considered to bring a new opening to sectors other than the insurance sector, it should be expressed that the centralization of successful and sector specific ombudsman mechanisms is harshly criticized[191].

The Financial Services Ombudsman has the authority to mediate for the resolution of problems and decide on the resolution thereof. However, an appeal to the High Court against these decisions is possible. Among those who can make a complaint to the Financial Services Ombudsman are personal customers, limited companies with an annual turnover of less than 3 million Euros, charity organizations, associations, trusts, etc[192].

The financing of the Financial Services Ombudsman Bureau is provided by the contributions taken from financial services providers and no application fee is paid for

---

[190] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - About Us - Overview*, http://www.financialombudsman.ie/about-us/ (29 January 2010), p.1-2; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.14; Oksay and Ceylantepe, p.65-66.

[191] Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.14; Oksay and Ceylantepe, p.66.

[192] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - Home*, http://www.financialombudsman.ie/ (29 January 2010), p.1-2; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.14; Oksay and Ceylantepe, p.66.

the complaints made by consumers[193]. If it is preferred to take professional aid for the applications to be made to the Bureau, the expenses related to this aid shall be met by the consumer[194].

To be able to make a complaint to the Financial Services Ombudsman Bureau, the consumers should have first contacted the financial services provider with which they have a problem and after all negotiations with this establishment, they should have been unable to find a resolution to their problems. Thus, directly making a complaint to the Financial Services Ombudsman before applying to the complaint mechanism of the relevant company is not possible[195].

On the other hand, the Financial Services Ombudsman may not investigate a matter which is or has been the subject of legal proceedings before a court or tribunal, or occurred more than six years before the complaint is made[196].

Within the framework of the abovementioned issues, it is first reviewed whether the complaints made to the Financial Ombudsman Bureau are within the jurisdiction of the Bureau. If it is concluded in this examination that the issue is within the jurisdiction of the Bureau, the Deputy Financial Services Ombudsman will deal with the issue and review whether a satisfactory answer has been given to the consumer about his/her complaint made to the financial services provider. If the Deputy concludes that the issue has been settled by the relevant company in a proper way, the consumer is

---

[193] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - Guide for Complainants - Costs*, http:// www.financialombudsman.ie/making-a-complaint/costs.asp (29 January 2010), p.1; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.14; Oksay and Ceylantepe, p.66.

[194] *Financial Services Ombudsman's Bureau of Ireland - Guide for Complainants - Costs*, p.1; Oksay and Ceylantepe, p.66.

[195] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Initial Steps*, http:// www.financialombudsman.ie/complaints-procedure/ (29 January 2010), p.1; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.66.

[196] Irish Financial Services Ombudsman, *The Financial Services Ombudsman's Bureau of Ireland, Making a Complaint, Overview*, http://www.financialombudsman.ie/making-a-complaint/ (15 January 2010), p.1; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.67.

informed thereof. The consumer's right to take the issue to the Financial Services Ombudsman is reserved[197].

If the Deputy Financial Services Ombudsman is in the opinion that the situation has not been settled by the company in a proper way, he/she can ask for additional information and documents from the company. The companies have to fulfil this request within 25 days. After these documents have been reviewed, the Deputy Financial Services Ombudsman prepares an advisory report and shares this with the parties. In the event that the parties find this report acceptable, the problem will be solved and conclusions arrived at by the report will become binding on the parties. Otherwise, the parties must express their reservations by applying to the Bureau within 25 days. In this case, the Deputy Financial Services Ombudsman prepares an advisory report and submits it to the Financial Services Ombudsman with other documents. Decisions made by the Financial Services Ombudsman are binding on both parties and can only be appealed to the High Court[198].

Within the framework of this decision, it is possible for the Financial Services Ombudsman to make awards up to 250,000 Euros, to impose sanctions for ending the practice which has caused the relevant complaint or to take precautions to remove the consequences of the incident against which the complaint has been made[199].

To this extent, it can be expressed that the Financial Services Ombudsman has very broad authorities for the protection of consumers. Indeed, the Ombudsman has the authority to investigate on the file and on the field and to turn to affidavits of the relevant personnel of the company. In case of conduct directed to hinder the performing

---

[197] *Making A Complaint, Overview*, p.1-2; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.67.

[198] *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Initial Steps*, p.1-3; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.67.

[199] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Redress,* http://www.financialombudsman.ie/complaints-procedure/redress.asp (29 January 2010), p.1; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.67-68.

of the Ombudsman, fines up to 2,000 Euros and/or three months imprisonment are at stake[200].

C. FRANCE

In France, regarding the use of ADR mechanisms for insurance complaints, a mediation protocol has been prepared by the National Consumers Institute (Institut National de la Consommation) representing the consumers and the Advisory Commission of the National Insurance Council (Commision Consultative du Conseil National des Assurances) representing the regulatory bodies in the sector and this protocol has been signed by all the insurance companies. Within this context, companies have a preference for providing ADR services within their own bodies or participating in the systems established by the associations of which they are a member[201].

In 1993, a mediation system was established by the French Federation of Insurance Companies (FFSA) to ensure that consumer complaints are resolved by the member companies of the Federation more quickly and economically. This system established by the FFSA is based on voluntary participation. Thus, only complaints against companies that are a party to the mediation protocol are dealt with within the system[202].

The financing of the mediation system is obtained from FFSA and consumers do not pay any fees for making a complaint. Although this system works under the roof of the Federation, investigations into complaints are carried out independently of the Federation[203].

---

[200] Irish Financial Services Ombudsman, *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Refusal to Cooperate*, http://www.financialombudsman.ie/complaints-procedure/refusal.asp (29 January 2010), p.1; Ceylantepe, *Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği*, p.15; Oksay and Ceylantepe, p.68.

[201] Oksay and Ceylantepe, p.68.

[202] Tolga Ceylantepe, "Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA", **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını, No.8 (April-June 2007), p.18; Oksay and Ceylantepe, p.68.

[203] Ceylantepe, *Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA*, p.19; Oksay and Ceylantepe, p.68.

A board consisting of the President of the National Consumers Institute (Institut National de la Consommation), the President of the Advisory Commission of the National Insurance Council (Commision Consultative du Conseil National des Assurances), and the President of the FFSA choose the person who will function as the mediator in the system for a renewable term of three years[204]. Another important issue that supports the confidence in the system is that the mediator is chosen by a commission independent from FFSA[205].

The complainant should have first applied to the relevant insurance company for the resolution of the dispute so that the mediator can investigate the dispute. In complaints to the mediator, there are not any limitations on the amount of the dispute[206].

In case the disputing parties cannot reconcile among themselves while the complaint is being investigated by the mediator, the decision that will be made at the end of the procedure is considered as a non-binding opinion. Since decisions made by the mediator are not binding on the parties, their right to litigate is reserved. Although decisions are to be made within three months according to the mediation protocol, this period can be exceeded in practice[207].

D. GERMANY

There are currently 203 ADR centres for out-of-court resolution of disputes in Germany[208]. From among these, two ombudsman offices are dealing with disputes on insurance and operating in the whole country. The PKV Ombudsman (Private Kranken- und Pflegeversicherung Ombudsmann) provides mediation services only for disputes between the insured and the insurer on private health and long-term care insurances.

---

[204] Ceylantepe, *Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA*, p.18.
[205] Oksay and Ceylantepe, p.69.
[206] Ceylantepe, *Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA*, p.18-19; Oksay and Ceylantepe, p.69.
[207] Ceylantepe, *Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA*, p.19; Oksay and Ceylantepe, p.69.
[208] European Commission, *The European Commission, Database of Notified Out-Of-Court Bodies*, http://ec.europa.eu/ consumers/redress/out_of_court/database/index_en.htm (15 January 2010), p.1.

The Insurance Ombudsman Society (Versicherungsombudsmann e.V.), on the other hand, deals with the resolution of disputes on all other insurance branches[209].

The Insurance Ombudsman Society works on voluntary basis. All companies in the sector that are a member of the German Insurance Association (Gesamtverband der Deutschen Versicherungwirtschaft – GDV) can be a part of the system at their will. More than 40 personnel are working in the Insurance Ombudsman Society. These personnel respond to information requests made by telephone as well as the written complaints[210].

The German Insurance Ombudsman is chosen by member insurance companies and starts working after the approval of the Board consisting of 30 people including insurers, consumer organizations and the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin). To be chosen as an Ombudsman, it is obligatory that the relevant person has knowledge about insurance and holds the necessary qualifications for this position, most notably being independent. The term of office of the Ombudsman is five years and re-election is not possible[211].

Complaints resolved by the German Insurance Ombudsman are presented in Table 2. In the year 2008, a total of 18,801 complaint files were reviewed and closed by the German Insurance Ombudsman and the number of closed cases increased by 11% compared to the previous year. Moreover, the average duration of the complaints procedure was three months in the year 2008[212].

---

[209] *Members of FIN-NET*, p.2; Oksay and Ceylantepe, p.70.

[210] Ombudsmann für Versicherungen, **Jahresbericht 2008**, Berlin, 2009, p.42-43; Oksay and Ceylantepe, p.70-71.

[211] Ombudsmann for Versicherungen, *Ombudsmann für Versicherungen, Der Beirat*, http://www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/DerBeirat/index.html (15 January 2010), p.1; *Stellung und Kompetenzen des Ombudsmanns*, http://www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/StellungUndKompetenz/index.html (15 January 2010), p.1; Oksay and Ceylantepe, p.71.

[212] *Jahresbericht 2008*, p.63.

Table 2

Number of Cases Concluded by the German Insurance Ombudsman in the Year 2008

	2008	2007	2006	2005	2004
Admissible Complaints	13.412	10.906	11.307	7.323	7.102
Inadmissible Complaints	4.709	5.261	5.065	3.663	3.039
Not Followed by the Complainant	680	722	666	288	1.158
Total	**18.801**	**16.889**	**17.038**	**11.274**	**11.299**

Source: Ombudsmann für Versicherungen, Jahresbericht 2008.

In order for the Insurance Ombudsman to be able to deal with a complaint, the complainant should have first applied to and received a final response from the relevant insurance company. Also, the insured party has to make his/her complaint within 6 weeks at most after the final response has been given by the company[213].

The Ombudsman deals with the complaints of consumers up to 80,000 Euros. Within this framework, decisions on complaints up to 5,000 Euros are binding on insurance companies. However, decisions on complaints between 5,000 and 80,000 Euros are advisory[214].

The financing of the Ombudsman system in Germany is obtained from the German Insurance Association (GDV) and insurance companies while the consumers do not pay any application fees for their complaints. Insurance companies participate to the financing of the system in proportion to their market shares and collected premium amounts[215].

[213] *Jahresbericht 2008*, p.64; Oksay and Ceylantepe, p.71.

[214] Ombudsmann für Versicherungen, *Wie endet das Verfahren?*, http://www.versicherungsombudsmann.de/Navigationsbaum/IhreBeschwerde/Verfahrensende/index.html (15 January 2010), p.1; Oksay and Ceylantepe, p.71.

[215] Ombudsmann für Versicherungen, *Wichtige Informationen über das Beschwerdeverfahren gegen Versicherungsunternehmen*, http://www.versicherungsombudsmann.de/Navigationsbaum/IhreBeschwerde/Verfahrensende/index.html (15 January 2010), p.1; Oksay and Ceylantepe, p.71.

E. FINLAND

A system was established for the resolution of consumer complaints on insurance in Finland by the Federation of Finnish Insurance Companies and the Finnish Consumer Agency according to an agreement signed in 1971. This system consists of the Finnish Insurance Ombudsman Bureau, the Supervisory Board of the Bureau, and the Finnish Insurance Complaints Board[216].

1. Finnish Insurance Ombudsman Bureau

The Finnish Insurance Ombudsman Bureau working as the secretariat of the Finnish Insurance Complaints Board has 14 permanently working personnel. The Bureau also works with external advisors on medical and technical issues when necessary[217].

The main function of the Finnish Insurance Ombudsman Bureau is to inform consumers and help the insured parties and the insurers with the resolution of disputes. The Bureau works on resolution activities of disputes on all non-compulsory insurance branches and some compulsory insurance branches. Motor vehicles and the environment insurance are among the abovementioned compulsory insurance branches. In this context, the Bureau makes recommendations to the consumers on their request. Although these recommendations are made in the shortest possible time, this can take two weeks or a couple of months in practice. These recommendations are generally relating to the price and coverages of insurances presented on the market[218].

Among the duties of the Bureau are making investigations and collecting evidence on the issues to be decided by the Finnish Insurance Complaints Board, and trying to find a solution to the complaint by getting in contact with the insurance company before the complaint is submitted to the Board. The Bureau shares its statistics

[216] Oksay and Ceylantepe, p.72.
[217] Oksay and Ceylantepe, p.72.
[218] Oksay and Ceylantepe, p.72.

on the complaints with insurance companies, thereby enabling them to determine the primary problems and take measures accordingly[219].

As of 1.1.2009, together with the Advisory Office for Bank Customers and the Finnish Securities Complaint Board, the Finnish Insurance Ombudsman Bureau merged into the Finnish Financial Ombudsman Bureau. The new bureau provides advisory services to private and small corporate customers in questions relating to the banking, insurance and securities business[220]. As banking and insurance products have become closely related, it has been considered beneficial that the customers have guidance for both products in the same location[221].

2. Finnish Insurance Complaints Board

The Finnish Insurance Complaints Board reviews the complaints made by the insured parties, parties who have incurred a loss or damage, persons shown as beneficiary in the policy and insurance companies. Within this framework, considering the function of the Board to comment on some complaints made by the companies, it can be said that the Board functions beyond a classical consumer complaints mechanism. In addition to this, insurance agencies are not included in the system, thus insurance agencies cannot make a complaint and a complaint against insurance agencies cannot be made[222].

Disputes concerning non-compulsory insurance contracts and compensation payments made under such contracts are considered by the Insurance Complaints Board. However, The Finnish Insurance Complaints Board cannot be approached for disputes started to be discussed before the court[223].

---

[219] Oksay and Ceylantepe, p.72-73.

[220] Finnish Financial Supervisory Authority, *The Finnish Financial Ombudsman Bureau*, http://www.finanssivalvonta.fi/en/Customer/Contact_for_help/Fine/Pages/Default.aspx (15 January 2010), p.1.

[221] Federation of Finnish Financial Services, *The Finnish Insurance Ombudsman Bureau*, http://www.venevahinko.fi/www/page/fk_www_4582 (15 January 2010), p.1.

[222] European Commission, *The Finnish Insurance Complaints Board (Vakuutuslautakunta)*, http://ec.europa.eu/consumers/redress/out_of_court/commu/ acce_just04_fi_ccb2_en.html (15 January 2010), p.1; Oksay and Ceylantepe, p.73.

[223] European Commission, *Alternative Dispute Resolution: Finland*, http://ec.europa.eu/ civiljustice/adr/adr_fin_en.htm (15 January 2010), p.2; Oksay and Ceylantepe, p.73.

Having a president and two deputy presidents, the Board works with four subcommittees. However, decisions on issues considered important are made in meetings with the participation of all members. The president of the Board chairs these meetings participated by all members, and also one of the subcommittees. The deputy presidents of the Board chair other subcommittees. Half of the subcommittee members are consumer representatives (2 people) and the other half consists of representatives from the insurance sector (2 people)[224].

The President of the Board and the members are appointed by the Supervisory Board of the Finnish Insurance Ombudsman Bureau for a three-year-term. There is not a time limit for complaints made to the Board on any issue. However, the statutory time limits applicable to the claims arising from the insurance contract is binding on the Board as well. On the other hand, there are not any limitations on the amount of the dispute concerning the complaints made to the Board[225].

