

Turkey: Third Party Right For Direct Claim Against Liability Insurer

Last Updated: 25 October 2013

Article by **Pelin Baysal** and **Alişya Bengi Danişman**

Gun & Partners

1. Introduction & General Background

Third party right for direct claim has been explicitly recognized with a specific provision (Article 1478) introduced by the new Turkish Commercial Code numbered 6102 and dated January 13th, 2011 ("the TCC").

Until July 1st, 2012, when the TCC, with a wider insurance section and a specific part in relation to third party liability insurance, entered into force, there was no specific provision in the former TCC with respect to right of direct claim against a third party liability insurer (except for Article 1310 of the former TCC on fire third party liability insurance). However, at the time when the former TCC was in force, the right of direct claim/court action by the third party against the third party liability insurer had long been recognized by the Turkish Court of Appeals with respect to all types of third party liability policies.

Moreover, certain other codes such as the Highway Traffic Act, the Highway Transportation Act, the Turkish Code of Obligations (with respect to employee liability policies) and general conditions of some of the third party liability insurance types (prepared by the Insurance General Directorate of the Turkish Treasury) also provided for such a right. Though, many aspects with respect to third party rights had still remained unclear or controversial due to lack of provisions in the old TCC and a lack of court precedents.

This article provides an overview on the third party right for direct claim against third party liability insurers under the TCC and the controversial aspects of relevant provisions.

2. Conditions for a Direct Claim & Usual Practice

Article 1478 of the TCC, entitled "Right for Direct Court Action", explicitly provides that a third party suffering loss is entitled to directly bring a claim/court action against the liability insurer subject to the time limitation period applicable to the insurance contract and the insurance sum.

For the use of direct claim right, apart from the above referred conditions stated in Article 1478, the TCC has not provided any other restrictions such as type of loss/damage, identity of the damaged third party or nature of the legal basis of liability. Thus, any damaged third party who has a ground for raising a claim on the basis of the insured's liability (validly covered by the insurance) would have the right to directly raise its claims against the liability insurer.

With respect to the use of direct claim right, the usual practice in Turkey is to claim from both the insured and the liability insurer in the events that the identity of the insurer is known, although an application solely against the liability insurer is permissible. On the other hand, in the event where the identity of a liability insurer cannot be determined by the third party, the relevant third party usually first brings a court action against the insured, and then through the court asks the insured whether he has any valid liability insurance coverage or not. In such a court action raised against an insured, the insured -if there is a valid liability insurance coverage- usually prefers to notify its liability insurer of the court proceedings through the court and invites the insurer to intervene in the court proceedings in order to support its defences. Alternatively, in such a case a third party can also bring an additional court action against the liability insurer to be merged with the proceedings against the insured.

3. Classification of Article 1478 under the TCC

The TCC, under Article 1486, classifies some provisions regarding liability insurances as mandatory where parties of an insurance contract cannot agree otherwise.

However, Article 1486 does not refer to Article 1478 which foresees third party right for direct claim as one of the mandatory provisions in liability insurances section in the TCC. According to some doctrinal views, such deficiency in Article 1486 may inaccurately be evaluated as the elimination of a third party right for a direct claim in the insurance contract is permissible, since the relevant article does not classify such right among the mandatory provisions. Among the majority of the scholars, it is commonly criticized that this situation leads to an inadmissible conclusion which explicitly contradicts with the aim of recognition of the right of direct claim in liability insurances. Besides, it is also inadmissible considering that such a restriction in an insurance contract agreed between the insured and insurer would in principle have no effect in respect of a third party outside of the contractual relationship. On this basis, supporters of this view are indeed arguing that the lawmaker might have found it unnecessary to explicitly state Article 1478 (providing for direct claim right) among the mandatory provisions of the TCC, in consideration of the aim of such regulations as well as the bilateral nature of an insurance contract which would in principle prevent any restriction on a third party right which is directly granted by the law.

From our point of view, an evaluation to the contrary would indeed highly likely result in the elimination of direct claim rights by the insurers where such provisions would not provide the expected utility in respect of the third parties suffering loss.

4. Notification of Claims & Liability Insurer's Right for Obtaining Information from the Third Party

According to the TCC, in order to raise a direct claim against a liability insurer; the relevant third party is not required to notify the insured or raise a prior claim against the insured first. The third party is also not subject to any specific notification period while directing his claim against the liability insurer.

Notification periods in the TCC particularly regulate the relationship between the insured and the liability insurer. In this respect, the insured, after receiving a third party claim, has the duty of immediate notification of the claim to its insurer (TCC Article 1475/2), unless otherwise agreed in the insurance contract. Upon notification of such a claim, the liability insurer in turn must inform the insured within 5 (five) days whether it will take the control of the legal process on behalf of the insured and support him in his defense against the third party. If the liability insurer does not make any decision in this respect or fails to notify the insured of its decision within the stated 5 (five) day period, it will have to pay the conclusive insurance indemnity to be ruled in such a court proceeding against the insured. It should be noted that this is a semi mandatory provision which cannot be amended by contract against the insured.

