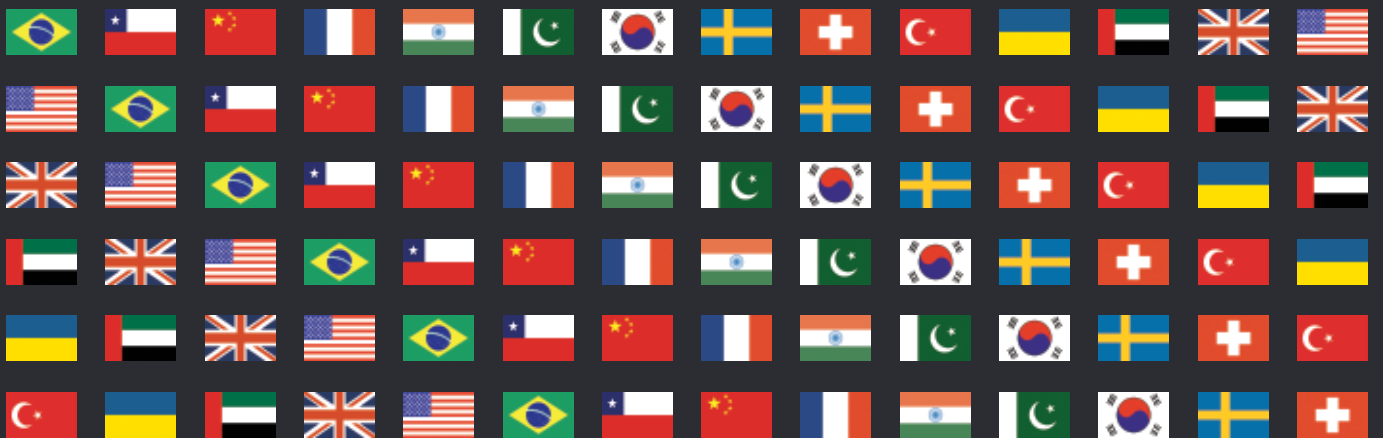


Insurance Litigation 2021

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Insurance Litigation 2021

Contributing editors**Mary Beth Forshaw, Bryce Friedman and Karen Cestari
Simpson Thacher & Bartlett**

Lexology Getting The Deal Through is delighted to publish the eighth edition of *Insurance Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Pakistan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mary Beth Forshaw, Bryce Friedman and Karen Cestari of Simpson Thacher & Bartlett, for their assistance with this volume.



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PRELIMINARY AND JURISDICTIONAL CONSIDERATIONS IN INSURANCE LITIGATION

Fora

1 | In what fora are insurance disputes litigated?

In the Turkish judicial system, insurance disputes are resolved by the commercial courts, irrespective of the amount or value of the dispute. On the other hand, insurance disputes arising out of maritime law are heard by a specialised commercial court. If a province has no specialised court or any other regular commercial court, disputes are heard by the general competent court, namely a civil court of first instance.

The Code of Civil Procedure provides the claimant with a number of alternative courts with jurisdiction for insurance disputes, including the commercial courts at the domicile of the defendant, and the place of immovable property or risk that is claimed to have triggered the insurance coverage. The Code on Private International Law and International Civil Procedure No. 5718 has designated specific jurisdictions for the cases arising from insurance contract disputes including foreign elements, and clearly states that they cannot be contracted otherwise by the parties. Article 46 of the the Code on Private International Law and International Civil Procedure No. 5718 provides that the relevant jurisdictional rules shall prevail:

The court where the insurer's headquarters, or its branch office or the agent who concluded the contract are located in Turkey, has jurisdiction in the disputes arising from insurance contracts. In the cases to be filed against the insured or the beneficiary, the court of the Turkish domicile of these persons has the jurisdiction.

As an alternative, the Insurance Arbitration Commission (Commission), which is incorporated under the Insurance Union of Turkey, is a feasible dispute-solving mechanism alternative to court proceedings. No arbitration clause is needed to apply to the tribunal, provided that the insurer is a member of the Commission. The total number of disputes settled by the Commission reached 398,516 as of 30 September 2020. The proceedings conducted before the Commission is a unique mechanism of dispute resolution, since it lacks some of the essential aspects of arbitration, as no arbitration agreement is concluded between the parties and the arbitrators are appointed by the Commission, instead of the parties, from the arbitrators registered in the Commission's list.

It is also possible to initiate international or domestic arbitration proceedings pertaining to the insurance disputes.

Causes of action

2 | When do insurance-related causes of action accrue?

