

DECODING BUSINESS INTERRUPTION INSURANCE: INSIGHT FROM TURKISH LAW

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Business interruption insurance is a common industry practice that aims to protect insureds against losses that occur when its operations are unexpectedly interrupted and to place it in the position it would have occupied if the interruption had not occurred.¹ In the aftermath of catastrophic events that deeply impact individuals and businesses, it is expected that disputes arising from business interruption insurance will see a significant rise. For instance, the COVID-19 pandemic led to a global surge in such disputes, and a similar trend can be anticipated after the earthquakes that widely impacted 11 Turkish cities on February 6, 2022. This article provides an overview of how Turkish courts interpret different business interruption clauses found in policies and the common methods used to calculate losses.

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Unlike most jurisdictions, Turkish law does not prescribe a fixed set of insurance general terms and conditions that provide insureds with business interruption or profit loss insurance.² In fact, the only example where business interruption insurance is provided to insureds under general terms and conditions is the “General Terms and Conditions of Fire Loss of Profit Insurance”. Some other widely adopted insurance general terms and conditions such as the “General Terms and Conditions of Compulsory Earthquake Insurance” and the “General Conditions of Construction Insurance (All Risks)” actually specifically exclude coverage for loss of profits and loss caused by business interruption. However, this does not mean that the scope of application for business interruption insurance is narrow in Turkey. Parties to an insurance contract are free to determine special conditions to expand the coverage provided under the general terms and conditions³ and include losses caused by business interruption, which is often the case. There is also no limitation on the types of businesses that can be insured against business interruption in Turkey, with the prevalent sectors including energy, infrastructure, hotel industry and construction.

In practice, business interruption insurance is provided under various wordings in policies, some clearer than others. For example, some policies determine a daily loss

¹ Christopher C. French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, Georgia State University Law Review, 2014, p. 469.

² Araş. Gör. Aktan Özkan, *Rizikonun Genelliği/Özelliği Perspektifinden Covid-19'un Sigorta Sözleşmelerine Etkisi*, Yaşar Hukuk Dergisi, 2020, p. 6.

³ TCC Art. 1425: The insurance policy shall set out the respective rights of the parties, provisions relating to default, general and special conditions, if any, and shall be drafted in an intelligible and easily readable manner

value, making it relatively easy for courts to calculate business interruption losses, as was the case in a Court of Cassation decision dated 2008. In that particular case, the parties agreed that the insured's loss caused by business interruption would be calculated as 20.000 USD per day in the policy.⁴ Another common wording for business interruption clauses is when the policy stipulates that a certain percentage of the total indemnity shall be paid to the insured separately as business interruption indemnity. For example, in a Court of Cassation decision dated 2019, the parties have agreed that the “10% of the indemnity to be paid by the insurer shall separately be paid to insured as business interruption indemnity [...]”.⁵ In such cases, the courts have it relatively easier when valuing the insured's business interruption loss. However, it can be argued that these types of wordings may not accurately reflect a business's actual loss caused by the interruption. Hence, more often than not, business interruption insurances follow formulations that include variables such as the insured's gross profit and standard turnover with consideration for the most probable experience of the business had no loss occurred. The wording of the “Indemnity Calculation” clause in “General Terms and Conditions of Fire Loss of Profit Insurance” is an example of this type of formulation:

“Unless a separate calculation method is specified and defined in the contract due to the nature of the insured's commercial activity, the insurance indemnity shall be calculated by deducting the costs of operation that would have been deducted from the gross profit during the indemnity period but were not due to the damage from the loss of gross profit resulting from the decrease in turnover and increase in business costs.”

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Scholars express that policy clauses which include such variables adopt a nebulous loss valuation language and warn the parties that they can be applied inconsistently by courts.⁶ However, based on the available court decisions it can be said that Turkish courts have developed a consistent approach to address the unpredictability of such valuations.

