Right of Direct Action of the Aggrieved Party and the "Pay to be Paid" Rule

The Turkish Commercial Code no. 6102, which entered into force upon its promulgation in the Official Gazette on 14.02.2011, has established a right of direct action for the aggrieved party in liability insurances, in addition to other new thing it has legislated. Pursuant to the provisions of article 1478/1 of TCC, the insurer shall be jointly liable together with the insured against a third party who is not a party to the contract, in addition to the act undertaken by him due to his obligation arising from the existing insurance contract.

In order to understand the legislative intention of the law-maker, it is necessary to look at the grounds of the article. It is stipulated in the preamble of the article that "Although the main purpose of the liability insurance is to compensate the decrease in the property of the insured depending on the indemnity to be paid to a third party because of the damage given, the indirect consequence of the same is to recover the damage of the aggrieved party as soon as possible and to protect third parties against the insured's inability to pay." In addition, direct application of the aggrieved person to the insurer will have a comforting effect on the insured causing the damage and make it easier for the insured to reach the purpose he/she would like to achieve with the liability insurance. However, the arrangement brought does not in any way put the liability insurance into a contract in favor of a third party. Because it is still the assured whose interest is insured".

§Currently number of international regulations such as the CLC of 1969, 1971 Fund Convention, the 2001 Bunkers Convention, the HNS Convention, the 1974 Athens Convention and the 2007 Nairobi Convention as well as systems in which various risks anticipated such as maritime pollution, wreck, death-injury, are anticipated to be covered by a guarantor/insurer, have created the right for the aggrieved party to apply directly. It is also observed that the article in the Turkish Commercial Code constitutes an exception to the condition that the existing loss prescribed in the insurance policies is paid by the insured in principle (Pay to be Paid Principle).

If we take a look at the situation in the UK in relation to the aggrieved party's right to a direct claim to the insurer from the comparative law perspective, in principle, in English Law, third parties do not have the right to directly claim against the P&I Club.

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Pursuant to "Third Parties Act Rights" (TPAR) dated 1930, the precondition for the claimant to be able to sue the insurer was that the liability of the insured to be determined by a court or through arbitration. By the 2010 revision made in this law, this condition has been removed. Therefore, the third person can directly sue the insurer without having to address hostility to the insured under the current situation in England. However, the same law stipulated a new condition and stipulated that the insured must have gone bankrupt or had to be given a liquidation decision so that the victim could directly sue the insured and the succession was directly transferred to the insured.

Towards the end of the 80's, the English courts had to consider the existence of the right of direct action to the insurer i.e. the issue of the application of the in "Pay to be paid rule", in two separate cases. Firstly, in the "Fanti" case, the Judge Staughton found that this rule was in contrary to 1930 Act and was therefore unenforceable. However, in the subsequent "Padre Island" case, Judge Saville took a completely opposite approach, noting that no third party could be in a better position than the assured even for legal succession and therefore the rule was applicable. The cases were appealed first at the Court of Appeal, then at the House of Lords. As a result, it was concluded that the right of direct action could not be exercised in the presence of this clause and it was pointed out that the application of the rule eliminated two drawbacks; i) The assured / members benefit from an unjust enrichment when receiving payment from the insurer / club ii) The risk that no third party will be paid. However, in order to protect the third party victim, there is a tendency that the rule is not applicable to cases of death and injury.

Subsequent applications will show how the court practices and maritime insurances, will be shaped in the light of this development and how the balance for preventing unjust enrichment of third party or insured while serving for the purpose of protecting the victim on the one hand, will be maintained. On top of everything, we believe that this situation constitutes a basis for better cooperation between insurer and assured, which underlines that the interests of the assured and the insurer come together, as the phrase goes "we are in the same boat", except the cases where this situation is without prejudice to the policy coverage. Thanks to this regulation, "the information/disclosure" obligations, which are among the legal obligations of the parties will be performed better and when becoming a joinder to the case, either compulsory in terms of Code of Civil Procedure or arbitrary for performing defense in favor of the owner under any incident, it will be in favor of the assured in terms more effective and powerful defense by obtaining support, experience from the insurer in addition to the legal support provided by the same.