As per the general insurance rules stipulated in the Turkish Commercial Code (TCC) No. 6102 and dated 14 February 2011, the insured's cause of action against the insurer accrues when the insurer's obligation to indemnify the insured commences; in any event, this is within 45 days of the date of notification of the policyholder following the occurrence (in life insurance, this period is 15 days) provided that the insurer's right to examine the risk in question is not prejudiced by the insured or any external hindrance. After this 45-day period (15 days in life insurance), the insurer falls into default without further notice and is also responsible for the interest arising from the delay.

There is a prescription period that should always be kept in mind. As per the general insurance rules under the TCC, all claims arising from insurance contracts shall be prescribed after a period of two years as of the date when payment falls due. In any event, all claims relating to an insurance indemnity or insurance sum shall be prescribed after a period of six years from the date of materialisation of the risk. This maximum prescription period is 10 years in liability insurances from the date of the event constituting the subject of the insurance: for example, negligence of the insured.

Preliminary considerations

3 | What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

Mediation has become a mandatory course to be exhausted before filing a lawsuit on commercial disputes, as per the Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements No. 7155, published in the Official Gazette No. 30630, dated 19 December 2018. However, the culture of settlement or mediation is not yet firmly established in practice in Turkey.

In general, the following must be taken into account before initiating insurance litigation:

- the scope of the law governing the insurance contract and duties imposed on the insured or policyholder by the governing law and policy conditions;
- the competency of the courts or arbitral tribunal;
- costs that will arise from litigation (in the Turkish litigation system, although the costs are not sky-high, the claimant should bear the costs during the litigation and the losing party should bear the costs after the litigation period is completed, together with the claimant's attorney fee up to the amount prescribed by the tariff of the Turkish Bar Association); and
- the prescription period of the claim.

The parties should also keep in mind that insurance contracts must be concluded in Turkish and must not contain words in foreign languages,

pursuant to the Insurance Act. Similarly, all private law contracts must be concluded in Turkish as per Law No. 805 on Compulsory Use of Turkish Language among Commercial Entities. This is an outdated law falling short of satisfying the commercial needs of today. Scholars suggest that the applicable law on the form of insurance policies is either *lex causae* or *locus regit actum* (ie, the law of the place where the contract is executed) and consider that the provision in the Insurance Act stipulating the form of the policies should not apply to policies concluded abroad. However, scholars are concerned that Law No. 805 is a piece of mandatory Turkish law that, by reason of its particular purpose, is applicable regardless of the designated law. In line with this, the Court of Cassation still takes into account whether the parties complied with the requirements of Law No. 805.

The consequence of the breach of the formalistic requirements laid down by Law No. 805 has not been determined. Based on court practice, however, the use of foreign languages may cause, depending on the circumstances, the exclusions in the contract and insurance policy to be deemed invalid or the contract to be interpreted to the insurer's detriment.

Regarding insurance disputes, identifying the damage, determination of the material facts in relation to loss and whether the insured has increased the risk of occurrence is particularly important. Similarly, these also have an immense effect on the recourse action between jointly liable parties.

To identify and determine the damage or loss accrued and the material facts as of the date of the loss, it is advisable to take immediate action to record the evidence. In practice, this action is preferably taken right after the occurrence of the risk. Obtaining an adjuster's report or filing a determination action before the court is also advisable to secure required evidence and fulfil the burden of proof. It is also important for the insurer to detect whether there is another insurance covering the risk.

Last but not least, the conditions to initiate a recourse action must be considered carefully. The following should be noted: (1) to be entitled to the right of subrogation, first the insurer must pay the indemnity to its insured or, depending on the circumstances, the beneficiary; (2) the right of subrogation only covers the amount that is paid by the insurer and the insured or beneficiary remains the rightful owner of the amount that is not covered by the insurer; (3) the interest applied to this amount starts from when the payment was made; (4) principally, the prescription period set forth for the successor is the same as that stipulated for the original insured; and (5) during and before the recourse action, the insured is obliged to take the necessary precautions to protect the insurer's rights of recourse and to collaborate.

Damages

4 | What remedies or damages may apply?

Monetary damages are claimed in a typical litigation case.

Monetary damages in insurance disputes would cover the indemnity foreseen under the policy and the default interest, provided that the claim for the interest is stated within the initial claim. The commercial interest rate to be accrued is set every year; in 2020 it was 13.75 per cent per year. With respect to foreign currency, the commercial interest rate will be the highest interest rate applied to deposit accounts with a one-year maturity, unless a higher rate is stipulated in the contract.

