Insurance Litigation

Contributing editors
Mary Beth Forshaw and Elisa Alcabes

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Preface

Insurance Litigation 2019

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Insurance Litigation*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

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 **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 new chapters on Belgium, Brazil and France.

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.gettingthedealthrough.com.

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.

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 and Elisa Alcabes of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

London
January 2019

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Turkey

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Preliminary and jurisdictional considerations in insurance litigation

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 the Specialised Maritime Court. If there are no specialised courts (ie, a commercial court in a certain province), 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 having 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 Turkish Code of International Private Law numbered 5718 has designated specific jurisdictions for the cases arising from insurance contract disputes, and clearly states that they cannot be contracted otherwise by the parties. Article 46 of the Code 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 contacts. 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, which is incorporated under the Insurance Union of Turkey, is a feasible dispute-solving mechanism alternative to court proceedings. Only the insured or policyholder is entitled to apply to the Commission to avoid prolonging litigation procedures and obtain a viable solution. No arbitration clause is needed to apply to the tribunal, provided that the insurer is a member of the Commission. Regarding disputes arising out of mandatory insurances, the insured, beneficiary and policyholder are entitled to apply to the arbitral tribunal even if the insurer is not a member of the Commission. It is also possible to initiate international or domestic arbitration proceedings.

2 When do insurance-related causes of action accrue?

As per the general insurance rules stipulated in the Turkish Commercial Code (TCC) numbered 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 (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.

However, 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. In liability insurance, indemnity shall be prescribed within 10 years of the event constituting the subject of the insurance: for example, negligence of the insured.

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

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 imposed 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.

In practice, the culture of settlement or mediation is not yet firmly established in Turkey; in most cases, therefore, disputes are resolved by actions before the courts.

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, as these offer safer claims to initiate an action. It is also important for the insurer to detect whether there are other insurances covering the risk.

Last but not least, in liability insurance, the recourse actions must be considered carefully as there are conditions to be met to initiate litigation for recourse claims. The following should be noted: 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; and the right of subrogation only covers the amount that is paid by the insurer to the insured or beneficiary and the interest applied to such amount starting from when the payment was made. The insured or beneficiary remains the rightful owner of the amount that is not covered by the insurer.

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 2018 it was 19.5 per cent per year. With respect to foreign currency, the legal 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

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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.

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 fails 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 such court judgments unless a particular clause holds the reinsurer responsible.

Interpretation of insurance contracts

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 TCC, it is highlighted that the founding principle of insurance contracts is the protection of the insured.

As a general principle of Turkish law, the terms of a contract are construed to the detriment of the author of such term. Since insurance policies are considered to contain the standardised terms of contract imposed by the insurer, they will be interpreted to the detriment of the party that formulated the provision, who is usually the insurer.

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 if the policy or endorsement thereof contradicts such documents.

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

As per article 1,425 of the TCC, insurance policies shall be drafted in an intelligible and easily readable manner. Indeed, the primary duty of providing proper wording is on the insurer. In this respect, article 11 of the Insurance Act also requires insurance contracts to be written in Turkish and stipulates that any wording not in Turkish would be construed by taking into account the meaning provided by the Turkish Language Association. Although we observe dissenting opinions in some court precedents, which go a step further by arguing that insurance clauses not written in Turkish should be deemed voidable, this opinion has not gained any ground so far.

During the conclusion and the term of the insurance contract, there may be some points that are not clear or have more than one meaning that may create ambiguity in the insurance contract. These points may cover everything related to the insurance contract – for example, relating to the obligations of the parties, coverage, exclusions and deductibles.

During the negotiation or the conclusion of the insurance contract, if there are any provisions that are questioned by the insured, the insurer and its agents are under the obligation to inform and clarify these points, principally in writing. The burden of proving that the pre-contractual information duty has been duly fulfilled shall lie with the insurer. It is seen in practice that the Court of Appeals gives utmost importance to the positive duty of information of the insurer. For example, in one of its decisions, the Court of Appeals ruled a decision of reversal where it determines that the indemnification requested by the insured should have been identified depending on whether the insurer can prove that it has accomplished its informative duty.

Notice to insurance companies

8 What are the mechanics of providing notice?

The TCC introduces 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 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 such notification is not clearly defined in the TCC. This may vary depending on the policy. In some policies, usually in property insurance, notifying the occurrence to the insurer may be made by leaving a notice of claim 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 due.