The Board makes decisions on approx 1,000 complaints every year. Decisions made by the Board are advisory. However, it can be said that in practice, the rate of complying with these decisions is quite high and especially insurance companies comply with almost all the decisions made by the Board[226].

General liability insurances are in the first place while accident insurances are in the second and legal protection insurances are in the third place among all the complaints made to the Board[227].

The financing of the system is provided by the insurance companies in the sector while consumers benefit cost-free from the services of the Finnish Insurance Complaints Board and the Finnish Insurance Ombudsman Bureau[228].

---

[224] *The Finnish Insurance Complaints Board (Vakuutuslautakunta)*, p.1; Oksay and Ceylantepe, p.73.
[225] *The Finnish Insurance Complaints Board (Vakuutuslautakunta)*, p.1; Oksay and Ceylantepe, p.73.
[226] Oksay and Ceylantepe, p.74.
[227] Oksay and Ceylantepe, p.74.
[228] European Commission, *Alternative Dispute Resolution: Finland*, http://ec.europa.eu/civiljustice/adr/adr_fin_en.htm (15 January 2010), p.2; Oksay and Ceylantepe, p.74.

F. SWEDEN

The Swedish National Board for Consumer Complaints works within the Ministry of Finance. The president, deputy president, 18 unit managers and 200 expert members work within the Board. The president, deputy president and unit managers of the Board are appointed by the government and these people should be lawyers and have experience as a judge. The term of office for unit managers is two years. Expert members are appointed by the president for three years in accordance with the recommendations of institutes and organizations representing sectors and consumers. These institutes and organizations are determined by the government[229].

The duties of the Board include[230]:

- Reviewing and making recommendations on the problems between consumers and goods and service providers,
- Forming opinions for the courts in case of their request,
- Helping local consumer organizations by providing training, recommendations and information on their roles concerning mediation.

The board deals with consumer complaints by its departments working on the specific issue of the relevant complaint. Within this framework, the department of banking, boating, electronics, motor vehicle, travel, textiles and insurance are among the existing departments[231].

Within this framework, disputes concerning insurances are reviewed by the insurance unit. The insurance unit reviews the complaint of the dispute only if it exceeds 2,000 SEK (195 Euros). While this limit is determined as the same for banking and shipping sectors, the limit for issues concerning motor vehicles is determined as

[229] European Commission, *Information on the National Board for Consumer Complaints (ARN)*, http://ec.europa.eu/consumers/redress/out_of_court/commu/acce_just04_sv_ccb1_en.html (15 January 2010), p.1; Oksay and Ceylantepe, p.74.
[230] Oksay and Ceylantepe, p.74-75.
[231] ARN-The National Board for Consumer Complaints, *What is ARN*, http://www.arn.se/_Other-languages/English/ (15 January 2010), p.1-2; Oksay and Ceylantepe, p.75.

1000 SEK (98 Euros), and for disputes on shoes and textile, it is determined as 500 SEK (49 Euros)[232].

In order for an insurance consumer to make a complaint to the board, he/she has to try to solve the dispute with the relevant insurance company first. Consumers must make a complaint to the Board within 6 months following the negative answer by the insurance company. The procedures of the Board are entirely in writing, thus the parties do not have to be present in the meetings on their issues[233].

Under normal conditions, the relevant units decide in meetings under the presidency of the president, the deputy president, or the unit managers with the participation of two expert members representing relevant sectors and consumer organizations. Although in some cases the number of people present in the meeting changes, the representation of sectors' and consumers' benefits on equal basis is obligatory. Thus, it is possible to hold a general meeting on some issues considered to be important. In this case, the participation of the president or deputy president, two thirds of the unit managers and not less than four expert members in the meeting is required[234].

As decisions made by the Board as a result of the investigations are advisory for both parties, these decisions are not binding on the parties. When relevant decisions are not complied with, the consumers can apply to the litigation. However, in practice, insurers and goods and services providers comply with these decisions almost all the time[235].

On the other hand, services of the Board are not subject to any payment for both parties. In cases where the Board needs an investigation report, costs of this report are paid by the consumer. However, when the consumer is considered to be rightful as a

[232] *What is ARN*, p.2; Oksay and Ceylantepe, p.75.
[233] *What is ARN*, p.2-3; Oksay and Ceylantepe, p.75.
[234] *Information on the National Board for Consumer Complaints (ARN)*, p.1; Oksay and Ceylantepe, p.75.
[235] *Information on the National Board for Consumer Complaints (ARN)*, p.1; Oksay and Ceylantepe, p.76.

result of the investigation by the Board, the consumer can demand these costs from the insurer[236].

G. BELGIUM

The Ombudsman system in Belgium which was operating within the Insurance Companies Association (Assuralia) for the resolution of insurance disputes and to which people could only apply against companies that are members of the Association (Omdusman de l'Union professionnelle des entreprises d'assurance) was superseded by the Ombudsman mechanism providing services for the whole insurance sector in 2001. Within this framework, it is also possible for the consumers to make a complaint to the Ombudsman against insurance agencies since 2002. The new structure of the Ombudsman system aims at serving consumers better and being the Ombudsman of the insurance sector[237].

The Belgian Ombudsman's function is to investigate consumer disputes in the insurance industry and provide mediation between a consumer and an insurance company or an intermediary. The Ombudsman must be approached in writing. He/she produces a reasoned written opinion at the earliest opportunity and in all cases within six months. Consumers do not pay any application fee for the complaints they make to the Ombudsman[238].

H. POLAND

The Polish Insurance Ombudsman institution was established according to the legal regulations adopted in Poland in 1995[239]. The main function of the institution performing public service is to protect contractual benefits of consumers. Ever since the

---

[236] *Information on the National Board for Consumer Complaints (ARN)*, p.1; Oksay and Ceylantepe, p.76.

[237] Oksay and Ceylantepe, p.76.

[238] European Commission, *Alternative Dispute Resolution:Belgium*, http://ec.europa.eu/civiljustice/adr/adr_bel_en.htm (15 January 2010), p.5.

[239] The Insurance Ombudsman was created in 1995 as the effect of amendments to the Act of 8 June 1995 (Journal of Laws 1995 No. 96 item 478). Polish Insurance Ombudsman, *Causes of Creating the Insurance Ombudsman Institution in Poland*, http://www.rzu.gov.pl/english/Causes_of_creating_the_Insurance_Ombudsman_institution_in_Poland__2322 (15 January 2010), p.1.

establishment of the institution, it has provided mediation service for the resolution of disputes between the insurers and the insured parties[240].

The Insurance Ombudsman is the president of the institution. The Insurance Council including participants from various associations and organizations in Poland function as the advisory body of the Ombudsman institution. The Insurance Ombudsman is appointed by the Prime Minister of Poland. The term of office of the person appointed as the Ombudsman is four years and no one can perform as an Ombudsman longer than two terms. If a gross violation of interests of the insurers, policyholders, members of the Pension Funds and other subjects entitled to the insurance service is committed, the Insurance Ombudsman can be dismissed before the end of his/her office by the Prime Minister on motion of the Minister of Finance and the minister of Social Security after the Insurance Council has pronounced an opinion[241].

There has been an arbitration court performing within the Ombudsman office ever since 2004. This court can follow two types of procedures[242]:

- An arbitration procedure as a result of which a decision for the resolution is going to be made,
- A mediation procedure which will be carried out by a mediator who will be chosen by the parties from among the arbitrators working within the court.

According to the relevant legislation, it is stipulated that there shall be at least 20 arbitrators within the court, not less than half of whom must be lawyers. Currently, there are 25 arbitrators in the court in total, 14 of whom are lawyers[243].

This court can be approached for disputes, court value of which is 1,000 PLN (250 Euros) and more. Disputes between 1,000 and 5,000 PLN (250-1,250 Euros) are

[240] Oksay and Ceylantepe, p.78-79.
[241] *Causes of Creating the Insurance Ombudsman Institution in Poland*, p.3; Oksay and Ceylantepe, p.79.
[242] Oksay and Ceylantepe, p.79.
[243] Oksay and Ceylantepe, p.79.

dealt with by an arbitrator while an arbitration panel consisting of three arbitrators makes the decision for disputes exceeding this amount[244].

Making an application to the Arbitration Court is subject to a fee and 15 PLN (4 Euros) is paid by the consumers as an application fee. Besides, there is an arbitration fee covering the costs of the arbitrators and varying according to the issue of the complaint. A lower limit as 100 PLN (25 Euros) is determined for the arbitration fee[245].

The financing of the Polish Insurance Ombudsman office is obtained from the annual contributions made by the insurance and pensions companies and the fees paid by the consumers applying for the dispute resolution. Annual contributions of insurance and pensions companies are calculated as not exceeding 0,01% of their gross collected premium[246].

İ. OTHER EUROPEAN UNION MEMBER STATES

In addition to the countries reviewed above, there are various mechanisms dealing with consumer complaints or providing ADR service in the Member States of the EU. Within this framework, in Italy, for example, the first Insurance Ombudsman office was established in 1971. A system dealing with consumer complaints within the relevant Ministry is already in service in Greece. Various ombudsman mechanisms concerning consumer activities are available in the Netherlands. In Luxembourg, an ADR mechanism intended to settle insurance disputes was established by the Insurance Companies Association and the Consumers Association[247].

In Denmark, although there is not an Ombudsman mechanism concerning consumer complaints and consumer disputes on insurance, also an Insurance Complaints Board is working with the Consumers Council. The Board consists of a president who is a high-ranking judge and two members representing consumers and the sector and decides the cases. Decisions made against an insurance company or an agency are binding on the relevant company or agency unless the decision is objected

[244] Oksay and Ceylantepe, p.79.
[245] Oksay and Ceylantepe, p.80.
[246] Oksay and Ceylantepe, p.80.
[247] *Members of FIN-NET*, p.2-4; Oksay and Ceylantepe, p.80.

within four weeks. In this case, if the consumer takes the issue to the court, he/she can request costs and legal aid from the insurance company[248].

As seen, there is not a common practice for introduction and implementation of ADR mechanisms in the Member States of the EU. However, the tendency to develop ADR mechanisms for consumers in the EU increases each day[249].

Indeed, The European Insurance and Reinsurance Federation (CEA) also supports studies conducted by the EU concerning ADR practices. Besides, CEA particularly emphasizes that it should not be obligatory for companies to participate in and use the ADR mechanisms, non-flexible and strictly formal structures should not be established and legislation of Member States should be harmonized with the principles in the Recommendations dated 1998 and 2001 both of which determine the basic principles of the EU on ADR[250].

[248] Oksay and Ceylantepe, p.80.
[249] Oksay and Ceylantepe, p.80-81.
[250] Oksay and Ceylantepe, p.81.

ALTERNATIVE DISPUTE RESOLUTION IN TURKISH INSURANCE LAW

I. ALTERNATIVE DISPUTE RESOLUTION IN TURKISH INSURANCE LAW

In Turkish insurance law, ADR methods have not undergone an important development to date. However, if separate arrangements present in our positive law are examined, it will be seen that there are rarely used arrangements that may be described as ADR in Turkish insurance law.

In practice, although it is not prescribed by laws, for the settlement of disputes arising from insurance contracts and relating to the appraisal of the insurance indemnity, the arbitrator-experts institution is accepted in general terms of insurance policies. Regarding this practice, it has been a debate subject in the beginning whether the arbitrator-experts institution is an arbitration institution. However, as a result of the established precedents of the Supreme Court, it has already been accepted that the arbitrator-experts practice does not have the characteristic of an arbitration process. It is an evidence agreement regulated in Art. 287/2 of the Code of Civil Procedure and just relating to the appraisal of the damage and the insurance indemnity to be paid[251]. For this reason, after arbitrator-experts have assessed the damages for the insured good, they cannot decide who will pay the damages in which proportion. They should have been chosen and appointed as an arbitrator to be able to decide on this matter. Consequently, the practice of arbitrator-experts is not an alternative to arbitration[252].

A. VOLUNTARY ARBITRATION

In Turkish practice, it is very rare in the insurance field that voluntary arbitration agreements are concluded. In such a rare case gone to the Supreme Court, it is decided that the arbitration clause between the policy holder and the defendant carrier

[251] Işıl Ulaş, "Sigortacılıkta Tahkim", **Banka ve Ticaret Hukuku Dergisi**, Vol.XXIV, No.2 (December 2007), p.239-240; Üstündağ, p.939-941; Ulusoy, p.238.
[252] Ulusoy, p.238.

is also binding on the insurer according to the provision of Art. 1361 of the Turkish Commercial Code and in accordance with the principle of legal subrogation[253].

After the Insurance Law No. 5684 entered into force on 14 June 2007, even persons who act as arbitrators in arbitration proceedings which are conducted according to the Code of Civil Procedure shall also meet the criteria sought in insurance arbitrators by Art. 30 of the Insurance Law (Art. 30/23 of the Insurance Law)[254]. Cases referred to voluntary arbitration according to the provisions of the Code of Civil Procedure cannot then be brought to insurance arbitration (Art. 16/2 subpar. (b) of the Regulation on Insurance Arbitration)[255].

While it is possible for a dispute arising from the insurance contract to be referred to domestic arbitration, is it also possible for it to be referred to international arbitration? An insurance dispute must involve a foreign element to be able to be referred to international arbitration[256]. According to Art. 2/1 subpar. (3) of the Turkish International Arbitration Law, the fact that at least one of the partners of the company which is a party to the main contract which forms the basis of the arbitration agreement has brought foreign capital according to the legislation on encouraging foreign investments[257] or it is necessary for this contract to be able to be executed to conclude loan and/or guarantee agreements with the aim of obtaining capital from foreign countries shows that the dispute involves a foreign element and in this case, arbitration gains an international characteristic. Almost all insurance companies operating in Turkey today have foreign capital owners[258]. In that case, almost all disputes arising from insurance contracts in Turkey involve a foreign element and arbitration has an international characteristic accordingly. However, the Law No. 5718 on International

---

[253] Yargıtay HGK 01.02.1995, E. 1995/11-765, K. 1995/39 (**II. Uluslararası Özel Hukuk Sempozyumu: Tahkim**, İstanbul: Tasarruf Mevduatı Sigorta Fonu and Marmara Üniversitesi Hukuk Fakültesi, 14.02.2009) p.453-455; Ulusoy, p.238.

[254] Ulusoy, p.241; Ulaş, p.240; Mertol Can, **Türk Özel Sigorta Hukuku (Ders Kitabı)**, Üçüncü Bası, Ankara: İmaj Yayınevi, Temmuz 2009, p.354; Zekeriya Yılmaz, "Sigortacılık Kanununa Göre Sigortacılıkta Tahkim", **Terazi Hukuk Dergisi**, No.17 (January 2008), p.48.

[255] Can, p.352.

[256] Sibel Özel, **Milletlerarası Ticari Tahkimde Kanunlar İhtilafı Meseleleri**, Birinci Baskı, İstanbul: Legal Yayıncılık, Aralık 2008, p.23-24.

[257] Now, it is called Foreign Direct Investments Law.

[258] For capital owners of insurance, reinsurance and pension companies in Turkey, please see www.sigortacilik.gov.tr (29 January 2010).

Private Law and Procedure Law has determined the courts that have jurisdiction over disputes arising from employment contracts, consumer contracts and insurance contracts with the help of three new articles not included in the Law No. 2675 on International Private Law and Procedure Law. Again, according to Art. 47/2 of the Law No. 5718, the jurisdiction of determined courts cannot be put aside by the agreement of parties. In that case, it cannot be possible for a dispute arising from the insurance contract to be referred to international arbitration.