Regarding non-life insurance, the main principle is the prohibition of enrichment. Therefore, in non-life insurance such as property and liability insurance, it is not possible to claim for a higher amount than the incurred damages. The ultimate purpose of the damages to be awarded by the court would be to reinstate the insured or policyholder to the position it would have been in had the risk covered under the policy not occurred.

If the policy stipulates a fixed sum for all damages, it may not be possible for the insured to be in the position it would have been in before it suffered damage. However, if the policy covers the total property valued under the contract, provided that all duties of the insured are satisfied, it may be possible for the insured to claim and obtain the sum of all its damages.

It is also possible to include a revaluation clause in the insurance contract and pay the current value of the property. This is usually preferred in motor vehicle insurance, where the value of the motor vehicle is revalued at the time of the occurrence.

Last but not least, the TCC establishes that no insurance can be made covering a loss that may arise from acts of the insured or the policyholder that violate the mandatory provisions of the law, morality, public order and personal rights.

5 | Under what circumstances can extracontractual or punitive damages be awarded?

Under Turkish law, it is not possible to award punitive damages because of the principle of prohibition of enrichment. It is, however, possible to insert penalty clauses in agreements where one or more of the parties agree to pay a certain sum of money or perform an action if they fail to fulfil their obligations under a contract. Under penalty clauses, loss does not need to be proved. However, it is not common to insert penalty provisions in insurance policies in Turkey.

In reinsurance, extracontractual obligations refer to damages awarded by a court against an insurer that are outside the provisions of the insurance policy, owing to fraud, bad faith or negligence of the insurer in handling a claim. Turkish law precedents and practice are scarce in this respect; however, courts are inclined to deal with this issue from the point of the insurer's burdens of proving the scope of the insurance coverage and enlightening the insurer regarding fundamental aspects of the policy. If the insurer fails to fulfil these burdens, the court may either conclude that the disputed matter is within the scope of the insurance policy regardless of the written agreement or may order the insurer to compensate the insured for any loss caused as a result of the insurer's failure. The reinsurer, on the other hand, would be responsible only to the extent of the reinsurance agreement with the insurer and may avoid any compensation for these court judgments unless a particular clause, such as Follow the Fortunes, holds the reinsurer responsible.

INTERPRETATION OF INSURANCE CONTRACTS

Rules

6 | What rules govern interpretation of insurance policies?

Although the general approach of Turkish legislation is towards protecting the relatively weak party in a legal transaction, there are no explicit rules regarding the interpretation of insurance policies. However, under the reasoning of the Turkish Commercial Code (TCC), it is highlighted that the founding principle of insurance contracts is the protection of the insured.

As a general principle of Turkish law, any ambiguity of contractual terms are construed to the detriment of the author of the term namely, insurers in insurance disputes.

Ambiguities

7 | When is an insurance policy provision ambiguous and how are such ambiguities resolved?

As per article 1425 of the TCC, insurance policies must be drafted in a simple and easily readable manner. The duty of providing proper wording is primarily on the insurer.

In this respect, article 11 of the Insurance Act states that no foreign words shall be included in insurance agreements. Otherwise, Turkish words that correspond to the foreign word, as determined by the Turkish Language Association, shall be used.

Other than this, the basic principle of the contract remaining in force and the consensus of the parties are also dominant in the interpretation of insurance policies. In this respect, the TCC upholds the terms and conditions negotiated between the parties or contained in the proposal form communicated by and between the parties over the policy or endorsement thereof that contradicts the earlier negotiation.

As per article 1423 of the TCC, the insurer, before the conclusion of the insurance contract, is obliged to inform the insured in writing of all information related to the contract, the rights of the insured, the provisions that the insured should pay special attention to and the notification obligations. Article 11 of the Insurance Act also requires the insurers to enlighten the insured on the scope of coverage and further stipulates that the risks that are not expressly excluded from the coverage shall be deemed to be insured. The burden of proof of whether the pre-contractual information duty has been duly fulfilled is on the insurer. On these grounds, the Court of Cassation, in some instances, rules that the admissibility of the insured's indemnification claim may depend on whether the insurer can prove fulfilment of the information duty.

NOTICE TO INSURANCE COMPANIES

Provision of notice

8 | What are the mechanics of providing notice?

The Turkish Commercial Code (TCC) imposes a positive duty for notification on the insured. Notice should also be made by a third party as far as it is aware of the insurance coverage and is entitled to the right to obtain compensation. As a general rule, the notification should be made as soon as the incident giving rise to the insurance claim has occurred.