As well as the insured's above referred duty of notification of a third party claim to the insurer, the TCC (Article 1475) also provides that the insured has also the duty of notification of events which will lead to its liability within ten (10) days. Failure in notification in both cases may lead to a decrease in the amount of the insurance indemnity. However, for example in an event, having wide media coverage, it can be assumed that the relevant liability insurer is already aware of the occurrence of the risk which will prevent the insurer to argue insured's failure in notification and to decrease the insurance indemnity on that basis.

According to Article 1479, a liability insurer, in order to determine the amount and cause of the loss, is entitled to request information from the relevant third party suffering loss. The third party in this respect is obliged to provide the liability insurer with all relevant documents available, where otherwise the insurer's liability would be limited to the amount which would have been paid under normal circumstances –if the third party had fulfilled its obligation-, provided that the insurer had warned the third party in writing about such consequence. This provision is mandatory where the insurer's right for requesting information from a third party cannot be removed by contract.

5. Liability Insurer's Obligation of Indemnification & Scope of Defences That Can Be Raised Against a Third Party by the Liability Insurer

It is very important to determine the scope of the defences that can be raised by the insurer against a third party in a direct claim/court action.

The TCC explicitly provides (under Article 1484) in terms of mandatory insurance that the insurer's liability against the third party continues up to the insurance sum, even if the insurer has been entirely or partially relieved from its liability against its insured (as a result of failure in notification etc.).

The TCC is silent on optional liability insurance in that respect, except for the prohibition of setting off receivables arising from the insurance contract against the insurance indemnity. Namely, the TCC (Article 1480) in this respect only provides that the insurer cannot set off its receivables arising from the insurance contract against the insurance indemnity to be paid to the third party. It is argued among some of the scholars that the insurer shall be entitled to raise

against the third party many of the defences that can be raised against the insured under normal circumstances, such as the insurance sum (limit), scope of coverage and alike.

The lack of more detailed provisions in the TCC determining the scope of the defences available to the insurer against the third party with respect to optional liability insurances has been subject to criticism among doctrinal views.

6. Time Limitation Period & Management of Settlement Processes

In terms of liability insurances, the TCC foresees a 2 (two) year general time limitation period starting from the maturity date (i.e. the date when the insured's receivable of compensation from the insurer becomes due), and a ceiling time limitation of 10 years as of the date of the occurrence of the risk.

While evaluating the referred time limitation periods, type of the liability insurance policy, i.e. whether it is an occurrence based or claims made policy, should also be considered.

In this respect, one of the clarities introduced by the TCC is that a third party liability policy is considered "occurrence based" unless otherwise indicated in the policy. Besides, agreeing on retroactive dates and extended reporting periods in an insurance policy is permissible in principle.

With regard to a settlement process as to a third party liability insurance, first it should be stated that although Article 1473/2 of the TCC provides that the principle is to make the payment of compensation to the damaged third party, such provision is not mandatory where parties can agree otherwise. As a consequence, an insured and a liability insurer can adopt a *paid to be paid* principle in their contract and agree that the payment of compensation shall be made to the insured first. In this respect, a settlement can be concluded between the insured and the insurer enabling the insurer to make the insurance indemnity payment to its insured without contacting the damaged third party.

However, as referred above, in compulsory third party liability insurance, even if the insurer has been entirely or partially relieved from its liability against its insured, its liability against the third party continues up to the insurance sum. Taking this principle into account, it would be the safest way in any case to involve the third party in the settlement. Thus, it would be possible for a liability insurer to avoid any likely further claims by a third party.

7. Conclusion

Recently introduced provisions in the TCC in respect of third party right for direct claim against liability insurer are constructive and would certainly increase the number of direct claims to be raised against liability insurers. However, applicability of such provisions in practice would depend on Turkish courts' evaluation on whether or not the elimination of third party right for direct claim is possible in an insurance contract.

Footnotes

1 Numbered 2918 and dated 13 October 1983.

2 Numbered 4925 and dated 17 July 2003.

3 Numbered 818 and dated 22 April 1926.

4 E.g., General Conditions of Environmental Pollution Liability Insurance, Mandatory Maritime Passenger Transportation Liability Insurance, Mandatory Liquefied Petroleum Gas Liability Insurance, Mandatory Highway Passenger Transportation Liability Insurance, Mandatory Private Security Liability Insurance, Mandatory Sea Pollution Liability Insurance for Coastal Plants.