The Law No. 5718 on International Private Law and Procedure Law has prevented the jurisdiction of competent courts from being put aside by jurisdiction agreements with the aim of protecting the weak party in jurisdiction agreements, i.e. the employee in employment contacts, the consumer in consumer contracts and the policy holder or people benefiting from the insurance contract in insurance contracts. However, it has also prevented a foreign arbitration court from being given jurisdiction by a valid arbitration agreement. In Turkish law, arbitration is not allowed in disputes arising from employment contracts[259]. As for disputes arising from consumer contracts and insurance contracts, domestic arbitration can be approached, whereas international arbitration cannot be approached. It has not been appropriate to prevent disputes arising from insurance contracts from being referred to international arbitration because of the idea that all policy holders and people benefiting from the insurance contract are economically and socially weak.

B. ARBITRATION COMMITTEES FOR CONSUMER PROBLEMS

According to Art. 30/14 of the Insurance Law, people who are in conflict with member establishments of the insurance arbitration system cannot apply to the Insurance Arbitration Commission regarding disputes which have been referred to Court or to the Arbitration Committee for Consumer Problems according to the provisions of the Law on the Protection of Consumers.

An interpretation can be put on this provision that the person who is in conflict with an establishment operating in the insurance business has a free choice either to go

to court or to the Arbitration Committee for Consumer Problems. If the relevant establishment is a member of the insurance arbitration system, the person can also go to the Insurance Arbitration Commission.

The arbitration committees for consumer problems are regulated by the Law No. 4077 on the Protection of Consumers as amended by the Law No. 4822 and provide an alternative to state litigation. According to Art. 22 of the Law No. 4077 on the Protection of Consumers as amended by the Law No. 4822, the Ministry of Industry and Trade is obliged to establish at least one arbitration committee for consumer problems at the centres of provinces and districts to resolve the disputes arising between consumers and sellers. Arbitration committees introduced for the purposes of protecting consumers through using a dispute resolution process which is more simple and works quickly, and of reducing the workload of judicial organs, are an ADR process at the side of consumer courts[260]. Ildır states that the Arbitration Committee for Consumer Problems has been suggested as a process alternative to state litigation for the purposes of reducing the increased workload of general courts, and of facilitating the process for consumers[261]. She describes the Arbitration Committee for Consumer Problems as a formal establishment providing resolution of consumer disputes by means of an alternative to state litigation[262].

According to Art. 22 of the Law No. 4077 on the Protection of Consumers as amended by the Law No. 4822, it is mandatory to apply to arbitration committees regarding disputes of which value is less than a certain amount[263]. In such disputes, the

---

[259] Kuru, Vol. 6, p.5952 et sequa.; Cemal Şanlı, **Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları**, İstanbul, 2005, p.348; Özel, p.49; Üstündağ, p.943.

[260] Hakan Pekcanıtez, "Tüketici Sorunları Hakem Heyeti", **İzmir Barosu Dergisi**, No.3 (Temmuz 1996), p.41; Hakan Pekcanıtez, "Tüketici Mahkemeleri", **İstanbul Barosu Dergisi**, No.4-5-6 (1996), p.142; Aydın Zevkliler, **Tüketicinin Korunması Hakkında Kanun**, Ankara, 2001, p.229; Ömer Ulukapı, "Tüketicinin Korunması Hakkında Kanun Çerçevesinde Uyuşmazlıkların Çözüm Yolları", **Prof. Dr. M. Şakir Berki'ye Armağan**, Vol.5, No.1-2 (1996), p.79; Özbek, s.396.

[261] She states in fn.39 that Pekcanıtez is also in the same opinion, Pekcanıtez, *Tüketici Sorunları Hakem Heyeti*, p.42, Ildır, p.130.

[262] Ildır, p.130.

[263] According to Art. 22/6 of the Law No. 4077 on the Protection of Consumers as amended by the Law No. 4822, the monetary limits determining whether a decision shall be final or considered as evidence shall be increased at the end of October each year at the average annual rate of increase in the Wholesale Price Index announced by the State Institute of Statistics. This shall be announced in the Official Gazette by the Ministry of Industry and Trade in December each year. The monetary limit is TRY 938.75 for the year 2010 (Official Gazette No. 27429 dated 11.12.2009).

decision of the arbitration committee is binding upon the parties. The parties may appeal against such decisions before consumer courts within 15 days. In disputes of which value exceeds the certain amount, it is possible to go to either consumer courts or arbitration committees. In such disputes, the decision of the arbitration committee can also be used in evidence before consumer courts.

Although it does not comply with the voluntary characteristic of ADR, in disputes of which value is less than a certain amount, it is made mandatory and a special reason for refusal of the case by the consumer court that consumers apply to the Arbitration Committee for Consumer Problems before they file a lawsuit. However, as arbitration committees ensure that the dispute is ended by a decision taken by an arbitration panel instead of by a court, they can still be described as an ADR process[264]. It is understood that the legislator has preferred this procedure for the purposes of preventing the case load accumulation in consumer courts and of ensuring that small amount consumer disputes are resolved quickly and economically. On the other hand, as it is recognized that the parties have the right to appeal against decisions of the Arbitration Committee for Consumer Problems before consumer courts within 15 days, the freedom to claim rights of the parties is tried to be protected[265].

The arbitration procedure introduced by Art. 30 of the Insurance Law is only applicable to insurance establishments that are members of the insurance arbitration system. People who are in conflict with insurance establishments that are not members of the insurance arbitration system can prefer applying to the Arbitration Committees for Consumer Problems instead of to state courts, if they want to make use of an ADR process.

---

[264] Haluk Konuralp, "20. Yüzyıl Sonunda Medeni Usul Hukuku Sorunlarına Bir Bakış", **Yeni Türkiye**, No.10 (1996), p.538; Hakan Pekcanıtez, *Tüketici Mahkemeleri*, p.145; Özbek, p.396.

[265] Mehmet Akif Tutumlu, **Tüketici Sorunları Hakem Heyetlerinin Yapısı, İşleyişi, Sorunları ve Çözüm Önerileri**, Birinci Baskı, Ankara: Seçkin Yayıncılık, 2006, p.26; Ildır, p.138.

C. ARBITRATION PROCEDURE INTRODUCED BY THE INSURANCE LAW

The institution of insurance arbitration was introduced by the Insurance Law No. 5684 for the purpose of settling the disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract on the one side and the party undertaking the risk on the other side, in a simple, prompt and fair manner by arbitrators who are insurance experts at the same time.

Insurance arbitration is another ADR procedure in the Turkish insurance law. However, because of its importance, the organizational principles of this new system and the legal procedures which should be followed in the settlement of disputes will be examined below separately.

II. ARBITRATION PROCEDURE INTRODUCED BY THE INSURANCE LAW TO THE TURKISH INSURANCE SECTOR

With the Insurance Law No. 5684 adopted on 03.06.2007[266], the Turkish insurance sector arrived at a legal arrangement for an arbitration system for the first time. The preamble to Art. 30 of the Insurance Law indicates that the practice of the ombudsman system being implemented in different countries has been used as a basis for Art. 30 of the Insurance Law. To ensure that a parallel is provided with the legal system in our country, the Turkish insurance arbitration system has been fashioned within the limits of the basic principle and procedures of the arbitration system in the Code of Civil Procedure[267].

The purpose of the arrangement is to eliminate a certain factor shaking the public confidence in the Turkish insurance sector. According to the preamble to Art. 30 of the Insurance Law, the factor shaking the confidence in the insurance business is as follows: Due to the unavailability of specialized courts in the insurance field, the litigation process takes a long time and is very costly. The insured parties are therefore wronged and as the compensation of the damage takes a long time, this situation is

[266] Official Gazette No. 26552 dated 14.06.2007.
[267] Ulusoy, p.237.

completely contrary to the primary purpose of insurance. For these reasons, the insured parties are left no choice but to accept the indemnity offered by the parties who undertake the risk, even if the amount of the indemnity is unfair. In order to prevent this problem, it is regulated with a special provision that an Insurance Arbitration Commission shall be established within the Association of the Insurance and Reinsurance Companies of Turkey (the Association). Indeed, Yılmaz states that before the law has been passed, the Association has received increased complaints regarding insurance disputes and it has thus been determined that the complaint owners see the Association as an establishment having control over its members and want it to help with the resolution of disputes[268].

According to Art. 30/20 of the Insurance Law, the structure and the duties of the Commission, the qualifications of the Commission director and deputy directors of the Commission and their working principles and procedures, the working principles and procedures of rapporteurs and insurance arbitrators, the way of arrangement of the awards, principles of application to the Commission, principles related to the keeping of the List and the budget and other issues such as participation fee shall be determined by regulation. The regulation mentioned here was published under the name of the "Regulation on Insurance Arbitration" in the Official Gazette No. 26616 dated 17.08.2007. Then the "Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1" was published in the Official Gazette No. 27117 dated 21.01.2009 and finally, the "Circular on the Professional Experience to Be Sought in Insurance Arbitrators according to the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1" was published by the Undersecretariat of Treasury on 25.06.2009.

A. CHARACTERISTIC OF INSURANCE ARBITRATION

Art. 30/1 of the Insurance Law reads that a person who is in conflict with a member establishment of the insurance arbitration system may still benefit from the arbitration procedure, even if there is no special provision in the relevant insurance

[268] Yılmaz, p.38; Ulusoy, p.238.

contract[269]. In other words, the insured party individually has the power of making a free choice to apply to arbitration and it makes no difference if there is not an arbitration arrangement between the parties. If the person who is in conflict with a member establishment of the insurance arbitration system prefers resolution of the dispute by arbitration and applies to the Insurance Arbitration Commission, it will be mandatory for the insurance establishment to go to arbitration. In such a case, the insurance establishment cannot object to arbitration and apply to state courts to have the dispute resolved by litigation[270].

Therefore, it is voluntary for the policy holder or people benefiting from the insurance contract to apply to arbitration, even if there is not a voluntary arbitration agreement but arbitration is mandatory for the insurance establishment that is a member of the insurance arbitration system. The application of the policy holder or people benefiting from the insurance contract to arbitration does not depend on an arbitration agreement between themselves and the insurance establishment but it is based on law (Art. 30/1 of the Insurance Law). Ulusoy therefore describes the arbitration procedure regulated by Art. 30 of the Insurance Law as relatively mandatory arbitration[271].

On the other hand, insurance establishments that are not members of the insurance arbitration system do not have to go to arbitration because the arbitration procedure introduced by Art. 30 of the Insurance Law is only applicable to insurance establishments that are members of the insurance arbitration system. The disputes arising between such establishments and the policy holder or people benefiting from the insurance contract may be resolved by voluntary arbitration but not by the arbitration procedure introduced by the Insurance Law No. 5684. This is because any arbitration agreement concluded with the policy holder before becoming a member of the system is not considered within the scope of the Regulation on Insurance Arbitration (Art. 15/1 of the Regulation on Insurance Arbitration). However, even persons who will act as arbitrators in arbitration proceedings which will be conducted according to the Code of

[269] Ulusoy, p.240; Can, p.350; Yılmaz, p.39-40, 42.
[270] Ulusoy, p.240.
[271] Ulusoy, p.240-241.

Civil Procedure shall also meet the criteria sought in insurance arbitrators by Art. 30 of the Insurance Law (Art. 30/23 of the Insurance Law)[272].

Contrary to Ulusoy, Ulaş describes the arbitration procedure regulated by Art. 30 of the Insurance Law as voluntary arbitration because the participation of insurance establishments in this system depends on their own free will[273]. He states that in this system, people can apply to insurance arbitration for the resolution of disputes arising from the insurance contract on condition that the insurance establishment is a member of this system. Unless this condition is met, the policy holder or people benefiting from the insurance contract cannot apply to insurance arbitration. It is therefore left to the choice of insurance establishments whether the insurance arbitration system can be used or not. Ulaş criticizes this aspect of the system because parties of insurance contracts are not offered equal possibilities to claim rights[274]. In this insurance arbitration system, one of the ways to claim rights of some policy holders or people benefiting from the insurance contract has been blocked right from the beginning[275].

The insurance arbitration system introduced by the Insurance Law has institutional arbitration characteristics of its own kind[276]. Although the arrangement in Art. 30 of the Insurance Law is based on the general arbitration system in the Code of Civil Procedure, it comes out that principles of institutional arbitration will apply because the Insurance Arbitration Commission has been established within the Association[277]. The general arbitration system regulated in the Code of Civil Procedure is based on the principle that the selection of arbitrators and adjudication rules are freely determined by the parties through concluding an arbitration agreement or adding an arbitration clause to a contract. However, as the arbitration system introduced by the Insurance Law has partly abandoned these principles, it displays a characteristic which is unique and directed towards institutional arbitration[278]. Institutional arbitration has

[272] Ulusoy, p.241; Ulaş, p.240; Can, p.354; Yılmaz, p.42, 48.
[273] Ulaş, p.240; in the same opinion Zihni Metezade, "Nedir Tahkim?", **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını, No.17 (July-September 2009), p.23.
[274] Ulaş, p.249.
[275] Ulaş, p.264-265.
[276] Ulaş, p.264.
[277] Ulaş, p.240-241.
[278] Ulaş, p.248.

been considered appropriate as regards the management of insurance arbitration. Indeed, one of the duties and authorities of the Association is to organize the operation of insurance arbitration and to keep a list of insurance arbitrators (Art. 24/8 subpar. (h) of the Insurance Law). In order to settle the disputes arising from the insurance contract, an Insurance Arbitration Commission is established within the Association (Art. 30/1 of the Insurance Law and Art. 5/1 of the Regulation on Insurance Arbitration). Of whom the Commission will be composed are shown in Art. 30/2 of the Insurance Law and Art. 5 of the Regulation on Insurance Arbitration[279].

In contrast, Kender states that the legal characteristic of the arbitration institution is not understood. In Art. 30/1 of the Insurance Law, the legal meaning of the expression "within the Association" is not clear. She asks questions as to whether the Commission is bound to the Association or not, what is its legal structure if it is not bound to the Association and what is the legal status of people working there[280].

B. PARTIES TO INSURANCE ARBITRATION

According to Art. 30/1 of the Insurance Law, an Insurance Arbitration Commission shall be established within the Association in order to settle the disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract on the one side and the party undertaking the risk on the other side[281].

Although they are not a party to the insurance contract, people benefiting from the insurance contract, the beneficiary in life insurance, for example, can also apply for the resolution of disputes arising from the insurance contract by arbitration[282]. Ulaş states that the application procedure to the Insurance Arbitration Commission for arbitration should be considered as regards the policy holder who is a party to the insurance contract and the insurance beneficiary, if any. This is because these are the people who put forward that their rights arising from the insurance contract are not met

[279] Ulusoy, p.242.
[280] Rayegân Kender, **Türkiye'de Hususi Sigorta Hukuku, Sigorta Müessesesi, Sigorta Sözleşmesi**, 9. Baskı, İstanbul: Arıkan Yayınevi, Ocak 2008, p.125.
[281] Ulusoy, p.241; Yılmaz, p.39.
[282] Ulusoy, p.241.

by the relevant insurance establishment and who are in a position of demanding rights from it[283].

With regard to policy holders and insurance beneficiaries, the Insurance Law No. 5684 does not differentiate between natural and legal persons or consumers and commercial entities. However, in the United Kingdom, for example, the person who will make a complaint to the Ombudsman should be a natural person or a business enterprise with a total annual turnover of less than one million sterling on the date of the complaint, or a charity with an annual income of less than one million sterling on the date of the complaint, or a trust with a net worth of less than one million sterling on the date of the complaint. In Ireland, only natural persons and business enterprises with an annual turnover of less than three million euros can apply to the Ombudsman. In Germany, only consumers can apply to the Ombudsman[284].