The procedure for this notification is not clearly defined in the TCC. In principle, however, the notices and communications between the merchants, pertaining to default, termination or cancellation are required to be served via notary public, by registered mail return receipt requested, by telegram or via an electronic mail system with an e-signature.

In some policies, usually in property insurance, notification to the insurer may be duly made by electronic means, whereas in other policies, notification may be sent through a notary public. However, for the sake of proof, it is advisable for the insured to send a written notification, preferably via registered post or notary public, to avoid any uncertainty regarding when the indemnification duty of the insured becomes payable.

Obligations

9 | What are a policyholder's notice obligations for a claims-made policy?

The TCC does not explicitly regulate notice obligation in claims-made policies, but provides general rules for the notification duty of the policyholder. Accordingly, the policyholder shall notify the insurer without delay when it becomes aware of the occurrence of the risk.

In liability insurance, the insured shall notify the insurer within 10 days of those events that may give rise to its liability. Moreover, the insured shall notify the insurer of any claim made against it immediately, unless otherwise agreed. This provision cannot be altered to the detriment of the insured in an insurance contract. When there is such an alteration, the rules provided in the TCC will directly apply.

The scope of this notification is not clearly set in the TCC. However, in accordance with the contract or at the insurer's request, the insured shall provide all information and documents necessary for determining the extent of the risk and indemnity and that might be expected from the policyholder to the insurer within a reasonable period of time.

Timeliness

10 | When is notice untimely?

The TCC does not provide any strict time limit but leaves it to the discretion of the judge to determine whether the notice is timely in consideration of the particularities of the case. The only period stipulated by the law is for the liability insurance, which is 10 days starting from the events that may give rise to insurer's liability. If the notice is not provided within this period without a valid excuse, notice is considered to be untimely.

11 | What are the consequences of late notice?

The TCC gives utmost importance to the causal link between the negligence of the policyholder in its notification duties and the magnitude of the insurer's indemnity obligation.

If the insurance indemnity or the fixed sum to be paid is increased as a result of the failure or delay in giving notice of the occurrence of the risk, the indemnity or the fixed sum shall be reduced by taking into consideration the degree of the policyholder's negligence. This provision cannot be altered to the detriment of the insured in an insurance contract.

INSURER'S DUTY TO DEFEND

Scope

12 | What is the scope of an insurer's duty to defend?

The insurer's duty to defend is only possible in liability insurance. It is not a duty but more of a right granted by the Turkish Commercial Code (TCC) to insurers. In other words, insurers are not obliged to defend the insured in a possible litigation. Apart from this, the insurer, as per article 1474 of TCC, shall cover the reasonable judicial costs in connection with the claims asserted by a third party. If requested by the insured, the insurer shall also grant an advance on costs.

Article 1476 of the TCC requires the insurer to declare its decision on the insured's request for assistance within five days of the date of notification of those events that may give rise to its liability.

When the insurer defends, it acts on behalf of the insured but for its own account and under its own responsibility, and assists in the defence of the insured with regard to the claims of the third persons. If the insurer considers its right to defend, it should also give due consideration to the rights and interests of the insured.

This provision cannot be altered to the detriment of the insured in the insurance contract. In the case of detrimental alteration, the provisions of the TCC shall apply.

It is common for an insurer to choose to take over defence for its own account, as it is to the benefit of the insurer with regard to coverage matters.

Failure to defend

13 | What are the consequences of an insurer's failure to defend?

If the insurer remains silent and does not choose to defend the insured, it shall pay the indemnity that would become final and binding on the insured. Any settlement agreed by the insured without the consent of the insurer is not binding on the insurer if it did not approve this settlement within 15 days of notification. It should be noted that the insurer shall not refrain from approving the settlement for unjust causes.

STANDARD COMMERCIAL GENERAL LIABILITY POLICIES

Bodily injury

14 | What constitutes bodily injury under a standard CGL policy?

In the Turkish insurance framework, such a standard CGL insurance does not exist. Instead, the Insurance and Private Pension Regulation and Supervision Agency (who recently assumed the tasks and responsibilities of the former Undersecretariat of the Treasury) provides alternative general conditions for the different needs of business organisations.

As per the General Conditions of Professional Liability Insurance, for example, third-party liability insurance covers both bodily injury and property damage claims of third parties. According to the general rules of the law of obligations, bodily injury covers death, loss of limb and other harm to the human body, including sickness or disease as well as associated damage and costs such as deprivation of income. According to the General Conditions, however, non-pecuniary damages are excluded unless the parties expressly agreed to the contrary.

