One way in which the Covid-19 pandemic has affected traders and producers is the shock negative pricing rates for crude oil. On 20 April 2020, the price of a barrel of West Texas Intermediate (WTI), the benchmark for pricing US oil, fell as low as minus USD 37.63. Although the situation only lasted for a few hours, its global impact is measured in millions of dollars. As a result of globalisation, individual investors in Turkey profoundly felt the plunge in prices thousands of miles away. This has heightened the importance of special conditions in insurance contracts in Turkey, an issue recently considered by the Constitutional Court.

Special conditions' functionality gets restored

Against such global impacts as the Covid-19 pandemic, measures taken in the Turkish reinsurance market have so far had limited scope. Most notably, a government-backed trade credit insurance was introduced in March 2020 with respect to the real sector's imbalance of payments due to the effects of the pandemic. The government's involvement was mainly aimed at compensating the insufficiency of reinsurance coverage for risk accumulations assumed by the local insurance market and incentivising the local insurers to support the real sector more confidently.[1]

While the benefits of this incentive are yet to be seen, in July 2020 the government took a bold step to penetrate the insurance market by merging all state-owned insurance companies into one single company named Türkiye Sigorta.[2] This follows the establishment of a state-owned reinsurance company Türk RE in September 2019 with the aim to develop the Turkish reinsurance market.[3] In the meantime, regulators have not taken any concrete steps regarding the impact of Covid-19 on the insurance market, other than advising insurance companies to show leniency when evaluating Covid-19-related health expenses under life insurances,[4] and to tolerate late premium payments.[5]

Apart from the impact of Covid-19, all contemporary issues introduced by the ever-changing trade and business environment have long been governed by outdated template general conditions issued by the Treasury, other than mandatory but broad provisions of the Turkish Commercial Code (new TCC).[6] The template conditions were intended to draw the narrowest possible coverage of insurance products to protect the policyholders and insureds. The individual wordings of insurance contracts, however, have become more of an issue over time. The general conditions trace their roots back to the annulled insurance provisions which, unlike the new TCC, had adopted an 'all risk' principle requiring insurers to be liable for all relevant risks that are not expressly excluded.

The heightened importance of special conditions, along with the new TCC and the 'named perils' principle therein, will be even more critical following the recent Constitutional Court's decision which finally questioned the enforceability of the general conditions in view of the constitutional freedom of contract and rule of law.[7] Although the judgment related exclusively to the compulsory insurance against civil liability in respect of motor vehicles, the Constitutional Court's conclusion will have a broader influence. Certain provisions of the disputed law,[8] which refer to the general conditions, were found to involve the arbitrary interference of administrative bodies in the scope of insurance contracts, which must only be defined by and between the parties within the statutory framework.

The Constitutional Court's decision may require the court to examine policy wordings more diligently. However, no guiding court precedent has been developed so far to shed light on interpretation methods adopted for insurance contracts. This is in considerable part due to complex insurance-related disputes being settled amicably by parties in order to avoid uncertain and lengthy court proceedings. As a general remark, the courts are inclined to interpret the ambiguities in favour of the insured and often look for approximate and direct causation between the invoked exclusions and the loss involved in relieving the insurers from liability. Against this background full of uncertainties, foreign reinsurers, who often involve a fronting local insurer when subscribing to a policy, ought to curb their expectations when settling an insurance dispute governed by Turkish insurance law. This is despite the fact that their own special conditions are often incorporated into the local insurance relationships. With the increased importance of the special conditions, however, there may be greater scope for the parties when drafting the policies and negotiating the settlements.

The insurance aspect of negative prices

The matter of suffering Turkish investors arises from unprecedented market conditions experienced on 20 April, when the price of a barrel of WTI crude oil, the benchmark for US oil traded on the New York Mercantile Exchange, fell dramatically to a negative price of minus USD 37.63. The Covid-19 pandemic had disrupted the use of crude oil while storage facilities around the globe were rapidly depleting. This resulted in producers paying buyers to take the commodity off their hands.

Furthermore, the negative prices seriously affected the trading system of a leading brokerage in Turkey (the insured), as it prevented investors who possess WTI futures contracts from sending instructions to close their positions. The insured's trading system, powered by an international investment bank specialised in online trading, was unable to support the orders placed by the investors with respect to WTI contracts when the prices became negative. The insured in question was not the only victim of this software problem, as all other brokerage firms who use the same trading platform were unable to respond the investors’ phone calls. Similarly, other international investment banks reported failures in maintaining their own trading platforms offered to corporate and individual investors in this turmoil.

The insured’s liability to third parties was covered under the special conditions of Lloyds reinsurers’ Future Industry Certificate. However, the trading system’s failure may require the insured to pay compensatory damages. The Turkish courts, according to established precedents, encumber financial institutions with a heightened duty of care towards the customers. Irrespective of the terms of the licensing and partnership agreement with the investment bank; the insured would be regarded by the courts as the investors’ contractual counterparty who delegated a part of the performance to a third-party associate while remaining responsible for the damages caused by the associate in carrying out such tasks as per article 116 of the Turkish Code of Obligations. Against this background, the insured, without even consulting the reinsurers, sought to agree a price with each of the investors as soon as possible and then resorted to reinsurers for indemnification under the Future Industry Certificate.

The reinsurers, on notification, did not engage in a discussion regarding the close causation of Covid-19 in this scenario; given that the Certificate did not mention any virus other than computer viruses. However, even if there was an exclusion concerning a pandemic or any wording to that effect in the Certificate, it remains unclear whether a Turkish court would see the pandemic relevant enough to relieve the reinsurer from liability due to a software malfunction attributed undisputedly to an omission on the insured’s part, who arguably has a closer relationship to the loss.

Conclusion

The ongoing Covid-19 pandemic has local and global effects on almost all lines of businesses. The negative pricing of oil in the US, by way of example, may easily trigger an insurance company’s liability to individuals hit by millions of dollars of financial losses. As the special conditions and party autonomy when drafting the policies gain importance in the Turkish jurisdiction, it may be preferable for both the insurer and insured to think outside the box and tailor policies to address parties’ individual needs accurately.

Notes

[1] Communique amending state-sanctioned trade credit insurance for small and medium sized enterprises, 25 March 2020, available at: www.resmigazete.gov.tr/eskiler/2020/03/20200325-9.htm.

[2] Türkiye Sigorta's official webpage, available at: https://turkiyesigorta.com.tr/tr-tr/hakkimizda.

[3] Türk Reasürans' official website, available at: www.turkreasurans.com.tr/about-us.

[4] Insurance Agents Executive Committee, 'COVID-19 Insurance Companies' announcement, available at: www.tobbsaik.org.tr/index.php/duyurular/270-covid-19-sigorta-sirketleri-ozel-saglik-sigortalari.

[5] Minister of Treasury and Finance, 'Industry Announcement on Measures Taken for the COVID-19 Outbreak (2020/4)' 23 March 2020, available at: www.tobbsaik.org.tr/files/Sektr_Duyurusu.pdf.

[6] Turkish Commercial Code no 6102, published in the *Official Gazette*, 14 February 2011.

[7]Constitutional Court, decision 2019/40 – 2020/40, dated 17 July 2020, published on 9 October 2020, available at: www.resmigazete.gov.tr/eskiler/2020/10/20201009-17.pdf.

[8] Articles 90 and 92 of the Highway Traffic Law no 2918.