C. SUBJECT OF INSURANCE ARBITRATION

According to Art. 30/1 of the Insurance Law, the subject of the insurance arbitration is the disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract and the party undertaking the risk[285].

The insurance arbitration system can be applied to disputes arising from both the life and non-life insurance groups (Art. 30/7 of the Insurance Law)[286].

D. INSURANCE ARBITRATION COMMISSION

1. Formation of the Commission

In order to settle the disputes arising from insurance contracts, an Insurance Arbitration Commission is established within the Association (Art. 30/1 of the Insurance Law and Art. 5/1 of the Regulation on Insurance Arbitration). The Insurance Arbitration Commission is composed of the Presidency of the Insurance Arbitration Commission, Commission director and Commission deputy directors, Office director

[283] Ulaş, p.249.
[284] Metezade, p.26.
[285] Ulusoy, p.241.

and Office deputy directors, rapporteurs and other personnel[287]. According to Art. 30/2 of the Insurance Law, the Presidency of the Insurance Arbitration Commission is composed of a representative from the Undersecretariat, two representatives from the Association, one representative from a consumers' association and an academician lawyer who will be determined by the Undersecretariat. Can states that it is not appropriate that the Ministry of Justice offering justice services in the country is not given the opportunity to send a representative to the Commission composed of six members in total[288]. The qualifications of the participants are also defined in the same arrangement and in Art. 5 of the Regulation on Insurance Arbitration[289].

The Commission is to be composed in the above-mentioned manner and commission members whose memberships will also be valid for two years will elect a president from among themselves to serve for two years. If necessary, commission deputy presidents are also elected by commission members from among themselves. In the Commission, decisions are taken with the absolute majority of the total number of members (Art. 30/2 of the Insurance Law and Art. 5 of the Regulation on Insurance Arbitration)[290].

The Commission appoints a director and two deputy directors who will be subordinated to the Commission. In order to be able to be appointed to this duty, the commission director shall meet the criteria sought in founders of insurance companies and reinsurance companies except the criteria of financial power, at least hold an undergraduate degree and have a minimum two years of experience in insurance law or a minimum five years of experience in insurance. In the appointment of the deputy director, it will be sought that he/she possesses the same qualifications except for the experience. Other people who will be recruited will be appointed by the Commission at the suggestion of the commission director (Art. 30/5 and 6 of the Insurance Law and Art. 7/3 subpar. (c) of the Regulation on Insurance Arbitration)[291].

---

[286] Ulaş, p.241; Ulusoy, p.241.
[287] Yılmaz, p.40.
[288] Can, p.344.
[289] Ulaş, p.241; Can, p.344; Ulusoy, p.242; Yılmaz, p.40.
[290] Ulaş, p.241; Can, p.345; Yılmaz, p.40.
[291] Ulaş, p.241-242; Can, p.346-347.

Besides carrying out managerial work, commission directors are also conferred judicial powers such as reviewing requests for the refusal of arbitrators and making decisions accordingly. The service period of directors and deputy directors are set by the Commission Presidency (Art. 7/3 subpar. (ç) and 4 of the Regulation on Insurance Arbitration)[292].

2. Insurance Arbitration Commission Office

The head office of the Insurance Arbitration Commission is in Istanbul (Art. 5/3 of the Regulation on Insurance Arbitration). However, the Commission is authorized to open Insurance Arbitration Commission Offices in places where it deems necessary according to the business volume generated by the insurance arbitration (Art. 30/4 of the Insurance Law and Art. 7/1 subpar. (f) of the Regulation on Insurance Arbitration)[293]. Offices can be found in city centres or in a city chosen as a hub of a region. The centres of these regional offices are determined by the Commission Presidency. A director and deputy directors, if necessary, are assigned to those offices. In each office, there must be enough recruited rapporteurs and personnel (Art. 10 of the Regulation on Insurance Arbitration)[294].

Office directors shall possess the same qualifications with those of the Commission director. Authorities and duties to be assigned to the office director are determined by the Commission (Art. 30/4 of the Insurance Law)[295].

People who are involved in a dispute arising from an insurance contract may apply to either the Arbitration Commission Presidency for the resolution of the dispute via insurance arbitration system or the office, if there is one, where he/she resides or the loss has been occurred (Art. 16/1 of the Regulation on Insurance Arbitration)[296].

[292] Ulaş, p.242; Can, p.347.
[293] Ulaş, p.242; Can, p.348; Yılmaz, p.41.
[294] Ulaş, p.242; Can, p.348-349; Yılmaz, p.41-42.
[295] Ulaş, p.242; Can, p.348-349; Yılmaz, p.41-42.
[296] Ulaş, p.242; Can, p.351; Ulusoy, p.242; Yılmaz, p.43.

3. Duties of the Insurance Arbitration Commission

The Insurance Arbitration Commission is obliged to appoint directors and deputy directors, to prepare the budget of the Commission which is to be followed in a separate account by the Association and submit the budget to the Association, to take measures to ensure that the arbitration system operates in a fair, impartial and effective manner, to prepare an annual report on the results of the activities of the Commission and send this report to the Association and the Undersecretariat, to prepare the computer infrastructure and to perform other duties assigned to it by the laws (Art. 30/3 of the Insurance Law)[297].

As mentioned before, while the Insurance Arbitration Commission is using the authorities determined above, decisions must be taken with the absolute majority of the total number of members (Art. 30/2 of the Insurance Law)[298].

The Insurance Arbitration Commission is under the supervision of both the Association and the Undersecretariat of Treasury (Art. 20 of the Regulation on Insurance Arbitration). The Commission annually submits a detailed report (Annual Report) about all of its operations to both the Association and the Undersecretariat so that these operations can be inspected periodically. This report includes information about the personnel, statistics on operations, information on the Commission budget and other matters (Art. 20 of the Regulation on Insurance Arbitration)[299].

E. ARBITRATORS AND RAPPORTEURS IN THE INSURANCE ARBITRATION COMMISSION

As the main function of the Insurance Arbitration Commission is to ensure that disputes arising from insurance contracts are resolved by arbitration, rapporteurs and especially arbitrators who are to perform this duty constitute the fundamental elements of this system[300].

---

[297] Ulaş, p.242-243; Can, p.346, 349-350; Yılmaz, p.40-41.
[298] Ulaş, p.243.
[299] Can, p.350.
[300] Ulaş, p.243.

1. Arbitrators in the Insurance Arbitration System

The necessary qualifications of arbitrators who will work in the Insurance Arbitration Commission which has the characteristic of institutional arbitration and the rules to be obeyed by them while performing their duties are regulated in detail in paragraph 7 and following paragraphs of Art. 30 of the Insurance Law[301].

The insurance arbitrator is the person who is conferred adjudicatory powers to settle disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract and the party undertaking the risk, namely the insurance establishment[302].

a. List of Insurance Arbitrators

Under the arrangement introduced by Art. 30 of the Insurance Law, arbitrators who will work in the Insurance Arbitration Commission have to be registered in the Insurance Arbitrators List which is also to be kept by the Commission. The Commission keeps these lists for life and non-life groups separately (Art. 30/10 of the Insurance Law and Art. 14 of the Regulation on Insurance Arbitration)[303].

People who are willing to be registered in the Insurance Arbitrators List either for life or non-life insurance groups shall meet the criteria sought in founders of insurance companies and reinsurance companies except the criteria of financial power, at least hold an undergraduate degree, have a minimum of five years of experience in insurance law or a minimum of ten years of experience in insurance (Art. 30/8 of the Insurance Law). As different from the arrangement in the Code of Civil Procedure, this arrangement makes it obligatory that arbitrators who will take part in the insurance arbitration system possess specific qualifications[304].

Moreover, according to Art. 30/18 of the Insurance Law, persons in charge of management and audit of insurance companies, reinsurance companies, other

[301] Ulaş, p.243; Can, p.354.
[302] Ulaş, p.243.
[303] Ulaş, p.243.
[304] Ulaş, p.243-244; Can, p.354.

establishments that engage in insurance business, loss adjusters, insurance agents and brokers and persons who have signing power on their behalf, and persons performing professional activities for them and loss adjusters, insurance agencies and brokers shall not act as an insurance arbitrator. Such restrictions shall also apply to the spouses of these persons and their children. Besides the qualifications determined in Art. 30/8 of the Insurance Law, this article lays down such negative conditions for arbitrators to be able to join the Insurance Arbitrators List by creating a prohibitive rule. It is clear that laying down such conditions has the purpose of ensuring the impartiality of the arbitrator[305].

Only if they document that they have the qualifications determined above, applicants who are deemed eligible from those who have applied to the Insurance Arbitration Commission for becoming an arbitrator are notified by the Commission to the Undersecretariat for acceptance. The names of those whose applications are approved and accepted also by the Undersecretariat are registered in the Insurance Arbitrators List which is to be kept by the Commission and a copy of which is to be sent to the Ministry of Justice. As a consequence of the completion of this procedure, those, whose applications for becoming an arbitrator are accepted, are considered as insurance arbitrators registered in the mentioned list. The Insurance Arbitrators List is compiled on Istanbul and office basis for Turkey in general. These lists are updated monthly (Art. 30/10 of the Insurance Law and Art. 13 and 14 of the Regulation on Insurance Arbitration)[306].

The name of the insurance arbitrator is permanently removed from the list if he/she has lost the qualifications necessary for working as an insurance arbitrator or it has been proven that he/she has acted in violation of the principle of impartiality. If the insurance arbitrator has failed to conclude the files received by him/her in due time for maximum three times a year, his/her name is removed from the list for a period of one year (Art. 30/11 of the Insurance Law)[307].

[305] Ulaş, p.244; Can, p.354; Yılmaz, p.47.
[306] Ulaş, p.244; Can, p.355.
[307] Ulaş, p.244; Can, p.355.

The fees of insurance arbitrators are determined by the Undersecretariat of Treasury taking into account the opinion of the Insurance Arbitration Commission. The fees of arbitrators are paid by the Commission (Art. 30/17 of the Insurance Law and Art. 6/1 subpar. (e), Art. 7/3 subpar. (e) and Art. 11/3 of the Regulation on Insurance Arbitration)[308].

b. Prohibition and Refusal of Insurance Arbitrators

(1) Reasons for Prohibition of Insurance Arbitrator

Such as judges, also insurance arbitrators have to act impartial during their adjudicatory activities as they are in charge of resolving disputes arising from insurance contracts in a just manner[309].

Considering the last sentence of Art. 30/18 of the Insurance Law, if one of the four situations determined in Art. 28 of the Code of Civil Procedure occurs, the insurance arbitrator will be prohibited from its duty to resolve the dispute. In such cases, even if this situation is not put forward by any of the parties, the insurance arbitrator must withdraw from the dispute on its own[310].

Also, as mentioned before, in Art. 30/18 of the Insurance Law, it is prohibitively regulated that persons in charge of management and audit of insurance companies, reinsurance companies, other establishments that engage in insurance business, loss adjusters, insurance agents and brokers and persons who have signing power on their behalf, and persons performing professional activities for them and loss adjusters, insurance agencies and brokers shall not act as an insurance arbitrator. Such restrictions shall also apply to the spouses of these persons and their children. Even if they were appointed as insurance arbitrators somehow, people who are in such a condition should withdraw from the dispute to which they have been assigned as

[308] Ulaş, p.244; Can, p.358; Yılmaz, p.42, 45.
[309] Ulaş, p.245.
[310] Ulaş, p.245; Can, p.356; Yılmaz, p.44.

arbitrator, because of the prohibition. Their names must be removed from the Insurance Arbitrators List as well, even if they were already registered somehow[311].

According to the provision of Art. 30 of the Code of Civil Procedure, an arbitrator who is prohibited from hearing the case may only continue with this duty by explicit and written consent of all the parties. Otherwise, all adjudicatory proceedings in which the arbitrator took part as from the moment the prohibition reason came about may be cancelled. Also, awards and decisions given by the arbitrator are cancelled through renewal of proceedings within the limits of Art. 445/9 of the Code of Civil Procedure[312].

(2) Reasons for Refusal of Insurance Arbitrator

According to Art. 30/15 of the Insurance Law, insurance arbitrators may reject the duty to arbitrate the dispute on their own initiative or be refused by the parties to the dispute, if causes determined in the first five points of Art. 29/1 of the Code of Civil Procedure accrue. Although in Art. 17 of the Regulation on Insurance Arbitration, there is no provision related to the permission for arbitrators to refuse to arbitrate the dispute on their own initiative in such cases, according to the provision of Art. 29/1 of the Code of Civil Procedure to which Art. 30/22 of the Insurance Law makes a reference, arbitrators should have the right and obligation to refuse to arbitrate the dispute on their own initiative, if there are causes of refusal of arbitrators[313].

According to these legal arrangements, there will be a cause of refusal of the insurance arbitrator, if he/she gives advice to or guides one of the parties to the dispute he/she is arbitrating, declares his/her vote about the dispute in the presence of one of the parties or a third party even though there is no legal obligation, is heard or acts as a witness, expert witness, arbitrator (as in the meaning in the Code of Civil Procedure) or judge, if the dispute is connected with his/her relatives in the collateral line up to and including the fourth degree, if he/she has a legal case against one of the parties or there

[311] Ulaş, p.245.
[312] Ulaş, p.245-246.
[313] Ulaş, p.246.

is hostility between them during the dispute and finally if there are serious doubts about his/her impartiality (Art. 17 of the Regulation on Insurance Arbitration)[314].

If the above causes of refusal accrue, the arbitrator may also be refused by the parties to the dispute. The refusal request is presented to the Commission by a petition within five business days at the latest after the cause of refusal accrues by clarifying and documenting the causes of refusal. Upon the refusal request, the Commission director takes decision within five business days at the latest after hearing the views of both parties[315]. According to the provision of Art. 30/15 of the Insurance Law, the five-business day period begins after the views of the parties have been conveyed to the Commission. While the Commission director is reviewing the refusal request, according to the general reference in Art. 30/22 of the Insurance Law, the provisions of Art. 34 and the following articles of the Code of Civil Procedure that are related and appropriate to the subject should be taken into consideration. If the refusal request is rejected in the frame of the provision of Art. 35 of the Code of Civil Procedure, this decision may only be appealed together with the final judgement. According to the provision of Art. 36/A of the Code of Civil Procedure, in certain cases and proceedings where the final judgement cannot be appealed, the decision of the Commission director about the request of refusal of the insurance arbitrator will be a final decision. In cases and proceedings where the final judgement can be appealed, decisions of the Commission director about refusal requests can be appealed within seven days from the receipt date. Judgements given by the chambers of the Supreme Court on this matter are final and these judgements must be followed[316].

2. Rapporteurs in the Insurance Arbitration Commission

According to the provisions of Art. 30/5 of the Insurance Law and Art. 10 of the Regulation on Insurance Arbitration, the Commission recruits sufficient number of rapporteurs to work under itself. Insurance rapporteurs who shall work at the

[314] Ulaş, p.246; Can, p.356; Yılmaz, p.44.
[315] Although this period is determined as five business days in Art. 30/15 of the Insurance Law, it is determined as fifteen days in Art. 17/1 of the Regulation on Insurance Arbitration. Ulaş states that it is not appropriate. In such contradictory situations, the legislative provision should be applied. Ulaş, p.246; Can, p.357.
[316] Ulaş, p.246-247.

Commission shall meet the criteria sought in the director of the Commission (Art. 30/9 of the Insurance Law)[317].

An insurance rapporteur is the person who pre-examines the dispute files submitted to the Commission or the office in order to settle the disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract and the insurance establishment undertaking the risk (Art. 4/1 subpar. (g) and Art. 8 of the Regulation on Insurance Arbitration)[318].