Apart from the above, there are different kinds of financial liability policies, including professional liability insurance, independent auditors' professional liability insurance, motor vehicles liability insurance, financial liability insurance, employers' liability insurance and medical injury liability insurance.

Property damage

15 | What constitutes property damage under a standard CGL policy?

Property damage covers all kinds of physical and visible injury to the tangible property, such as total or partial loss of the property, including all injury resulting in the loss of use of that property. As widely accepted by practice, consequential damage is not covered by the CGL policy.

Occurrences

16 | What constitutes an occurrence under a standard CGL policy?

Scholars, in principle, describe an occurrence as the triggering factor of the insurance coverage. For general liability insurance, the law adopts the 'event occurrence' principle, which means, with reference to the insured event, the negligent act that forms the reason for the damage requiring the insured's liability.

If the policy is for the liability of a commercial enterprise, the policy is understood to be covering also the third parties' loss caused by the insured's employees and representatives or executives who are in charge of the management and supervision of the enterprise.

Insurance coverage, principally, becomes payable if the event occurs within the term of the insurance (or between the accepted retroactive date and the signing date of the insurance contract, if agreed so, provided that the insured was not aware the event had already occurred).

17 | How is the number of covered occurrences determined?

The number of covered occurrences is not explicitly determined in Turkish legislation.

Likewise, neither the TCC nor the General Conditions of Liability Insurance specifically stipulate how serial damages must be evaluated.

However, contracts tend to include a serial damages clause that considers continuous or continual occurrences as one and stipulates that the insurer shall indemnify the insured once, up to the value of the insurance coverage. In the absence of this agreement, the court may evaluate whether there is unity in cause or unity in time to consider the occurrences as a single insured event.

Coverage

18 | What event or events trigger insurance coverage?

In Turkish insurance practice, a CGL policy is generally based on occurrence of the covered risk, third party claims or suffered loss. In principle, the CGL policy is occurrence-based as per article 1473 of the TCC. That means, provided that the harming event occurs in the policy period, the materialisation of the loss and the timing of the third party's claim are not relevant for the assessment of the coverage (except for statute of limitation considerations).

The parties may agree otherwise and make the CGL policy claim-based or loss-based. In the claim-based CGL policy, the third party's claim must be in the policy terms and the occurrence of the harming event and the materialisation of the loss are not relevant. Likewise, in the loss-based CGL policy, the materialisation of the loss should be in the policy term and the occurrence of the harming event and the timing of the claim are not relevant.

On the other hand, a CGL policy may be on more than one basis. For instance, if a CGL policy is based on both occurrence and claims, the harming event and the third party's claim must be in the policy term to trigger the insurer's compensation obligation.

In Turkey, obligatory insurances are generally occurrence-based.

19 | How is insurance coverage allocated across multiple insurance policies?

In principle, if the same interest is insured against the same risk for the same term by more than one insurer at the same date or at different dates, the policyholder shall not be paid in excess of the insurance value. There are two different kinds of multiple insurance policies stipulated under the TCC.

Double insurance

In respect of an interest covered for its full value, the same person or other persons can only subsequently take out insurance against the same risks for the same periods, provided that:

- the double insurance is approved by the subsequent and previous insurers;
- the policyholder transferred its rights arising out of the previous insurance contract to the subsequent insurer or waived its rights under the previous insurance contract. In this case, the transfer or the waiver must be written on the insurance policy, failing which the subsequent insurance will be deemed to be invalid; and
- the liability of the subsequent insurer is restricted to the part of the loss that is not paid by the previous insurer. In this case, the previous insurance must be annotated on the subsequent insurance policy, failing which the subsequent insurance will be deemed invalid.

Joint insurance

If the same interest is insured with more than one insurer at the same date, against the same risk and for the same period, all of the co-insurance contracts will be deemed valid only up to the value of the insured interest. In other words, in joint insurance, there are different insurance policies for a part of the value of the property.

In such a case, each insurer shall be liable for the proportion that its insured sum bears to the total of the insurance sums. If the insurers are jointly liable according to their contracts, the insured will not have the right to claim more than its loss. Moreover, each of the insurers shall be liable up to the sum it must pay according to its contract. In that case, the insurer who has made the payment will have recourse to the remaining insurers for the proportion of the insurance sums that the insurers must pay to the insured under their contracts.

FIRST-PARTY PROPERTY INSURANCE

Scope

20 | What is the general scope of first-party property coverage?

