

# GLOBAL INSURANCE LAW CONNECT TO APPROACHES TO CORONAVIRUS

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## APPROACHES TO CORONAVIRUS



This document does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to highlight issues that may be of interest to customers of Global Insurance Law Connect. Specialist legal advice should always be sought in any particular case.

### Welcome

Since our first Global Insurance Law Connect report on the impact of COVID 19 in July 2020, we have seen changes in the way we live and work and begun to understand the challenges for businesses and economies around the world. While different countries and regions continue to endure different stages of progress towards recovery, thankfully the development of vaccines gives hope.

In this update, our GILC members offer their view of the issues facing insurers. Drawing upon in-depth understanding of the local jurisdiction and cultural, political and geographical challenges, we provide a unique overview for the insurance industry. We see common themes emerge from coverage to regulatory change, all addressed to compare approaches across the globe and provide insight and guidance for our clients.

Disputes concerning business interruption have triggered challenges in numerous jurisdictions. Our members consider the likely claims to come, not least in D&O, where several members focus upon the likely increase in bankruptcy procedures leading to legal actions and claims under credit insurance. How are the courts adapting and what regulatory changes do you need to address? A recurring topic is the change in working practices and business environment, while the acceleration in digitisation has seen the industry move several years' forward in just a few months.

We are delighted to welcome two new members from Turkey and the Netherlands to our network of leading insurance law firms as we continue to grow. You will find the contact details for all of our member firms in this report – please get in touch to seek their further guidance or advice. If you would like more information about Global Insurance Law Connect, the services we offer and our range of established expertise across business lines, please contact me.

**Jim Sherwood**

Chairman, Global Insurance Law Connect

SPARKE HELMORE

# AUSTRALIA

In the insurance sector, one of the most noteworthy developments has been the Australian BI test case and the test case appeal (*HDI Global Specialty SE v Wonkana No. 3 Pty Ltd trading as Austin Tourist Park* [2020] NSWCA 296). A copy of the judgement can be viewed [HERE](#).

In November 2020, the NSW Court of Appeal concluded the business interruption test case by rejecting the insurance sector's argument that policies should not cover COVID-19 pandemic-related losses. With many insurers expected to pay out considerable sums in pandemic-related business interruption claims, insurers are actively assessing the financial impacts of this ruling.

The Board of the Insurance Council of Australia (ICA) filed an application for special leave to the High Court of Australia, which seeks to appeal the decision of the NSW Court of Appeal regarding the application of the Quarantine Act exclusion to business interruption policies. The special leave application was filed on 16 December 2020 and can be viewed [HERE](#).

The option for an appeal by either the insurers or the insured was agreed to in the original decision to seek an outcome from the courts. If special leave to appeal is granted, the ICA will seek for the matter to be heard in the High Court as quickly as possible.

While the insurance industry has been sympathetic to businesses that have experienced hardship, particularly small- and medium-sized enterprises, the view remains that pandemics were not contemplated for coverage under most business interruption policies and that the Quarantine Act exclusion operates to exclude COVID-19 related claims.

The parties are due to complete all the preliminary steps required prior to the court hearing the special leave application. A hearing date for that application has not yet been set. Once this is completed, it will be up to the Court to make a decision based on the papers filed by the parties or to list the application for oral argument.

The insurance industry recognises the importance of seeking clarity on the interpretation of further aspects of business interruption policies and is working with stakeholders and policyholders to provide a resolution as quickly as possible. To listen to our recent podcast on the Australian Business Interruption test case decision, the implications, and the comparison with the UK test case, please click [HERE](#).

## Our clients' response

Operational agility, capability and resilience are key to successfully navigating the pathway out of the COVID-19 storm. For the most part of 2020 and in order to maintain social distancing, there was a significant shift to remote working in Australia with millions of employees directed to work from home. Our insurer clients were among those first to respond and support their workforce with the move to remote working whilst maintaining their commitment to their customers.

Ensuring peace of mind for the customer is paramount in times of crisis and stress and a number of steps were taken by our clients to ensure this was the case. Some of these included waiving deductibles or policy excesses and pre-approval of claims. With face-to-face interactions limited by social distancing, it was those who invested in digital technology advancements and assisted online platforms who were able to continue to engage with customers somewhat seamlessly and to service their customers' needs.

There will be a continuing need for flexibility and adaptation, as employers accept that some things have changed permanently. Whether managing claims or underwriting risk remotely, or launching new products to market quickly and efficiently, those insurers who have collaborated with their service providers to drive innovation, will be well placed to execute in a more effective way and continue to be there for their clients to provide peace of mind.