Like insurance arbitrators, also rapporteurs shall work in only one of the life and non-life insurance groups. Only disputes that fall within the scope of their group are assigned to them (Art. 30/7 of the Insurance Law)[319].

According to the provision of Art. 30/18 of the Insurance Law, also insurance rapporteurs shall be impartial like insurance arbitrators while carrying out their duties. Moreover, like insurance arbitrators, they shall not disclose any information and secrets they learn in the execution of their duties without the permission of the relevant parties (Art. 30/19 of the Insurance Law)[320].

According to the provision of Art. 8/2 of the Regulation on Insurance Arbitration, the term of office of rapporteurs working in the Commission and the fees they will receive for this duty are determined by the Presidency of the Insurance Arbitration Commission[321].

F. PARTICIPATION OF INSURANCE ESTABLISHMENTS IN THE INSURANCE ARBITRATION SYSTEM

All establishments operating in the insurance business may become members of the insurance arbitration system (Art. 15/1 of the Regulation on Insurance Arbitration). In terms of participation of insurance establishments in the insurance arbitration system, the Insurance Law allows these establishments freedom. In other

[317] Ulaş, p.247; Yılmaz, p.42.
[318] Ulaş, p.247; Can, p.352; Ulusoy, p.242.
[319] Ulaş, p.247; Can, p.348; Yılmaz, p.42.
[320] Ulaş, p.247; Yılmaz, p.47.

words, insurance establishments have no obligation to participate in this system (Art. 30/1 of the Insurance Law and Art. 15/1 of the Regulation on Insurance Arbitration)[322].

However, both in the United Kingdom and in Ireland, it is mandatory for enterprises operating in the financial sector to become a member of the system. In Germany, membership depends on the desire of insurance companies. It is voluntary for insurance companies to become a member of the system. In France, membership in the system occurs on a voluntary basis. For this reason, in the frame of the system, only complaints against companies that are parties to the mediation agreement prepared by the French Insurance Companies Federation (Fédération Française des Sociétés d'Assurances) are dealt with[323].

Insurance establishments that want to participate in the insurance arbitration system, in other words to become members in this system have to notify the Commission in writing[324]. This condition that applications be made in writing is not considered as a prerequisite of validity but a means of proof. Even though there is no written application of an insurance establishment, if it has fulfilled other conditions and these are actually accepted by the Commission, such an insurance establishment should be considered a member of the system[325].

The membership in the system starts with the payment of the fixed participation fee to the Presidency of the Insurance Arbitration Commission (Art. 15/1 of the Regulation on Insurance Arbitration). The participation fee consists of the fixed participation fee to be collected once a year and the participation fee to be collected for each of the files. However, the participation fee per file begins to be collected from each member after the first thirty files opened in a year's time and referred to the insurance arbitrator for settlement. As regards the participation fee per file, the one-year period is determined according to the calendar year. Membership participation fees are determined by the Undersecretariat taking into account the opinion of the Commission

[321] Ulaş, p.247; Can, p.348.
[322] Ulaş, p.248; Ulusoy, p.241.
[323] Metezade, p.25-26.
[324] Ulaş, p.248; Can, p.350; Yılmaz, p.39, 42.
[325] Ulaş, p.248.

Presidency. If necessary, these amounts may be revised in the months of January and July of each year (Art. 11/3 of the Regulation on Insurance Arbitration)[326].

If the insurance establishment does not pay the fixed participation fee even after its written request for membership in the system, it will also have the possibility to make the payment together with default interest (Art. 15/2 of the Regulation on Insurance Arbitration)[327].

G. APPLICATION PROCEDURE TO INSURANCE ARBITRATION

The person applying to the insurance arbitration system is obliged to pay an application fee to the Commission or its Office, if he/she is applying to a Commission Office (Art. 30/12 of the Insurance Law). The application is made to the Commission Centre or the Commission Office where the applicant resides or the loss has been occurred (Art. 16/1 of the Regulation on Insurance Arbitration)[328].

Upon the dispute application, the applicant is asked to fill out an application form first. As well as the application form, information and documents concerning the dispute and the bank receipt for the payment of the application fee should also be submitted. After the completion of this process, the application procedure of the policy holder and/or the insurance beneficiary to the insurance arbitration system is considered to be completed (Art. 30/12 of the Insurance Law and Art. 16/1 of the Regulation on Insurance Arbitration)[329].

According to the provision of Art. 30/13 of the Insurance Law, the document stating that the applicant has fallen into a dispute with the insurance establishment and that the relevant claim has been rejected wholly or partly, should also be among the above documents which should be given to the Commission for the application to insurance arbitration. According to the same provision, it is also sufficient for the application to the Commission that the insurance establishment has not given any

[326] Ulaş, p.248; Can, p.349, 350; Yılmaz, p.42.
[327] Ulusoy, p.241; Can, p.350; Yılmaz, p.42.
[328] Ulaş, p.249; Can, p.351; Ulusoy, p.242; Yılmaz, p.42, 43.
[329] Ulaş, p.249; Can, p.351-352; Yılmaz, p.43.

written reply to the relevant applicant within 15 business days after his/her written request made to itself (Art. 30/13 of the Insurance Law)[330].

H. EXAMINATION OF THE APPLICATION BY THE COMMISSION RAPPORTEUR

After the application is made in the frame of the procedure determined above, the Commission determines to which of the life or non-life insurance groups the dispute belongs and assigns the dispute file created on the relevant matter to the Commission rapporteur who is competent and authorized according to his/her expertise. The dispute file is examined by the Commission rapporteur in two stages in terms of the procedure and documents[331].

1. Pre-examination by the Commission Rapporteur

Receiving the dispute file sent to him/herself by the Commission or the Office, the rapporteur firstly examines and evaluates in procedural terms whether the dispute is subject to insurance arbitration[332].

The matter which should firstly be examined in the pre-examination is to determine whether the insurance establishment causing the dispute is a member of the insurance arbitration system. This is because, as mentioned before, a dispute with an insurance establishment which is not a part of this system cannot be resolved by insurance arbitration. It is sufficient that the insurance establishment against which the insurance arbitration process is started, is a member of this system. According to Art. 30/1 of the Insurance Law, it is also not obligatory that there is an arbitration clause in the insurance contract[333].

In the pre-examination, the rapporteur secondly determines whether the necessary application has been made to the insurance establishment, and, if made, whether the relevant demand has not been met in part or in full, or the insurance

[330] Can, p.351; Ulaş, p.249-250; Yılmaz, p.42.
[331] Ulaş, p.250; Can, p.352; Ulusoy, p.242; Yılmaz, p.43.
[332] Ulaş, p.250.
[333] Ulaş, p.250; Can, p.350-351; Yılmaz, p.39-40, 42.

establishment has not replied in writing within fifteen business days (Art. 30/13 of the Insurance Law and Art. 16/2 subpar. (a) of the Regulation on Insurance Arbitration)[334].

Also, in the pre-examination conducted by the rapporteur, another matter which should be determined in terms of the procedure is to determine whether the dispute made the subject of the application has been referred to Court, to the general arbitration procedure conducted according to the Code of Civil Procedure or to the Arbitration Committee for Consumer Problems. This is because if one of these procedures has been used, it is not possible to go to insurance arbitration (Art. 30/14 of the Insurance Law and Art. 16/2 subpar. (b) of the Regulation on Insurance Arbitration)[335].

At the end of the pre-examination conducted by the rapporteur, if he/she reaches the decision that the conditions determined above have not occurred, in other words, the dispute cannot be subject to insurance arbitration, as the dispute cannot be assessed by the Commission any more, the Commission immediately informs the applicant of the situation and returns ninety per cent of the application fee to him/her. There is no appeals process against the opinion of the Insurance Arbitration Commission that the dispute is not subject to insurance arbitration regulated in this law, in other words, there is no appeals process against its decision about the refusal of the relevant demand, that is also to say that there is no arrangement under which the parties can object to such a decision, neither in the law nor in the regulation. In the doctrine, according to the provision of Art. 519 of the Code of Civil Procedure to which Art. 30/22 of the Insurance Law makes a reference, it is suggested as a solution that the parties should apply to court in such a situation[336].

If the person who has applied to the Commission withdraws his/her demand before the rapporteur starts examining it, ninety per cent of the application fee is returned to him/her (Art. 16/4 of the Regulation on Insurance Arbitration)[337].

[334] Ulaş, p.250; Can, p.351; Yılmaz, p.43.
[335] Ulaş, p.250-251; Can, p.352; Yılmaz, p.43.
[336] Can, p.353-354; Ulaş, p.251; Ulusoy, p.242.
[337] Ulaş, p.251; Can, p.352; Yılmaz, p.43.

2. Examination of Documents by the Commission Rapporteur

If it is determined at the end of the pre-examination conducted by the Commission rapporteur in a manner explained above that the application is compliant with the procedure, the second stage of the examination which should also be made by the rapporteur will be entered[338].

In this stage, the rapporteur will examine and evaluate whether the information and documents in the dispute file are suitable for the resolution of the dispute. As a consequence of this examination and evaluation by the rapporteur, if it is understood that the dispute between the parties has arisen from the lack of information and/or documents, the parties are informed of this situation and the dispute file is closed according to the provision of Art. 16/5 of the Regulation on Insurance Arbitration. In such a situation, fifty per cent of the application fee is returned to the applicant (Art. 16/5 of the Regulation on Insurance Arbitration)[339].

Ulaş states that after the application to insurance arbitration is found suitable in procedural terms, this provision of the Regulation requiring that the rapporteur decide to close the file just for lack of a document and/or a piece of information about the dispute is a severe sanction because it does not appear in the Insurance Law. In this case, the rapporteur should inform relevant people of the situation and give them an appropriate and definite time period to complete the lacking document and it will be a more correct procedure in practical terms to close the file, if the lack is not remedied even at the end of this definite time period[340].

Rapporteurs have to complete their examination within fifteen days at the latest. Applications that cannot be settled by rapporteurs are referred to the insurance arbitrator (Art. 30/15 of the Insurance Law and Art. 16/6 of the Regulation on Insurance Arbitration). According to Art. 8/3 of the Regulation on Insurance Arbitration, the rapporteurs cannot settle the substance of disputes. This is because the authority and the duty to settle and end the substance of disputes by adjudication belongs only to

[338] Ulaş, p.251.
[339] Ulaş, p.251; Can, p.353; Yılmaz, p.43.
[340] Ulaş, p.252.

insurance arbitrators in the insurance arbitration system. Indeed, the preamble to Art. 30 of the Insurance Law indicates that if the dispute has arisen from reasons such as insufficient information or lack of documents, the application will be concluded by the communication of rapporteurs with the party undertaking the risk. Ulaş states that the terms appearing in both the law and the regulation are used inappropriately, and comes to the conclusion that they refer to the closing of the dispute file by the rapporteur at the end of the pre-examination phase[341].

İ. EXAMINATION OF THE APPLICATION BY THE INSURANCE ARBITRATOR/ARBITRATION PANEL

In accordance with the institutional arbitration practice, the insurance arbitrator who shall deal with the dispute is selected by the Commission from the insurance arbitrators list. Considering to which of the life and non-life insurance groups the dispute belongs, the Insurance Arbitration Commission selects and appoints an expert as arbitrator from the relevant list in a serial manner. In this selection by the Commission, a serial manner is adopted and considering the nature of the dispute, the expertise area of the arbitrator is also evaluated. According to the Regulation, if the expertise area of the insurance arbitrator who is in the first row of the list is not appropriate for the resolution of the dispute, the first next person whose expertise area is appropriate will be selected as arbitrator. In this selection, as well as geographical criteria, the workload of the arbitrator who is considered to be appointed is also taken into consideration (Art. 16/8 of the Regulation on Insurance Arbitration)[342].

The Commission may decide that a panel consisting of minimum three insurance arbitrators is formed according to the nature of the case. If the nature of the dispute is complicated and its resolution concerns more than one expertise areas, an arbitration panel is appointed in such cases. In other words, in such disputes, an arbitration panel is appointed notwithstanding the disputed amount. If the nature and scope of the dispute entail more expertise areas, more than three arbitrators may also be selected. However, where the disputed amount is equal to or above fifteen thousand

[341] Ulaş, p.252.
[342] Ulaş, p.253; Can, p.355; Ulusoy, p.242-243; Yılmaz, p.43-44.

Turkish Liras[343], it is compulsory to form a panel. If there is a lawyer-arbitrator in the relevant list, one of the arbitrators who will be appointed as a panel should be lawyer (Art. 16/7 of the Regulation on Insurance Arbitration)[344].

The arbitrator/arbitrators elected and appointed in a manner described above shall not reject this duty except for force majeure and unexpected circumstances. The decision of the Commission on the appointment is sent to the arbitrator/arbitrators and the parties to the dispute[345]. If the arbitrator/arbitrators and the parties to the dispute receiving this notice are of the opinion that there are reasons for withdrawal from the arbitratorship or reasons for refusal of the arbitrator, they will conduct the procedures for withdrawing from the dispute or refusing the arbitrator, as explained before[346].

J. ADJUDICATION PROCEDURE IN INSURANCE ARBITRATION

Neither in the law nor in the regulation, there are detailed arrangements for the trial procedure to be followed in insurance arbitration which has the institutional arbitration characteristic for the most part. Therefore, the limited provisions in the law and the regulation, and because of the general reference in Art. 30/22 of the Insurance Law, the provisions of the Code of Civil Procedure for arbitration will be evaluated together[347].

1. Beginning A Legal Case in Insurance Arbitration

As neither in the law nor in the regulation, there is any special arrangement for the filing date of the legal case, the subject will be evaluated within the limits of the provision of Art. 523 of the Code of Civil Procedure[348].

---

[343] According to the provision of Art. 30/21 of the Insurance Law, the Undersecretariat is authorized to increase the fixed monetary amounts specified in Art. 30 with the condition that the rate of increase shall not exceed the rate of the Producer Price Index declared by the Turkish Statistical Institute. Ulaş, p.253; Yılmaz, p.48.
[344] Ulaş, p.254; Can, p.355; Yılmaz, p.43.
[345] Ulaş, p.254; Can, p.355, 357; Yılmaz. P.44.
[346] Ulaş, p.254.
[347] Ulaş, p.254.
[348] Ulaş, p.255.

According to this arrangement, if the selection of the arbitrator is not left to the parties, the application date to the court for the selection of the arbitrator is determined as the filing date of the legal case. However, in the Insurance Law, it is regulated that those who want to claim rights by insurance arbitration should apply to the Commission and insurance arbitrators should also be selected by the Commission. In that case, when Art. 523 of the Code of Civil Procedure and Art. 30 of the Insurance Law are evaluated and interpreted together, it should be accepted that in insurance arbitration, the filing date of the legal case is the application date to the Commission[349].

As known, the most important consequence of determining the filing date of a legal case is that the statute of limitations prescribed by laws for the dispute subject stops to run according to the provision of Art. 133/2 of the Turkish Code of Obligations. After the parties have applied to insurance arbitration, starting from each of their actions directed towards arbitration proceedings or each order or decision of the insurance arbitrator/arbitration panel, the statute of limitations is interrupted and restarted according to the provision of Art. 136 of the Code of Obligations[350].

In procedural terms, other important consequences of applying to arbitration are that it prevents the plaintiff from bringing another action on the same claim and from discontinuing the action without the consent of the defendant in the frame of the provision of Art. 185/1 of the Code of Civil Procedure[351].