Under Turkish law, first-party property coverage includes all kinds of risks that would create physical damage to the property of the insured (eg, fires and floods). Some typical examples of first-party property insurance would be motor vehicle insurance, construction insurance and theft insurance.

Valuation

21 | How is property valued under first-party insurance policies?

As per the Turkish Commercial Code (TCC, depending on the nature of the property, the procedure for valuation of the property subject to the policy may vary. For example, in fire policies, it is usually the case that, after obtaining the information from the policyholder, the insurer appoints a private expert to value the asset. In case of a disagreement, the parties may appoint a referee expert as well. When determining the value of the commercial assets, the expert should take into account the assets' current value or purchase price of the day before the occurrence. The value of the machines and equipment, on the other hand, should be calculated taking into account the price of a new asset of the same quality. The value of the negotiable instruments should be determined according to their market value in the stock exchange.

The value of the insurance is set in the contract and constitutes a binding value for the property at the time of the occurrence. The insurer, however, is entitled to request a reduction of the value of the property, provided that the set value is excessive in relation to the real property value.

It is also possible to include a revaluation clause, which is widely seen in motor vehicle property insurance, in which the property is revalued at the time of the occurrence.

As a side note, the insurer is entitled to examine the value of the property during the term of the contract.

Natural disasters

22 | Is insurance available in your jurisdiction for natural disasters and, if so, how does it generally operate?

Insurance for earthquakes is compulsory in Turkish jurisdiction for those who own real estate that is used for anything other than commercial and industrial purposes. According to the General Conditions of Compulsory Earthquake Insurance, this insurance also covers losses arising out of fire, explosions, tsunamis and landslides triggered by earthquakes.

Other than the above, any policyholder can extend its facultative fire insurance wide enough to cover:

- its commercial and industrial buildings against earthquakes;
- other natural disasters such as volcanic eruptions, floods and fires;
- environment pollution that is directly or indirectly caused by one of the natural disasters within the scope of the insurance; and
- terrorism, strikes and civil commotions.

Also, Turk Re, a reinsurance company newly established on 6 September 2019, with the Ministry of Treasury and Finance as its sole shareholder, has undertaken the task of managing the pool of natural disaster risks.

Other than this, it is worth mentioning that in September 2019, one of the insurance companies has introduced the first ever climate insurance in Turkey.

DIRECTORS' AND OFFICERS' INSURANCE

Scope

23 | What is the scope of D&O coverage?

There is no standard D&O insurance coverage, as this type of insurance is not specifically regulated under Turkish law and the General Conditions of Professional Liability Insurance do not shed adequate light on the matter. The Turkish Commercial Code (TCC, however, does stipulate under article 361 that D&O liability insurance for an insurable interest exceeding 25 per cent of the capital shall be taken into account when assessing the joint-stock company's compliance with the corporate governance requirements.

In practice, the scope of the D&O insurance policy, as delineated in article 553 of the TCC, covers third-party claims against the insured that are caused by faults or improper performance of his or her professional services. Third parties would typically mean the shareholders of the company, regulatory authorities, creditors, competitors and employees.

Insurance companies in Turkey tend to provide D&O insurance coverage that includes cover for administrative monetary fines issued by the regulatory authorities and litigation costs, provided that there is a deductible stipulated in the contract and excluding any wilful misconduct and misrepresentation of the D&O.

Litigation

24 | What issues are commonly litigated in the context of D&O policies?

Claims under D&O policies are mostly based on the directors' breach of the general duty of care and other duties provided under the TCC and their work and service contracts. In these instances, the policyholder, after compensating the third party who suffered damage because of the policyholder's directors or officers, brings a claim against the insurer for reimbursement under the policy. The policyholder may also prefer to initiate a declaratory action before the first instance courts, requesting the court to set forth the liability of its directors, to ensure that the insured has solid grounds for requesting an insurance payment from the insurer.

While not frequent, D&O liability in antitrust infringements can also have severe consequences.

A considerable portion of the claims arise from administrative proceedings for non-compliance with the regulations such as capital markets, tax and customs-related legislation.

CYBER INSURANCE

Coverage

25 | What type of risks may be covered in cyber insurance policies?

Cyber insurance is a new concept in Turkey, and mainly offers cover for the risks related to threats to companies' networks and IT infrastructure. Recently, it has been reported that cybercrimes have increased by 300 percent with covid-19. It was also reported that Turkey ranks 5th among the countries most affected by cyber attacks in the world. A cyber attack on 27 October 2019, targeting some banking and telecommunication institutions in Turkey, demonstrated the importance of the issue.