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. In general, 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.

10 When is notice untimely?

If the notice is not provided within the periods stated in question 9, notice is considered to be 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.

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 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 negligence of the policyholder. This provision cannot be altered to the detriment of the insured in an insurance contract.

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Insurer's duty to defend

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 TCC to insurers. In other words, insurers are not obliged to defend the insured in a possible litigation.

If the insurer desires to defend the insured, the insurer shall declare its intent to defend the insured 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.

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 such 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

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 Undersecreteriat of the Treasury provides alternative general conditions for the different needs of business organisations.

As per the General Conditions determined by the Undersecreteriat of the Treasury, third-party liability insurance covers both bodily injury and property damage claims of third parties. 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.

In liability insurance against third persons, bodily injury covers death, loss of limb and other harm to the human body, including sickness or disease.

15 What constitutes property damage under a standard CGL policy?

Property damage covers all kinds of physical and visible injury to tangible property, such as total or partial loss of the property, including all injury resulting in the loss of use of that property.

16 What constitutes an occurrence under a standard CGL policy?

Under general liability insurance, the materialisation of the decrease in the assets of the policyholder arising out of either property damage or bodily injury constitutes an occurrence.

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.

Including a serial damages clause in a contract also has an effect on the deductible attributable to the insured. Together with the serial damages clause, the risk remaining with the insured shall be covered once, which is in some cases having a high amount of deductible preferred by the insured.

18 What event or events trigger insurance coverage?

As per the TCC, insurance coverage is triggered by the occurrence – or in other words, the materialisation – of the risk, provided that the occurrence is insured under the insurance policy and the notifications are duly made by the insured, irrespective of whether it is a claims-made or occurrence-based policy.

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 following circumstances and conditions are present:

- 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 shall 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 shall be deemed to be 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 shall 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 shall not have the right to claim more than its loss. Moreover, each of the insurers shall be liable up to the sum it has to pay according to its contract. In that case, the insurer who has made the payment shall have recourse to the remaining insurers for the proportion of the insurance sums that the insurers have to pay to the insured under their contracts.

First-party property insurance

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 (fire, flood, etc). Some typical examples of first-party property insurance would be motor vehicle insurance, construction insurance and theft insurance.

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

As per the 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

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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.

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, explosion, tsunami and landslide triggered by earthquake.

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

- its commercial and industrial buildings against earthquake;
- other natural disasters such as volcanic eruption, flood and fire;
- 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.

Directors' and officers' insurance

23 What is the scope of D&O coverage?

As per Turkish legislation, 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.

In practice, the scope of the D&O insurance policy 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 deductable stipulated in the contract and excluding any wilful misconduct and misrepresentation of the D&O.

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

Although it is difficult to provide statistical information in terms of the most severe and frequent claims because circumstances may vary significantly, it can be said that claims against D&O policies are frequently based on an allegation of a breach of the general duty of care and a breach of the duties in the company law provisions of the TCC.

While not frequent, D&O liability in antitrust infringements can be quite severe, amounting to an administrative fine of up to 5 per cent of the fine imposed on the company (up to 10 per cent of the annual turnover in Turkey).

It can also be said that frequent claims also arise from administrative proceedings for non-compliance with various legislation such as capital markets, tax and customs-related legislation.

Cyber insurance

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. Coverage 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 such company's systems, including its risk management systems;
- in communicating with affected customers about such 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.

26 What cyber insurance issues have been litigated?

Cyber risks become one of the newly emerging risks in Turkey. Reportedly, the number of those who are victimised by cyber attacks is 10 million per year and the total cost of the attacks is up to US$550 million. One of the biggest and most serious cyber attacks in Turkey to date involved one of the most reputable banks in 2016. According to the bank's official statements, 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.

In a recent court decision, it was shown once more that hackers are targeting corporations' electronic data, compelling the victims to seek settlement negotiations with the hackers to recover this data. In a case that came before the Supreme Court in October 2017, the court stated that lawsuits filed by the victims for a declaratory award with respect to

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loss of account records should not be dismissed owing to lapse of statute of limitation because the statute of limitation should be deemed to have commenced as of the date when the settlement negotiation is understood to yield no positive outcome.

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

Terrorism insurance

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 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.

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