2. Examination Phase by the Arbitrator/Arbitration Panel in Insurance Arbitration

Except for some rare provisions both in Art. 30 of the Insurance Law and in Art. 16 of the Regulation on Insurance Arbitration, there are no clear or detailed arrangements for the trial procedure to be followed in insurance arbitration after the application which cannot be settled by the rapporteur has been referred to the insurance arbitrator/arbitration panel[352]. However, with the Communiqué on Insurance Arbitration

[349] Ulaş, p.255; Ulusoy, p.242.
[350] Ulaş, p.255.
[351] Ulaş, p.255.
[352] Ulaş, p.255-256.

Procedure and Insurance Arbitrators No. 2009/1, the Undersecretariat of Treasury clarified a few queries raised by the doctrine as to the procedure of insurance arbitration. Art. 7/1 of the Communiqué stipulates, i.a., that according to Art. 30/22 of the Insurance Law, where the Insurance Law is silent, provisions of the Code of Civil Procedure shall be applied to insurance arbitration by comparison.

In the examination phase by the arbitrator/arbitration panel, the dispute file should have been completed with the information and documents necessary for the resolution of the dispute and then referred to the arbitrator/arbitration panel. In this way, the assumption comes out that the dispute file has already attained maturity necessary to be concluded by the arbitrator/arbitration panel in principle. Ulaş states that the arbitrator/arbitration panel cannot hold hearings because Art. 30/15 of the Insurance Law stipulates that the arbitrator may consider the case on submitted documents only[353]. However, according to Art. 7/1 subpar. (b) of the Communiqué on Insurance Arbitration Procedure which came into effect after the relevant article of Ulaş had been published, arbitrators examine filed documents in principle but there is also no obstacle for them to hold hearings[354].

On the basis of the assumption that in this phase, the dispute file has been completed in every respect, the Insurance Law precribes that the dispute is to be settled according to the information and documents in the file. Ulaş states that if it is understood during the examination which will be conducted by the arbitrator/arbitration panel that the information and documents deemed sufficient by the rapporteur for the resolution of the dispute are actually insufficient and the resolution of the substance of the dispute is therefore impossible, it should be accepted that the arbitrator/arbitration panel is authorized to have the lacking information and documents completed[355]. Contrary to Ulaş, Art. 7/1 subpar. (a) of the Communiqué on Insurance Arbitration Procedure specifies that arbitrators make their decisions based only on submitted documents.

[353] Ulaş, p.256; Ulusoy, p.243.
[354] Can, p.357.
[355] Ulaş, p.256.

Ulaş also argues that the arbitrator/arbitration panel is not allowed the possibility of applying to expert evidence in this arrangement[356]. However, Art. 7/1 subpar. (c) of the Communiqué on Insurance Arbitration Procedure states that provisions introduced by the Code of Civil Procedure for means of proof also apply to arbitration, thereby allowing the arbitrator/arbitration panel to apply to expert evidence.

As in the general arbitration, the arbitrator/arbitration panel cannot impose cautionary judgement and cautionary attachment also in the insurance arbitration system[357]. Art. 7/1 subpar. (ç) of the Communiqué on Insurance Arbitration Procedure has confirmed this opinion of Ulaş.

Moreover, according to Art. 7/1 subpar. (d) of the same Communiqué, third persons may be notified of an arbitration case and also third persons may intervene in arbitration cases[358].

3. Arbitration Period in Insurance Arbitration

As different from the system in the Code of Civil Procedure, the arbitration period in insurance arbitration is regulated in a special manner in Art. 30/16 of the Insurance Law and Art. 16/10 of the Regulation on Insurance Arbitration. According to these arrangements, arbitrators have to issue their award within four months, at the latest, as from the date they have been appointed by the Insurance Arbitration Commission. Ulaş states that the four-month period should begin as from the date the relevant arbitrator is notified of the duty. If arbitrators are appointed as a panel, the period should begin as from the date of the last relevant notification sent to arbitrators[359].

According to the same arrangements, this period can only be extended with the express and written consent of the parties to the dispute, i.e. the insurance establishment and the policy holder or the insurance beneficiary, if any. Ulaş states that the Insurance Law does not include the possibility in Art. 529 of the Code of Civil Procedure that the

[356] Ulaş, p.256.
[357] Kuru, Vol.6, p.6055 et sequa.; Ulaş, p.257; Can, p357.
[358] Can, p.357.
[359] Ulaş, p.257; Can, p.357; Ulusoy, p.243.

period can be extended by the decision of the competent court or its president judge except the parties[360]. Contrary to Ulaş, Ulusoy argues that it is prescribed by law that the provision of Art. 529 of the Code of Civil Procedure is applied to insurance arbitration because Art. 30/22 of the Insurance Law stipulates that where the Insurance Law is silent, provisions of the Code of Civil Procedure shall be applied to insurance arbitration by comparison[361]. The written consent, i.e. the agreement of the parties should be submitted to the Insurance Arbitration Commission. The new period given to the arbitrator/arbitration panel should clearly be specified in the period extension agreement. Otherwise, if the given period is indefinite, it is considered by the Supreme Court as a reason for reversal[362]. If necessary, the arbitration period may be extended more than once[363].

As there is also not any clear and special arrangement in the Insurance Law for the adjournment of the arbitration period, in such a case, Art. 528 of the Code of Civil Procedure should be considered according to the general reference in Art. 30/22 of the Insurance Law. According to Art. 528 of the Code of Civil Procedure, if any forgery incident that is subject to criminal proceedings comes up during the arbitration process, then the arbitration process shall be adjourned until the criminal court renders a judgement on this matter and in such as case, the arbitration period shall not run (HUMK 528). Considering this arrangement, in the event that a criminal case is brought based on a forgery claim about one or more documents in the dispute file, arbitration proceedings should be adjourned by the arbitrator/arbitration panel until the criminal case is decided[364].

If arbitration proceedings may not be closed within the period determined in the law or extended by the parties, according to the provision of Art. 30/16 of the Insurance Law, this dispute can only be settled by the competent court subsequently. This is because when the arbitration period ends, the arbitration agreement between the

---

[360] Ulaş, p.257.
[361] Ulusoy, p.243.
[362] Precedents of the Supreme Court in Erol Ertekin and İzzet Karataş, **Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi, Tanınması**, Ankara: Yetkin Yayınevi, 1997, p.243 et sequa.; Ulaş, p.258.
[363] Ulaş, p.258.
[364] Ulaş, p.258.

parties is terminated. As a predictable result of this, the arbitrator/arbitration panel becomes unauthorized to settle the dispute. Although the period ends, if the dispute is settled by unauthorized arbitrators, the award will be invalid. This is a ground of appeal and requires that the award be reversed according to the provision of Art. 533/1 of the Code of Civil Procedure[365].

4. Arbitration Award in the Insurance Arbitration System

After the examination and evaluation made by the arbitrator/arbitration panel in the frame of the basic principles explained above, the dispute arising from the insurance contract should be settled and an arbitration award should be rendered accordingly. As specified by the provision of Art. 30/15 of the Insurance Law, the arbitrator/arbitration panel makes decisions according to the results of the examination based only on documents in the dispute file[366].

In the Insurance Law, it is not regulated how an insurance arbitration award is to be written. Although Art. 30/22 of the Insurance Law states that the way of arrangement of the awards shall be determined by the regulation, the Regulation on Insurance Arbitration does not include any arrangement on this matter as well[367]. It is finally regulated by the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1. According to Art. 8 of the Communiqué, insurance arbitration awards should include the provisions for what the dispute involves, substantive and legal reasons upon which the award is based, the substance of the case and proceedings costs. Arbitration awards are prepared in a standard format determined by the Insurance Arbitration Commission and approved by the Undersecretariat[368].

According to the provisions of Art. 30/16 of the Insurance Law and Art. 16/10 of the Regulation on Insurance Arbitration, the arbitrator/arbitration panel submits the award including the legal reasoning to the Commission director. The Commission director then communicates the award to the court which is competent to settle the case,

[365] Ulaş, p.258; Can, p.357; Ulusoy, 243; Yılmaz, p.44-45.
[366] Ulaş, p.258.
[367] Ulaş, p.259.
[368] Can, p.357.

within three business days at the latest, in order for it to go through the necessary process according to the provision of Art. 532 of the Code of Civil Procedure[369]. The award delivered to the court in this way is sent to the parties by the clerk's office of the court. The time for appeal starts to run with the service of the award. If the award is not appealed by the parties within a prescribed period of time, it will become final. This is certified by the judge and the final award's annotation is inserted on the award and in its special records. According to the provision of Art. 536 of the Code of Civil Procedure, the arbitration award can only become executable when this procedure is completed[370].

As, according to the provision of Art. 30/17 of the Insurance Law, arbitrator fees are determined by the Undersecretariat and paid to the arbitrator or arbitrators by the Commission, it is not necessary for arbitrator fees to be specified among proceedings costs which should be included in the award[371].

According to the provision of Art. 30/12 of the Insurance Law, if a higher amount has not been expressly determined with a written agreement by the parties to the dispute, awards given by the arbitrator/arbitration panel up to forty thousand Turkish Liras shall be final for both parties[372]. Ulaş states that the amount of finality should not be determined according to the disputed amount as explained in the above-mentioned article but according to the amount in the award. Awards above forty thousand Turkish Liras may be appealed. Final awards should also be submitted to the Commission director in order for it to go through the necessary process according to the provision of Art. 532 of the Code of Civil Procedure[373].

[369] Ulaş, p.259-260; Can, p.357-358; Ulusoy, p.243; Yılmaz, p.45.
[370] Ulaş, p.259-260; Yılmaz, p.45, 47.
[371] Ulaş, p.260.
[372] The preamble to Art. 30 of the Insurance Law states that considering international practices and the workload of courts, it is appropriate that the award given by the arbitrator up to a certain amount is final for both parties. Ulaş, p.260; Can, p358; Ulusoy, p.243; Yılmaz, p.45.
[373] Ulaş, p.260.

K. LEGAL MEANS AGAINST INSURANCE ARBITRATION AWARDS

As the legal means for correction of insurance arbitration awards is legally not recognized, the appeals process and the renewal of proceedings will be examined in this section[374].

1. Appeals Process against Insurance Arbitration Awards

a. Application Procedure to the Appeals Process

In the Insurance Law, there is not any clear arrangement for the legal means to be applied against insurance arbitration awards. Only Art. 30/12 of the Insurance Law states that if a higher amount has not been expressly determined with a written agreement by the parties to the dispute, awards above forty thousand Turkish Liras may be appealed according to the principles and procedures determined in the Code of Civil Procedure. Ulaş states that this arrangement does not recognize regional appeal courts as a legal means against insurance arbitration awards. Indeed, according to the provision of Art. 427/1 of the Code of Civil Procedure, only the appeals process is recognized as a legal means against arbitration awards[375].

After the arbitrator/arbitration panel has issued the award about the dispute, the Commission director sends the file to the court which is competent to settle the case. Although the dispute file and the original of the award are maintained by the court, copies of the award are sent to the parties by the clerk's office of the court. Associated costs such as service costs are also met by the Commission[376].

Against appealable awards, the parties may apply to the appeals process in fifteen days as from the notification of the award to them according to the provision of Art. 427/1 of the Code of Civil Procedure. If one of the parties to the dispute is a public legal entity subject to the Law No. 4353, the period of applying to the appeals process will be thirty days for it. According to the second paragraph of the same article, the

[374] Ulaş, p.260.
[375] Ulaş, p.261; Yılmaz, p.46.

party whose claim is upheld in the arbitration award can also apply to the appeals process provided that he/she has any legal interest in the award being reversed. Fees and other expenses are imposed to the party applying to the appeals process[377].

b. Appeals Examination by the Supreme Court

The related Chamber of the Supreme Court that is assigned to make an appeal examination on the dispute file and the arbitration award both submitted to itself should first pre-examine whether the award is appealable and grounds of appeal have occurred. This is because, according to the provision of Art. 30/12 of the Insurance Law, principles and procedures relating to appeal against insurance arbitration awards are also governed by the Code of Civil Procedure[378].

As a result of the pre-examination conducted in the manner determined above, if it is decided that the award can be examined for the substance, the appeal examination should be conducted in the frame of Art. 533 of the Code of Civil Procedure. This is because, in Art. 30/12, the Insurance Law has reserved provisions of Art. 533 of the Code of Civil Procedure in the event that the appeals process is initiated in insurance arbitration. In other words, arbitration awards may only be appealed based on limited grounds determined in this article and then reversed on the same limited grounds specified in this article at the end of the appeal examination[379].

According to Art. 533 of the Code of Civil Procedure, arbitration awards can only be appealed for reversal under the following circumstances[380]:

- If the award is rendered subsequent to the expiration of the arbitration time limit,
- If the award is rendered for something not demanded,
- If arbitrators render an award falling beyond their competency,

[376] Ulaş, p.261.
[377] Ulaş, p.261.
[378] Ulaş, p.261.
[379] Ulaş, p.261-262; Ulusoy, p.243; Yılmaz, p.46.
[380] Ulaş, p.262; Can, p.358; Yılmaz, p.46.

- If arbitrators fail in rendering an award for each one of the allegations set forth by both parties.

If the arbitration award is reversed by the Supreme Court due to any of the last three grounds, insurance arbitrators should be reappointed by the Commission. Likewise, the arbitration time limit is redetermined. As arbitrators cannot take any decision of persistence, they must follow the reversal decision of the Supreme Court[381].

As a result of the appeal examination conducted by the Supreme Court, if appeal grounds are not considered appropriate, the arbitration award will be approved. This approval decision is added to the dispute file and the dispute file is sent to the competent court as in Art. 532 of the Code of Civil Procedure. Even this decision is sent to the parties by the clerk's office of the court. Ulaş states that it will be appropriate in practice, if a copy of the Supreme Court decision is sent to the Commission. This is because it will only be possible in this way that this decision is added to the records about the dispute file by the Commission[382].

In the event that the appeals process is initiated, the relevant arbitration award will only be enforceable after it is approved by the Supreme Court and becomes final[383].

Ulaş states that in the insurance arbitration system, during the phase of the proceedings conducted by the arbitrator/arbitration panel, it is not prescribed to hold hearings but on the contrary, the examination should be made based on the file, i.e. documents. Therefore, whatever the disputed amount is, the examination of the Supreme Court should be made based on the file without holding any hearings[384]. However, the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1 which came into effect on 21 January 2009 states that arbitrators examine filed documents in principle but there is also no obstacle for them to hold hearings. So, based on the reasoning of Ulaş, it can be said that the Supreme Court can

[381] Ulaş, p.262; Can, p.358; Yılmaz, p.46.
[382] Ulaş, p.262.
[383] Ulaş, p.262.
[384] Ulaş, p.262.

hold hearings as well (Art. 7/1 subpar. (b) of the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators).

According to the provision of Art. 535 of the Code of Civil Procedure, any contract to be concluded in advance between the two parties on waiving the renewal of trial and the appeals process, if specific conditions enumerated under Art. 533 occur, shall be null and void. However, according to the same provision, it is possible to waive the appeals process after an arbitration award has emerged[385].

Moreover, according to Art. 440/III subpar. (4) of the Code of Civil Procedure, it is not possible to use the legal means for correction of Supreme Court decisions approving or reversing arbitration awards[386].

2. Renewal of Insurance Arbitration Proceedings

According to the general reference in Art. 30/22 of the Insurance Law, against arbitration awards made in the insurance arbitration system, it is possible according to Art. 534 of the Code of Civil Procedure to use the legal means of renewal of trial which is regulated from Art. 445 to 454 of the same law[387].

It is accepted both by the doctrine and in practice that it may be possible to use the legal means of renewal of trial by applying to the court competent to settle the case, not to the arbitrator/arbitration panel rendering the award[388]. According to these practices and opinions, after the court has determined that grounds for renewal of trial are occurred and made its decision accordingly, the substance of the dispute file related to the renewal of trial should be examined by the arbitrator/arbitration panel again[389].