Although the legislative regulations are yet to come into effect, the insurance sector issues new products regarding the cyber attacks, under the name of identity protection insurance, digital protection insurance or personal cybersecurity insurance to cover the damage incurred because of the attacks targeting digital platforms such as computers, electronic devices or automated teller machines.

In 2016, one of the biggest and most serious cyber attacks in Turkey to date targeted one of the most reputable banks. According to the bank's official statement, the loss incurred by the bank was then remedied as per the lower limit of the banker's blanket bond, without seeking any separate insurance coverage particularly concerning cyber risk.

Coverage generally includes expenses incurred and payments made by a company:

- for the destruction or theft of its assets through any unauthorised access to or use of the company's systems, including its risk management systems;
- in communicating with affected customers about the data breach or loss;
- for the recovery of lost or breached data;
- in identifying how a breach to its systems or how a network failure has occurred; and
- in monitoring complaints raised by data subjects.

It is also possible to include digital media risks, such as:

- defamation of trade reputation, or of the character of any person or organisation;
- unintentional infringement of a copyright, title, slogan, trademark, trade name, trade dress mark, service mark, service name, domain name or licence agreement;
- invasion and infringement of, or interference with, the rights of privacy, publicity, morality and not being presented in a false light;
- theft of ideas or information, plagiarism, piracy or misappropriation;
- public disclosure of private facts;
- personal intrusion and commercial appropriation of a name;
- material interruption to a company's network systems; and
- data restoration.

Litigation

26 | What cyber insurance issues have been litigated?

Given that the cyber attack is a newly emerging risk in the Turkish insurance market, disputes in this regard are scarce.

In a case brought before the Court of Cassation in October 2017, hackers targeted the victim's commercial books, accounting records and all other official correspondence that was stored electronically and prevented the victim's access to all this data. The victim is understood to have first negotiated with the hackers to recover the data; however, it failed. It was only after the collapse of settlement negotiations and a number of unsuccessful technical attempts that the victim applied to the court for the declaration that the commercial books and other targeted documents were unusable. The court of first instance held that this request was time-barred and therefore inadmissible given that the applicant failed to submit this request within 15 days of discovering this cyber attack. Upon the applicant's appeal, the Court of Cassation overruled the decision and held that the statute of limitation should have commenced from the time when the victim became sure of the loss of the data, which, in the case at hand, happened only after the negotiations had collapsed and other technical attempts to recover the data had turned out to be fruitless.

With a fast-growing Turkish e-commerce market, new legislation and administrative measures are expected in the near future.

TERRORISM INSURANCE

Availability

27 | Is insurance available in your jurisdiction for injury or damage caused by acts of terrorism and, if so, how does it generally operate?

Anti-Terror Law No. 3713 dated 12 April 1991 defines terror as

all types of criminal offence committed by means of duress, violence, oppression, threat, menace or intimidation by members of an organisation for the purposes of changing the constitutional qualifications of the Republic, political, judicial, social, secular, economic order of the country, impeding the state's inseparable integrity with her realm and nation, endangering the existence of the state and the republic, debilitating, overthrowing or occupying the state's authority, dissipating fundamental rights and freedom, distorting domestic and international security, public order or public health.

The Act Concerning Compensation of Terror-Originated Losses No. 5233 dated 17 July 2004 regulates procedure and principles for compensation by means of amicable manners for the losses suffered by real persons and legal entities. Accordingly, the state compensates the losses arising from terror activities that cause:

- damage to livestock, trees, crops, and other movable and immovable assets;
- bodily injuries, disability, casualties, and relevant treatment or funeral expenses; and
- deprivation resulting from being unable to reach the owned assets.

These losses are principally compensated in kind, if possible. For example, the state gives priority to giving a house instead of cash to an aggrieved citizen who lost his or her house as a result of a terror attack.

When evaluating the amount of loss, however, the commission takes into account collateral benefits that the aggrieved may have enjoyed. Insurance payments are one of these possible benefits. The commission, upon an application for a compensation claim, researches and determines the amount the aggrieved may have received from his or her insurance policy because of the loss. This amount would be deducted from the suffered loss to determine the compensation to be made by the state. Insurance companies cannot recourse against the state for the insurance payments to indemnify the terror losses.

Turkish insurance law does not provide any restriction with regard to coverage for losses caused by acts of terrorism. Even though general conditions of an insurance type such as fire insurance do not include terror by default, the insured may request to include this risk in return for an additional premium.