## The court system

The Australian court system continues to remain flexible in the way it operates.

Most Australian jurisdictions have been managing matters online, with lockdown and other restrictions meaning in-person services and physical court attendances were halted. Closures meant documents had to be filed online, via email or by fax; hearings had to be conducted by telephone or video-conferencing; hearings considered non-urgent had to be postponed; and more procedural decisions were made "on the papers".

As the pandemic stabilises in Australia, courts appear to be moving to increase in-person appearances, albeit in a controlled and staggered manner. Courts and tribunals have implemented different approaches and there have been several challenges the court system faced, in particular, with technology. Most of these initial challenges now appear to have been resolved and if managed properly, the move to "business as usual" digital innovation among Australian courts could represent significant opportunity to streamline and speed up services. That said, such a move will no doubt be met with some resistance from legal practitioners, as they much prefer the in-person interaction they have in court and with the judge.

**THE BOARD OF THE INSURANCE COUNCIL OF AUSTRALIA (ICA) FILED AN APPLICATION FOR SPECIAL LEAVE TO THE HIGH COURT OF AUSTRALIA, WHICH SEEKS TO APPEAL THE DECISION OF THE NSW COURT OF APPEAL REGARDING THE APPLICATION OF THE QUARANTINE ACT EXCLUSION TO BUSINESS INTERRUPTION POLICIES.**

**MOST AUSTRALIAN JURISDICTIONS HAVE BEEN MANAGING MATTERS ONLINE. WITH LOCKDOWN AND OTHER RESTRICTIONS MEANING IN-PERSON SERVICES AND PHYSICAL COURT ATTENDANCES WERE HALTED.**



LYDIAN

# BELGIUM

Contrary to the measures taken in the beginning of the pandemic – in particular with Royal Decree no. 2 - no specific measures have been implemented **with the Royal Decree only remaining valid until 3 May 2020.**

We continue to see that, in practice, some courts are still working with videoconferencing (although not that common) and the “standard” COVID-19 measures (such as masks, distancing and the like) are impacting the scheduling of hearings by the courts.

Further, as to bankruptcies, a new moratorium was installed starting on 1 January 2021. This automatic moratorium was in effect (again) to protect Belgian companies from payment difficulties due to the corona measures. It was however limited to those businesses.



**ACCORDING TO A MARKET STUDY CARRIED OUT BY GRAYDON FOR THE VBO IN SEPTEMBER 2020, ALMOST 25% OF COMPANIES ARE AT RISK OF BANKRUPTCY. PARTLY AS A RESULT OF THE CORONA CRISIS AND THE MEASURES TAKEN IN THIS CONTEXT. IT IS THUS NOT SURPRISING THAT THERE IS CRITICISM OF THE DECISION NOT TO EXTEND THE MORATORIUM.**

This moratorium for seizures and bankruptcy was in force until 31 January 2021, but - somewhat contrary to expectations - it was not extended. Consequently, Belgian companies today may once again find themselves in bankruptcy or facing the seizure of their assets.

According to a market study carried out by Graydon for the VBO in September 2020, almost 25% of companies are at risk of bankruptcy, partly as a result of the corona crisis and the measures taken in this context. It is thus not surprising that there is criticism of the decision not to extend the moratorium.

However, a change to insolvency law is in the making, particularly with regard to the judicial reorganization procedure. A legislative proposal aimed at facilitating access to the judicial reorganization procedure, particularly for SMEs, was already submitted on 10 June 2020. Indeed, the proposers of the legislation anticipate that a large number of companies will resort to this procedure in order to protect themselves from the economic consequences of the COVID-19 pandemic. This does not seem unjustified to us. The judicial reorganization procedure (formerly WCO) offers an option.

The legislative proposal provides for a simplification of the procedure by, among other things, relaxing the formal requirements and the eligibility requirements, expanding the possibility of appointing a court mandatary, granting payment facilities by way of a provisional measure (including for new debts that have become due during the procedure), and expanding the effect of an amicable settlement.

The legislative proposal has not yet been adopted. The target date for its adoption has been pushed forward to March 2021.

## What industry regulatory changes are you seeing?

The NBB will focus its supervision and regulation on critical and essential tasks related to the impact of the coronavirus.

Furthermore, the NBB has implemented the EIOPA's COVID-19 virus recommendations with regard to the extension of delays in reporting and public disclosure.