One of the most common tools Turkish courts refer to value business interruption losses is a company's commercial books. Commercial books are accounting records that contain various financial data of companies and Turkish merchants are obligated to maintain them under TCC Art. 18. In a decision dated 2021, the 13th Istanbul Regional Appellate Court ruled that, in the absence of specified documents in the policy for calculating the loss, the insured's business interruption loss should be valued based on its commercial books. The court stated, “*The parties did not agree that the actual loss the defendant [the insurer] is obliged to pay will be calculated based on any other data. The actual loss, production and cost expenses, sales revenues, and profit shares can only be determined by the claimant's [the insured]*”

⁴ 11th Civil Circuit of Court of Cassation, E. 2006/12142 K. 2008/5134 T. 17.04.2008

⁵ 17th Civil Circuit of Court of Cassation, E. 2016/9939 K. 2019/7149 T. 10.6.2019

⁶ Christopher C. French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, Georgia State University Law Review, 2014, p. 466.

commercial books.⁷ The same approach was later adopted by courts of first instance as well.⁸

However, it should be noted that commercial books are not the sole records courts consider when valuing a business's loss covered by business interruption insurance. Turkish Courts also relied on independent expert reports acquired by the parties,⁹ feasibility reports for constructions in progress,¹⁰ and even sought the judgment of the Chamber of Shipping to determine the daily income a vessel could potentially generate when its operations were suspended.¹¹ Furthermore, Turkish courts implied that they would accept a business's potential income from various contracts if the insured could provide copies of such contracts or similar contracts that were concluded in the past, which in that specific case the insured was not able to do so.¹² Therefore, it is evident that Turkish courts maintain an open-minded approach, considering various sources of information as long as they are duly kept and provide useful data in assessing the projected profits of a business if the insured risk had not occurred.

Regarding the period taken into consideration when valuing a business interruption loss, Turkish courts often rely on historical data rather than prospects after the loss has occurred. However, there are exceptions in cases where the loss arises from a business that started operations shortly before the interruption. For instance, in a case where an electrical power plant began commercial activity in 2013 but suffered a loss in 2014, the Court of First Instance relied on the power plant's commercial books from 2015.¹³ It is understood that this approach was aimed at accurately reflecting the probable income the power plant would have earned in 2014 had the loss not occurred by taking into account its better-established operations in 2015.

It is also important to note that Turkish courts typically appoint expert panels in such cases, which usually include experts in insurance law, actuarial matters, and technical experts from the relevant field of business, such as electrical engineers for assessing losses in power plants. If the lower court fails to appoint a technical expert in such cases, the higher court is likely to overturn its decision as seen by the 14th Regional Appellate Court's decision no. E. 2019/1334 K. 2022/79 T. 3.2.2022.

Another relevant point in these cases is the insured's obligation to mitigate the loss. This obligation arises from the Turkish Commercial Code, and any loss that the insured could have prevented will not be covered by the insurer.¹⁴ For example, in a case where the insured's operations were suspended for over three months, the expert panel found that the insured was responsible for the two months of that delay.

⁷ 13th İstanbul Regional Appellate Court, E. 2019/676 K. 2021/220 T. 18.2.2021

⁸ 14th İstanbul Commercial Court of First Instance, E. 2016/546 K. 2021/403, T.29.4.2021

⁹ 7th İstanbul Commercial Court of First Instance, E. 2016/24 K. 2019/545, T. 24.9.2019

¹⁰ 14th İstanbul Regional Appellate Court E. 2019/1334 K. 2022/79 T. 3.2.2022

¹¹ 17th İstanbul Commercial Court of First Instance E. 2015/669 K. 2019/516, T. 24.12.2019

¹² 17th İstanbul Commercial Court of First Instance E. 2015/669 K. 2019/516, T. 24.12.2019

¹³ 14th İstanbul Commercial Court of First Instance, E. 2016/546 K. 2021/403, T.29.4.2021; a similar approach was also adopted by the Regional Appellate Court in decision no. E. 2019/676 K. 2021/220 T. 18.2.2021.

¹⁴ TCC Art. 1448: In the event that the risk materialised or materialisation of the risk became highly probable, the policyholder must, circumstances permitting, take measures to prevent the loss or its increase, mitigate the loss, and protect the insurer's rights of recourse against third persons.

As a result, the panel concluded that the losses incurred during those two months were not covered by the business interruption insurance.¹⁵

In summary, Turkish courts have demonstrated their determination to effectively value business interruption losses even when the policy wording is vague. They managed to do so by relying on commercial books, financial reports, and determinations from specialized technical experts. The courts also considered specific aspects of each case, such as the timing of the business's commercial activities but still maintained an objective approach by basing their decisions on tangible data. With the anticipated increase in disputes arising from business interruption insurance due to the recent earthquakes, the precedents set by the Turkish courts, as illustrated in this article, can help in accurately assessing business interruption losses.

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¹⁵ 14th Istanbul Regional Appellate Court E. 2019/1334 K. 2022/79 T. 3.2.2022