---

[385] Ulaş, p.263; Yılmaz, p.46.
[386] Kuru, Vol.6, p.6122; Ulaş, p.263; Yılmaz, p.47.
[387] Ulaş, p.263; Yılmaz, p.47.
[388] Although the correction of decisions regulated from Art. 440 to 442/A of the Code of Civil Procedure was abolished by the Law No. 5236, according to the same Law, the abolition of these provisions are postponed until the starting date for functioning of regional appeal courts. Ulaş, p.263.
[389] Ulaş, p.263.

In Art. 445/1 of the Code of Civil Procedure, it is limitedly enumerated in eleven paragraphs on which grounds the renewal of trial process may be initiated[390].

According to the provision of Art. 535 of the Code of Civil Procedure, any contract which requires the disputed parties not to make use of the process of the renewal of trial against arbitration awards, if certain conditions exist, in other words, to waive this legal means ab initio shall be null and void. However, the waiver after the arbitration award has emerged is valid[391].

L. ASSESSMENT OF INSURANCE ARBITRATION PROCEDURE

Ulaş states that a negative aspect of the insurance arbitration system at first sight is that it is regulated in an unsystematic manner. This is because as an important institution in the Insurance Law, the system has been regulated under one article having twenty-three paragraphs. Under this only article, both organizational principles of the system and legal procedures to be followed in the settlement of disputes are regulated in an overlapping and complicated manner. Ulaş asserts that the system which will perform a very important duty in the coming period should not have been regulated under a single article. If the system was regulated under the heading of Arbitration constituting the eighth part of the Law and the objective of the system, its organizational structure, the principles applying to managerial and adjudicatory functions of the Arbitration Commission and finally the legal means against awards which will emerge as a result of the adjudicatory process were all regulated under different headings and in different articles, this important system would be more understandable and a more useful piece of legislation to provide convenience for the practice[392].

Kender shares this opinion of Ulaş and states that provisions of Art. 30 of the Insurance Law have been regulated in a very complicated manner[393].

According to Ulaş, another negative aspect of the insurance arbitration system is that insurance establishments are offered a choice to participate in this system. By this

[390] Ulaş, p.263.
[391] Ulaş, p.263; Yılmaz, p.46.
[392] Ulaş, p.264.
[393] Kender, p.125.

arrangement manner, the policy holder's or the insurance beneficiary's claiming rights through applying this system is beforehand left to the choice or voluntary participation of insurance establishments. As a result, one of the ways to claim rights of some policy holders or people benefiting from the insurance contract has been blocked right from the beginning[394].

Kender criticizes that it is prescribed that a large number of personnel work for the Insurance Arbitration Commission, namely the president and deputy presidents in the Presidency of the Insurance Arbitration Commission, the director and deputy directors, rapporteurs, other personnel, arbitrators and personnel of Commission offices. Kender is of the opinion that there is no need for such a large organization to settle the disputes arising from the execution of insurance contracts between the parties by the arbitration process[395].

Kender also draws attention to the following gaps in the insurance arbitration arrangements[396]:

- It is not clear how many deputy presidents will be in the Presidency of the Insurance Arbitration Commission.
- Concerning the director and deputy directors, it is not clear in which field the undergraduate degree should have been gained.
- It is also not clear in which field the arbitrators should have gained their undergraduate degrees.

Kender asks what does "experience in insurance law" mean[397]. This is because the criteria for experience are defined neither in the Insurance Law nor in the Regulation. With regard to the criteria for the experience to be sought in insurance arbitrators, Art. 3 of the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1 stipulates, i.a., that:

- The condition of experience is reviewed for each application separately;

[394] Ulaş, p.264-265.
[395] Kender, p.125.
[396] Kender, p.125.

- Whether the applicant has a minimum two years of experience in insurance law is determined according to the quality and quantity of the work carried out by the applicant during the prescribed period;
- The work carried out must be directly related to the insurance technique.

Moreover, the Circular on the Professional Experience to Be Sought in Insurance Arbitrators according to the Communiqué on Insurance Arbitration Procedure and Insurance Arbitrators No. 2009/1 also states that the arbitrator's work requires expertise on the insurance technique. According to the Circular, following people are therefore not considered to meet the condition of experience in insurance law:

- People who work in recovery departments of insurance companies;
- People who have expertise in legal fields not connected with insurance law such as public prosecuters or criminal judges;
- People who mostly pursue recovery files, defaulting agencies, execution and penalty cases;
- People who offer consulting services to the agencies.

As seen, concerning the condition of experience in insurance law, insurance arbitration rules stipulate that the required experience should have been gained in technical fields of insurance, give a few examples of people who do not meet the condition and leave the last decision to the discretion of the Commission.

Ulaş states that in the Insurance Law, there is not sufficient arrangement for rapporteurs who owe important duties in the insurance arbitration system. This is because rapporteurs are not conferred sufficient powers to make the dispute file suitable for arbitration proceedings. Also, there are uncertainties about some of their powers. In Art. 30/15 of the Insurance Law, for example, the maximum fifteen-day period given to rapporteurs for the examination is not sufficient and there is not a sufficient clarity as to the limits, measures and forms of the dispute settlement power conferred to them[398].

[397] Kender, p.125.
[398] Ulaş, p.265.

Ulaş expresses that in the insurance arbitration system, the power to select and assign arbitrators is left to only the Commission. However, although this system has a kind of institutional arbitration characteristic, it should have been considered as an element which can increase the confidence in the system that the parties to the dispute are also given the right to select the arbitrator provided that the relevant arbitrator is included in the lists compiled by the Commission[399].

Ulaş states that another negative aspect of the insurance arbitration arrangement is that in the arbitrator's examination phase which constitutes the adjudicatory function, the examination power and duty of the arbitrator is limited to the information and documents in the file compiled by the Commission rapporteur. The duty of the justice system is not only to settle the dispute in a short time, but also to achieve a fair and right outcome which will satisfy the parties. Therefore, arbitrators should be allowed the possibility of deepening and widening the investigation, if necessary[400].

Kender asks which rules arbitrators will consider when they render their awards. This very important matter is also not explained in relevant provisions[401]. With regard to the domestic arbitration regulated in the Code of Civil Procedure, it is controversial in the doctrine whether arbitrators are bound by the provisions of the substantive law when they settle the dispute between the parties. In principle, arbitrators do not have to apply the provisions of the substantive law when they settle the dispute. This is because as different from court judgements, the contradiction to the law is not mentioned among grounds of appeal against arbitration awards in Art. 533 of the Code of Civil Procedure. However, if parties determine that arbitrators settle the dispute according to the provisions of the substantive law, arbitrators will have to render their awards in compliance with the substantive law. This is because although the contradiction to the substantive law is not a ground of appeal for arbitration awards, if arbitrators disregard the agreement of the parties to bind them to the substantive law,

[399] Ulaş, p.253, 265.
[400] Ulaş, p.265.
[401] Kender, p.125.

their award may be appealed according to Art. 533/3 of the Code of Civil Procedure[402]. In this case, arbitrators are deemed that they have rendered an award which falls beyond their competency.

Ulaş also criticizes the amount determining whether the award is final or not. The principle of equity which should be in all adjudicatory decisions has not been considered because a different arrangement from the Civil Procedure Code system has been accepted with regard to the amount and principles determining the finality of the award. He also criticizes that the finality amount has been specified as forty thousand Turkish Liras in the event that a higher amount has not been determined by the parties. The parties are thus authorized to determine the finality amount over forty thousand Turkish Liras without facing any limitations. Ulaş states that the prohibition of waiver of the right to appeal in advance introduced by the mandatory provision of Art. 535 of the Code of Civil Procedure has thus been ignored in an indirect way[403].

Another negative aspect criticized by Ulaş is that under the procedure of refusal of the arbitrator, Art. 30/15 of the Insurance Law leaves the duty and the power to review and decide on the refusal request to a director whose original function is managerial in the organization of the insurance arbitration system, although this duty and power has an adjudicatory characteristic and has been regulated by Art. 33 of the Code of Civil Procedure[404].

Ulaş believes that after the problems and the defects which are mentioned above and will further be determined by both the doctrine and legal precedents have been reconsidered and corrected, highly developed regulations able to satisfy the requirements of the insurance sector will come up[405]. Both Ulaş and Ulusoy think that this system will reduce the workload of state courts[406]. Moreover, in the event that disputes are resolved by arbitrators selected from the arbitrators lists consisting of experts in the insurance field, in a quick and fair manner, this may dispel the suspicions

[402] Üstündağ, p.965-966; Yılmaz, p.46.
[403] Ulaş, p.266.
[404] Ulaş, p.266.
[405] Ulaş, p.266.
[406] Ulaş, p.264; Ulusoy, p.238.

of Turkish people against the insurance system and make the insurance system more reliable in the eyes of Turkish people[407]. The lack of confidence is considered one of the key reasons why the development of the Turkish insurance sector has been delayed. Kender remains suspicious about the insurance arbitration system and states that it will be seen in practice whether the institution of insurance arbitration proves effective or not[408]. Finally, as stated by Yılmaz and Metezade, the arbitration system is a reform in insurance and the adoption of the arbitration procedure for the resolution of insurance disputes has been one of the really important and radical steps for our country[409].

[407] Ulaş, p.264.
[408] Kender, p.125.
[409] Yılmaz, p.39; Metezade, p.28.

CONCLUSION

The access to justice is at the top of the political agenda in all Member States of the EU. The Tampere European Council which took place on 15 and 16 October 1999 concluded that for better access to justice, alternative/extra-judicial procedures should also be created by Member States. The EU is therefore very interested in ADR. It is the Commission's view that encouraging the use of Mediation and other forms of ADR assists in the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation and so assists citizens in a real way to secure their legal rights[410].

Turkey is a candidate country for EU membership. In order to become a Member State, Turkey has to accept the Community legislation. As to the Turkish legal system, it has been criticized that the use of out-of-court dispute-settlement mechanisms remanins low in Turkey. In the 2004 Regular Progress Report for Turkey, it was stated that EU Member States need to effectively enforce the acquis through appropriate judicial and out-of-court dispute resolution mechanisms and administrative systems, including market surveillance and a role for consumer organisations[411]. Then in the 2005 Regular Progress Report for Turkey, it was stated that appropriate judicial and out-of-court dispute resolution mechanisms as well as consumer information and education and a role for consumer organisations should be ensured as well[412]. The Turkish legislator followed these pieces of advice when it was preparing the Insurance Law No. 5684 and adopted the insurance arbitration procedure.

According to the preamble to Art. 30 of the Insurance Law, although the practice of the ombudsman system which is implemented in different countries has been used as a basis for Art. 30 of the Insurance Law, the Turkish insurance arbitration system has been fashioned within the framework of the basic principles and procedures

---

[410] *Alternative Dispute Resolution – Community Law*, p.1.
[411] The Commission of the European Communities, Turkey 2004 Progress Report, Brussels, 6.10.2004, p.135-136.
[412] The Commission of the European Communities, Turkey 2005 Progress Report, Brussels, 9.11.2005, p.121.

of the arbitration system in the Code of Civil Procedure to ensure that a parallel is provided with the legal system in our country.

The Commission expressed its satisfaction and stated in the 2007 Regular Progress Report for Turkey that the introduction of out-of-court settlement body for customer protection is a welcome development in the insurance sector[413].

When we look at the subject matters of insurance disputes, these are mainly subjects which require espertise on insurance. The most considerable difficulty we have in our judicial system is that enough specialized courts have still not been established in the fields that need specialist expertise. For this reason, the specialized and impartial insurance arbitration commission is preferred to be established within the Association of the Insurance and Reinsurance Companies of Turkey.

Those who want to work as insurance arbitrators shall meet the criterion that they shall have a minimum of five years of experience in insurance law or a minimum of ten years of experience in insurance (Art. 30/8 subpar. (c) of the Insurance Law). The decision which requires expertise in the insurance field is thus taken by insurance experts. However, if an insurance dispute goes to judicial trial, a judge alone will have to decide the case which is maybe the first and the last one of its kind coming in front of him/her. This is one of the important aspects of the insurance arbitration system from which it should be superior than state courts.

The doctrine has welcomed the insurance arbitration procedure. It is commonly stated that this system will reduce the workload of state courts[414]. Moreover, in the event that disputes are resolved by arbitrators selected from the arbitrators lists consisting of experts in the insurance field, in a quick and fair manner, this may dispel the suspicions of Turkish people against the insurance system and make the insurance system more reliable in the eyes of Turkish people[415]. The lack of confidence is

[413] The Commission of the European Communities, Turkey 2007 Progress Report, Brussels, 6.11.2007, p.42.
[414] Ulaş, p.264; Ulusoy, p.238.
[415] Ulaş, p.264.

considered one of the key reasons why the development of the Turkish insurance sector has been delayed.

About two years after Art. 30 of the Insurance Law No. 5684 entered into force, the Insurance Arbitration Commission commenced operating and started to accept applications on 21 August 2009. It has 41 member establishments today (See Appendix 1). According to Art. 19/2 and 3 of the Regulation on Insurance Arbitration, a three monthly bulletin on the activities of the Commission and a three monthly periodical of distinctive arbitration awards shall be published by the Commission. Also, the Commission shall prepare an annual report on the results of its activities. However, as it has started operating only a short time before, the Commission has not issued any publications yet. After we have been able to see these first results of the Commission's activities, it will be more clear to see whether the institution of insurance arbitration proves effective or not.

APPENDICES

APPENDIX 1: Members of the Insurance Arbitration System

No.	Member Insurance Establishment	Membership Start Date
1	Işık Sigorta A.Ş.	13.07.2009
2	Ak Sigorta A.Ş.	29.07.2009
3	Güneş Sigorta A.Ş.	29.07.2009
4	Civ Hayat Sigorta A.Ş.	30.07.2009
5	Mapfre Genel Yaşam A.Ş.	30.07.2009
6	Allianz Hayat ve Emeklilik A.Ş.	31.07.2009
7	Allianz Sigorta A.Ş.	31.07.2009
8	Groupama Emeklilik A.Ş.	31.07.2009
9	Magdeburger Sigorta A.Ş.	31.07.2009
10	Finans Emeklilik ve Hayat A.Ş.	04.08.2009
11	Anadolu Anonim Türk Sigorta Şirketi	05.08.2009
12	Axa Hayat Sigorta A.Ş.	05.08.2009
13	Axa Sigorta A.Ş.	05.08.2009
14	Eureko Sigorta A.Ş.	05.08.2009
15	Generali Sigorta A.Ş.	05.08.2009
16	Groupama Sigorta A.Ş.	05.08.2009
17	Yapı Kredi Sigorta A.Ş.	05.08.2009
18	Zurich Sigorta A.Ş.	05.08.2009
19	Anadolu Hayat Emeklilik A.Ş.	06.08.2009
20	Birlik Sigorta A.Ş.	06.08.2009
21	Mapfre Genel Sigorta A.Ş.	06.08.2009
22	Acıbadem Sağlık ve Hayat Sigorta A.Ş.	07.08.2009
23	Birlik Hayat Sigorta A.Ş.	07.08.2009
24	Coface Sigorta A.Ş.	07.08.2009
25	Demir Hayat Sigorta A.Ş.	07.08.2009
26	Fiba Sigorta A.Ş.	07.08.2009
27	HDI Sigorta A.Ş.	07.08.2009
28	Hür Sigorta A.Ş.	07.08.2009
29	Ray Sigorta A.Ş.	07.08.2009
30	SBN Sigorta A.Ş.	07.08.2009
31	Türk Nippon Sigorta A.Ş.	07.08.2009
32	Yapı Kredi Emeklilik A.Ş.	07.08.2009
33	Ankara Anonim Türk Sigorta Şirketi	12.08.2009
34	Demir Sigorta A.Ş.	12.08.2009
35	Deniz Emeklilik A.Ş.	14.08.2009
36	Euro Sigorta A.Ş.	14.08.2009
37	Liberty Sigorta A.Ş.	04.09.2009
38	AvivaSA Emeklilik ve Hayat A.Ş.	19.11.2009
39	ERGOİSVİÇRE Sigorta A.Ş.	19.11.2009
40	Dubai Group Sigorta A.Ş.	05.01.2010
41	Ziraat Sigorta A.Ş.	12.01.2010

Source: www.sigortatahkim.org (28 January 2010).