The Financial Services and Markets Authority (“FSMA”) has published a newsletter regarding the coronavirus addressed to insurance intermediaries. The FSMA announced that it will not take any initiatives that could hinder the business continuity of insurance intermediaries, such as comprehensive requests for information.

## Any early considerations on where claims will fall?

Once the protective and support measures cease, we anticipate an important number of bankruptcy and restructuring proceedings. We anticipate an increase in scrutiny by creditors, trustees and courts of the director's liability. Indeed, although the measures are aimed to have “sound and healthy” companies protected from the COVID-19 impact, a number of companies have “misused” the measures to continue an already disrupted or loss-making business. Insurers might therefore expect an increase in D&O liability matters.

## SANTOS BEVILAQUA ADVOGADOS

## BRAZIL

Even before the pandemic, the Brazilian court system was a heavy user of technology. Lawsuits' records and petitions were digital, and video conferencing tools were immediately adopted after the pandemic. All things considered, we may say that the Brazilian court system is operating well.

**What industry regulatory changes are you seeing?**

Efforts have been underway over the last few years to modernize and liberalise both the insurance and the reinsurance regulation and although the pandemic put a stop to much corporate and government activity and caused the Brazilian nation to refocus on tragic issues at home, much of this particular project has continued to progress.

Already, the Brazilian insurance supervisor (SUSEP) has authorised greater freedom in the creation of new insurance products, with a significant reduction of complexity in the rules around insurance wordings and their registration with the SUSEP. These changes have been implemented over recent months and more changes are being discussed in public hearings.

The Sandbox is also already effective, with almost ten very innovative insurance companies approved to operate under special conditions.

**Any early considerations on where claims will fall?**

In Brazil, we have not seen a great number of lawsuits as a result of the pandemic.

This is probably because, on the life side, the insurance companies decided at the start of the pandemic, as a general rule, to cover claims associated to the pandemic and to COVID-19.

**ALREADY THE BRAZILIAN INSURANCE SUPERVISOR (SUSEP) HAS AUTHORISED GREATER FREEDOM IN THE CREATION OF NEW INSURANCE PRODUCTS, WITH A SIGNIFICANT REDUCTION OF COMPLEXITY IN THE RULES AROUND INSURANCE WORDINGS AND THEIR REGISTRATION WITH THE SUSEP. THESE CHANGES HAVE BEEN IMPLEMENTED IN THE LAST MONTHS AND MORE CHANGES ARE BEING DISCUSSED IN PUBLIC HEARINGS.**

Health insurance was not heavily impacted because most of the costs associated to COVID-19 were supported by the Public Health System.

In relation to property lines, potentially the most controversial coverage is in business interruption, but in Brazil this is not taken out by most companies. Only very large groups tend to take this out and, as a general rule, these companies have not incurred significant covered losses from the pandemic. In fact, there has already been one business interruption case which will be a major lawsuit, however the outcome is still yet to be seen.

On the liability and contracts side, it is possible that, in the future, we will see discussions arising from pandemic impacts but at this moment it does not seem to be a significant issue.



At the start of the pandemic, Brazil was beginning to see a process of economic recovery, which was abruptly stopped. Some economic measures continued to advance, and in Brazil lockdowns imposed at different levels of government (federal, state and municipal) were not as severe or effective as elsewhere in the world. On the one hand, this caused some worsening of the pandemic, and on the other also resulted in a smaller drop in economic activity.

It is, therefore, difficult to predict how the economy will be affected in the coming months but, for example, the insurance and reinsurance market did not note a drop in revenue in 2020 in comparison to 2019.

The general perspective is that, with the positive impacts of the vaccination, we will rapidly improve the overall economic activity.

# CHINA

On 14 February 2020, the Supreme People's Court (SPC) issued the Notice on Strengthening and Standardizing Online Litigation Work during the Period of Coronavirus Epidemic Prevention and Control, which provides clear guidelines on online court hearings, service, identity verification, submission, and record-tracking of litigation activities.

During the COVID-19 outbreak in early 2020 and the subsequent 'prevention and control period', China's judicial system actively relied on mobile micro-courts, litigation service websites and other online litigation platforms to provide online litigation services, which has helped ensure that the judicial system can operate in an orderly manner. The SPC has also emphasized that if the hearing of a case can be postponed during the COVID-19 prevention and control period, then it should be postponed in principle. In the event of an application for extension of the statute of limitations, the legitimate rights and interests of the parties concerned shall be fully respected based on actual conditions.