UPDATE AND TRENDS

Key developments of the past year

28 | Are there any emerging trends or hot topics in insurance law in your jurisdiction?

On 6 September 2019, Turk Re was founded by the Ministry of Treasury and Finance. Turk Re has a capital of 600 million Turkish liras and its sole shareholder is the Ministry of Treasury and Finance. Turk Re aims to retain US\$210 million of US\$1.4 billion in Turkey that is transferred abroad through reinsurance each year, said the general manager of Turk Re. In September 2020, Turk Re stated that the premium held domestically in the last six months was 597 million liras.

Moreover, the Insurance and Private Pension Regulation and Supervision Agency (IRSA) was founded on 18 October 2019 with the Presidential Decree No. 47 to act as the new insurance regulatory agency. As per this decree, all references previously made to the Ministry of Treasury and Finance and the Undersecretariat of the Treasury in legislation regarding insurance law will be made to the IRSA. The IRSA will regulate the insurance market with secondary legislation, protect insured parties and market participants, and carry out inspections and audits regarding insurance undertakings where necessary.

The Turkish Wealth Fund announced in December 2019 that insurance and personal retirement insurance companies controlled by public banks were being merged into one under the Fund. This newly established insurance company, namely Türkiye Sigorta, began operating on September 2020.

On the other hand, trade credit insurance has been introduced for small and medium-sized enterprises (SMEs). This insurance covers any risk of non-payment of debts on sales that are not subject to any security instruments. SMEs with net annual sales of less than US\$4.3 million will be able to benefit from this insurance.

Other developments worth mentioning are new products like legal protection, surety and cybersecurity insurance. Legal protection insurance covers any expenses that need to be incurred in the context of legal disputes or settlements. Surety insurance provides coverage for debtors for any failure in fulfilling their obligations. Unlike these two insurances adopted in the economic agenda, the Turkish government has not yet added cybersecurity to any of its governmental plans and issued general terms. However, the private sector has already taken the initiative to issue cybersecurity insurance. Moreover, due to covid-19 and recent earthquakes, premium generated from health insurances and fire and natural disaster insurances increased by more than 20 per cent compared to last year.

Furthermore, as of 1 January 2019, businesses consisting of five or more employees are also included in the compulsory enrolment process of the private pension scheme. The latest finance news, however, reports that this scheme has not reached the desired success given that 60 to 65 per cent of insured parties opted to quit shortly after their automatic inclusion. Being unsatisfied with the level of remaining participants, the presidency recently issued a new regulation that allows those who leave the system to re-enter the system and that provides further incentives. Due to these incentives and covid-19, the fund of the private pension scheme has been increased by 16 per cent in the first six months of 2020.

Coronavirus

29 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 26 March 2020, the Omnibus Law no. 7226 has been published in the Official Gazette. This law has aimed to mitigate the early effects of the covid-19 pandemic. The most important provision introduced by this law was that exercise of any right subject to prescription periods including filing lawsuits, enforcement proceedings, applications, objections, notices, notifications, submission periods, prescription periods and statutory limitations had been suspended from 13 March to 15 June 2020.

On 17 April 2020 the Law on Minimising the Impacts of the New Coronavirus (COVID-19) Outbreak on Economic and Social Life and the Amendment of Certain Laws no. 7244 was published in the Official Gazette no. 31102 and entered into force. Accordingly, termination of employment contracts are prohibited for three months, employers can

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impose unpaid leave without the employee's consent during this three-month prohibition period and a short-time working allowance will be paid based on the employer's statement during this period. This three-month period has been extended several times and will expire on 31 December 31 2020. Moreover, companies are restricted to distribute more than 25 per cent of their net profits generated in 2019 financial year until 30 September 2020 and retained earnings and free reserve funds cannot be distributed as dividend. This restriction period was later extended until 31 December 2020.

In March 2020, government-backed commercial credit insurance was introduced in relation to the imbalance of payments of the real economy suffering from covid-19. This move mainly aims to compensate for the lack of reinsurance coverages on risk accumulations undertaken by the local insurance market and encourage local insurers to more confidently support the real economy. Meantime, In order to deal with the individual effects of covid-19 on the insurance market, regulatory authorities have advised insurance companies not to be strict when evaluating covid-19-related health expenses under life insurance and to tolerate delayed premium payments.

With the administrative circulars regarding covid-19 measures, many workplaces such as gyms, hairdressers, restaurants and cafés were closed from March to June and these measures are expected to come again in December. Therefore, these lockdowns due to covid-19 may trigger business interruption insurances.

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