BIBLIOGRAPHY

General Works, Books

Applebey, George. "Alternative Dispute Resolution and the Civil Justice System", **A Handbook of Dispute Resolution: ADR in Action.** Karl J. Mackie. New York: Routledge, 1991, p.26-43.

Baldwin, John. **Small Claims in the County Courts in England and Wales: The Bargain Basement of Civil Justice?.** New York: Oxford University Press, 1997.

Brown, Gordon W. **Legal Terminology.** Fifth Edition. New Jersey: Pearson Prentice Hall, 2008.

Bühring-Uhle, Christian. **Arbitration and Mediation in International Business.** Second Edition. The Netherlands: Kluwer Law International BV, 2006.

Can, Mertol. **Türk Özel Sigorta Hukuku (Ders Kitabı).** Genişletilmiş ve Gözden Geçirilmiş Üçüncü Bası. Ankara: İmaj Yayıncılık, Temmuz 2009.

Collins Cobuild English Dictionary for Advanced Learners. "Dispute", Glasgow: HarperCollins Publishers, 2001.

Dayınlarlı, Kemal. **HUMK'da Düzenlenen İhtiyari İç Tahkim (m. 516-536) (Gözden geçirilmiş, genişletilmiş ve Yargıtay Kararları ile güncelleştirilmiş).** İkinci Baskı. Ankara: Dayınlarlı Hukuk Yayınları, 2004.

Dayınlarlı, Kemal. **Domestic Arbitration Regulated in the Turkish Code of Civil Procedure (Art. 516 – 536).** Ankara: Dayınlarlı Hukuk Yayınları, 2004.

Ildır, Gülgün. **Alternatif Uyuşmazlık Çözümü (Medeni Yargıya Alternatif Yöntemler).** Birinci Baskı. Ankara: Seçkin Yayıncılık, Haziran 2003.

Kender, Rayegân. **Türkiye'de Hususi Sigorta Hukuku, Sigorta Müessesesi, Sigorta Sözleşmesi**. 9. Baskı. İstanbul: Arıkan Yayınevi, Ocak 2008.

Menkel-Meadow, Carrie J; Porter Love, Lela and Kupfer Schneider, Andrea. **Mediation: Practice, Policy, and Ethics.** First Edition. New York: Aspen Publishers, 2006.

Menkel-Meadow, Carrie J; Porter Love, Lela; Kupfer Schneider, Andrea and Sternlight, Jean R. **Dispute Resolution: Beyond the Adversarial Model.** First Published. New York: Aspen Publishers, 2005.

Moore, Christopher W. **The Mediation Process Practical Strategies For Resolving Conflict.** Third Edition. San Francisco: Jossey-Bass, 2003.

Nolan-Haley, Jacqueline M. **Alternative Dispute Resolution In A Nutshell.** Third Edition. Minnesota: Thomson West, 2008.

Oksay, Suna and Ceylantepe, Tolga. **Sigorta Konusunda Ortaya Çıkan Uyuşmazlıkların Alternatif Yöntemlerle Çözümü (ADR): Avrupa Uygulamaları.** İstanbul: TSRSB Sigorta Araştırma ve İnceleme Yayınları, 2006.

Özbek, Mustafa. **Alternatif Uyuşmazlık Çözümü.** Ankara: Yaklaşım Yayınları, Ocak 2004.

Özel, Sibel. **Milletlerarası Ticari Tahkimde Kanunlar İhtilafı Meseleleri.** Birinci Baskı. İstanbul: Legal Yayıncılık, Aralık 2008.

Stitt, Alan J. **Alternative Dispute Resolution For Organizations: How To Design A System For Effective Conflict Resolution.** Ontario: John Wiley & Sons Canada Limited, 1998.

Şahin Ceylan, Şule. **Geleneksel Toplumdan Modern Topluma Alternatif Uyuşmazlık Çözümü.** 1. Baskı. İstanbul: On İki Levha Yayıncılık, 2009.

Tutumlu, Mehmet Akif. **Tüketici Sorunları Hakem Heyetlerinin Yapısı, İşleyişi, Sorunları Ve Çözüm Önerileri.** Birinci Baskı. Ankara: Seçkin Yayıncılık, Haziran 2006.

Suskind, Richard. **The End of Lawyers?: Rethinking the Nature of Legal Services.** First published. New York: Oxford University Press, 2008.

Ulusoy, Erol. "Finans Hukukunda Tahkim", **II. Uluslararası Özel Hukuk Sempozyumu: Tahkim.** İstanbul: Tasarruf Mevduatı Sigorta Fonu and Marmara Üniversitesi Hukuk Fakültesi. 14.02.2009, p.237-243.

Üstündağ, Saim. **Medeni Yargılama Hukuku.** C. I-II, İstanbul, 2000.

Ware, Stephen J. **Alternative Dispute Resolution.** 1 st Reprint. Minnesota: West Group, 2003.

Specific Works, Articles, Booklets, Journals, Electronic Documents and Reports

American Arbitration Association Dispute Resolution Services Worldwide. *Mini-Trial: Involving Senior Management*. 2007. http://www.adr.org/sp.asp?id=22007#procedures (28 December 2009).

Banka Ve Ticaret Hukuku Araştırma Enstitüsü (T. İş Bankası A.Ş. Vakfı). Adalet Bakanlığı Hukuk Muhakemeleri Kanunu Tasarısı'nda İç Tahkim (m. 411 - 448) Paneli, 23 Mart 2007. Ankara 2007/VII.

British Columbia Mediator Roster Society. *The Mediation Process*. http://www.mediatorroster.bc.ca/public/mediation/ mediationinbc_process.aspx (26 December 2009).

Ceylantepe, Tolga. "Fransa'da Sigorta Uyuşmazlıklarının Arabuluculuk ve Tahkim ile Çözümü: FFSA, CEFAREA". **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını. No.8, April-June 2007, p.18-20.

Ceylantepe, Tolga. "Sigorta ve Diğer Finansal Hizmetlerde Ombudsman Uygulaması: İrlanda Örneği". **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını. No.9, July-September 2007, p.12-15.

European Commission. *About SOLVIT*. http://ec.europa.eu/solvit/site/about/index_en.htm (15 January 2010).

European Commission. *Alternative Dispute Resolution: Belgium*. http://ec.europa.eu/civiljustice/adr/adr_bel_en.htm (15 January 2010).

European Commission. *Alternative Dispute Resolution – Community Law*. http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm (15 January 2010).

European Commission. *Alternative Dispute Resolution: Finland*. http://ec.europa.eu/civiljustice/adr/adr_fin_en.htm (15 January 2010).

European Commission. *Database of Notified Out-Of-Court Bodies*. http://ec.europa.eu/consumers/redress/ out_of_court/database/index_en.htm (15 January 2010).

European Commission. *Information on the National Board for Consumer Complaints (ARN)*. http://ec.europa.eu/consumers/redress/out_of_court/commu/acce_just04_sv_ccb1_en.html (15 January 2010).

European Commission. *Members of FIN-NET*. http://ec.europa.eu/internal_market/fin-net/members_en.htm (15 January 2010).

European Commission. *Settling out of Court – Developing Alternative Methods to Resolve Civil and Commercial Disputes in the European Union*. http://ec.europa.eu/justice_home/fsj/civil/ dispute/fsj_civil_dispute_en.htm (25 January 2010).

European Commission. *The European Consumer Centres Network*. http://ec.europa.eu/consumers/redress_cons/ index_en.htm (15 January 2010).

European Commission. *The Finnish Insurance Complaints Board (Vakuutuslautakunta)*. http://ec.europa.eu/consumers/redress/out_of_court/commu/acce_just04_fi_ccb2_en.html (15 January 2010).

European Commission. *Welcome to FIN-NET*. http://ec.europa.eu/ internal_market/fin-net/index_en.htm (15 January 2010).

Federation of Finnish Financial Services. *The Finnish Insurance Ombudsman Bureau*. http://www.venevahinko.fi/www/page/ fk_www_4582 (15 January 2010).

Financial Ombudsman Service. **Annual Review, Financial Year 2008/09.** London, May 2009.

Financial Ombudsman Service. *FAQs – Complaining to the Ombudsman, How Long Does It Take?* http://www.financial-ombudsman.org.uk/faq/answers/complaints_a6.html (29 January 2010).

Financial Ombudsman Service. *FAQs - Complaints from Businesses, Charities and Trusts*. http:// www.financial-ombudsman.org.uk/faq/answers/complaints_a9.html (29 January 2010).

Financial Ombudsman Service. *FAQs - Complaints We Cover*. http://www.financial-ombudsman.org.uk/faq/answers/complaints_a2.html (29 January 2010).

Financial Ombudsman Service. *FAQs – Funding*. http://www.financial-ombudsman.org.uk/faq/answers/research_a5.html (29 January 2010).

Financial Ombudsman Service. *Official Documents Underpinning Our Statutory Functions and Powers*. http://www.financial-ombudsman.org.uk/about/official-documents.html (29 January 2010).

Financial Ombudsman Service. *Our Complaints Procedure and How to Complain*. http://www.financial-ombudsman.org.uk/consumer/complaints.htm (29 January 2010).

Financial Ombudsman Service. *Your Complaint and the Ombudsman - Our Consumer Leaflet*. http://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm (29 January 2010).

Finnish Financial Supervisory Authority. *The Finnish Financial Ombudsman Bureau*. http://www.finanssivalvonta.fi/en/ Customer/Contact_for_help/Fine/Pages/Default.aspx (15 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland - About Us - Overview*. http://www.financialombudsman.ie/about-us/ (29 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Initial Steps*. http://www.financialombudsman.ie/complaints-procedure/ (29 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Redress*. http://www.financialombudsman.ie/complaints-procedure/redress.asp (29 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland - Complaints Procedure - Refusal to Cooperate*.

http://www.financialombudsman.ie/complaints-procedure/refusal.asp (29 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland - Guide for Complainants – Costs*. http:// www.financialombudsman.ie/making-a-complaint/costs.asp (29 January 2010).

Irish Financial Services Ombudsman. *Financial Services Ombudsman's Bureau of Ireland – Home*. http://www.financialombudsman.ie/ (29 January 2010).

Irish Financial Services Ombudsman. *The Financial Services Ombudsman's Bureau of Ireland, Making a Complaint, Overview*. http://www.financialombudsman.ie/making-a-complaint/ (15 January 2010).

Melamed, James. *Frequently Asked Questions about Mediation and Negotiation*. http://www.mediate.com/articles/Mediationfaq.cfm# (26 December 2009).

Metezade, Zihni. "Sigortada Ombudsman ve Yeni Bir Oluşum: Tahkim Komisyonu". **Sigorta Hukuku Dergisi.** Özel Sayı, April 2008, p.271-281.

Metezade, Zihni. "Nedir Tahkim?". **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını. No.17, July-September 2009, p.23-28.

National Arbitration Forum. *Mediating and Arbitrating Insurance Disputes: Includes Practical Tips and Model ADR Language*. January 2005. http://www.adrforum.com/users/naf/resources/InsuranceWP.pdf (26 December 2009).

National Board for Consumer Complaints. *What is ARN*. http://www.arn.se/ Other-languages/English/ (15 January 2010).

Oksay, Suna. "Finansal Ombudsman Servisi ve Sigorta Uyuşmazlıklarının Çözümü". **BİRLİK'ten**, Türkiye Sigorta ve Reasürans Şirketleri Birliği Yayını. No.4, April-June 2006, p.10-13.

Ombudsmann für Versicherungen. *Der Beirat*. http://www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/DerBeirat/index.html (15 January 2010).

Ombudsmann für Versicherungen. **Jahresbericht 2008.** Berlin, 2009.

Ombudsmann für Versicherungen. *Stellung und Kompetenzen des Ombudsmanns*. http://www.versicherungsombudsmann.de/Navigationsbaum/WirUeberUns/StellungUndKompetenz/index.html (15 January 2010).

Ombudsmann für Versicherungen. *Wichtige Informationen über das Beschwerdeverfahren gegen Versicherungsunternehmen*. http://www.versicherungsombudsmann.de/Navigationsbaum/IhreBeschwerde/Verfahrensende/index.html (15 January 2010).

Ombudsmann für Versicherungen. *Wie endet das Verfahren?*. http://www.versicherungsombudsmann.de/Navigationsbaum/IhreBeschwerde/Verfahrensende/index.html (15 January 2010).

Polish Insurance Ombudsman. *Causes of Creating the Insurance Ombudsman Institution in Poland*. http://www.rzu.gov.pl/english/Causes_of_creating_the_Insurance_Ombudsman_institution_in_Poland__2322 (15 January 2010).

The European Ombudsman. "The European Ombudsman: Could He Help You? Complaint Guide and Form". [Brochure]. June 2006.

The European Ombudsman. *The European Ombudsman at a Glance*. http://www.ombudsman.europa.eu/ atyourservice/ataglance.faces (15 January 2010).

Ulaş, Işıl. "Sigortacılıkta Tahkim". **Banka Ve Ticaret Hukuku Dergisi.** Vol.XXIV, No.2, December 2007, p.239-266.

United Nations. UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002. New York, 2004. http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (28 December 2009).

Yılmaz, Zekeriya. "Sigortacılık Kanununa Göre Sigortacılıkta Tahkim". **Terazi Hukuk Dergisi.** No.17, January 2008, p.37-48.

Web Addresses

http://www.adli-sicil.gov.tr

http://www.sigortacilik.gov.tr

http://www.sigortatahkim.org

Official Journals of European Union

O.J. L 115, 17.4.1998, p.31-34.

O.J. L 109, 19.4.2001, p.56-61.

O.J. L 136, 24.5.2008, p.3-8.

Official Documents of European Union

The Commission of the European Communities. **Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196 Final.** Brussels, 19.04.2002.

The Commission of the European Communities. **Commission Recommendation of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-Of-Court Settlement of Consumer Disputes (Text with EEA relevance) (98/257/EC).** O.J. L 115, 17.4.1998, p.31-34.

The Commission of the European Communities. **Commission Recommendation of 4 April 2001 on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (notified under document number C(2001) 1016) (Text with EEA relevance) (2001/310/EC).** O.J. L 109, 19.4.2001, p.56-61.

The European Parliament and the Council of the European Union. **The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.** O.J. L 136, 24.5.2008, p.3-8.

The Commission of the European Communities. **2004 Regular Report on Turkey's Progress Towards Accession {COM(2004) 656 final}.** Brussels, 6.10.2004. SEC(2004) 1201.

The European Commission. **Turkey 2005 Progress Report {COM (2005) 561 final}.** Brussels, 9 November 2005. SEC(2005) 1426.

The Commission of the European Communities. **Commission Staff Working Document, Turkey 2007 Progress Report, accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008 {COM (2007) 663 final}.** Brussels, 6.11.2007. SEC(2007) 1436.