Furthermore, for the convenience of parties abroad amid the pandemic and more specifically to address the issue of case-filing by foreign parties, the SPC issued the Measures on Provision of the Online Case-filing Services to the Parties of Cross-border Disputes which comes into effect as of 3 February 2021. This is also part of the SPC's comprehensive plan to promote the integration of foreign-related trials and intelligent courts.

**IN THE EVENT OF AN APPLICATION FOR EXTENSION OF THE STATUTE OF LIMITATIONS, THE LEGITIMATE RIGHTS AND INTERESTS OF THE PARTIES CONCERNED SHALL BE FULLY RESPECTED BASED ON ACTUAL CONDITIONS.**

## What industry regulatory changes are you seeing?

- In August, the China Banking and Insurance Regulatory Commission (CBIRC) announced a three-year plan (2020-2021) to better develop and enhance the country's P&C market, which follows the announcement in mid-July that the regulator would take control of struggling firms including Tianan Property Insurance, Huaxia Life Insurance Co, Tianan Life Insurance Co and Yi An Property & Casualty. It is of great significance to the development and supervision of the country's P&C market, as it is the first time that the CBIRC has issued a plan in this aspect since it was established.
- On 3 September 2020, in the field of auto insurance, CBIRC officially issued Guidance on the Implementation of Comprehensive Reform of Auto Insurance. The reforms include both commercial auto insurance and compulsory traffic insurance. This aims to promote the decisive role of the market in the allocation of auto insurance resources and minimize direct government supervision.
- Against the backdrop that COVID-19 pandemic has further accelerated the development of online insurance in China, on 14 December 2020, CBIRC announced that it has issued and implemented the "Internet Insurance Operations Regulatory Measures" in order to "effectively prevent risk and protect the lawful rights and interests of consumers."
- CBIRC also released the Provisions on the Supervision and Administration of Insurance Agents which comes into effect on 1 January 2021. Under these new provisions, insurance agencies/agents and insurance brokers face increasingly harmonised supervision requirements. The concept of "personal insurance agent" has been proposed for the first time





## SOCRATES

## FINLAND

At the time of writing, Finland's COVID-19 policy can be viewed to be somewhat successful. The number of infections has stayed relatively low and the total amount of reported cases is currently approximately 44,000. The government and public authorities have issued some restrictions which have mainly affected businesses in the restaurant, entertainment, tourism, and sports sectors. Temporary amendments to the employment law made in the spring expired at the turn of the year.



Since the start of autumn, the courts have begun to unload the pile of cases accumulated in the spring and main hearings are being held in a normal manner apart from some safety measures. It has been a pleasure to notice that the courts have continued to organize oral preparatory hearings via telecommunications applications. New flexible approaches have also been exercised in arbitration processes.

As was expected, insurance related discussion has mainly concentrated on business interruption insurance claims arising from government issued restrictions to restaurant business.

In November, the Finnish Financial Ombudsman Bureau ("**FINE**"), an organization that among its other functions issues recommendations for the resolution of disputes related to insurance, gave a recommendation as to which losses of income to restaurants caused by the COVID-19 pandemic shall be covered from the restaurants' business interruption insurance policy. The recommendation concerns only policies of a single large Finnish insurer. In its recommendation FINE analysed how the policy term defining covered loss caused by epidemic should be interpreted.

The terms of the policy defined the specific statutes, such as the Finnish Communicable Diseases Act, on which restrictions to the insured's business shall be based on in order for the loss to be covered by the policy, whereas restrictions issued on the basis of some other legislation not mentioned in the policy fell outside the scope of the policy, even though the root cause of the restrictions has been COVID-19 pandemic.

FINE considered that the loss caused by public restrictions shall be covered by the business interruption policy to the extent that the restrictions were based on regulations issued under the Act on Temporary Amendments to the Communicable Diseases Act from 1 June 2020. However, the insureds were not entitled for indemnity for loss arising from restrictions preceding 1 June 2020, as earlier restrictions were not issued based on the Communicable Diseases Act.

FINE's recommendation received nationwide publicity in Finland and a lot of speculation has emerged as to what consequences this may have. The particular insurer in question has informed its policyholders that it will not renew its policies containing epidemic protection at the end of the present policy term and that it will amend the terms of future policies. This will affect thousands of policies.

The insurer has gone against FINE's recommendation and refused to indemnify the insureds for their losses. Consequently, several companies in the restaurant business are now filing lawsuits against the insurer. Currently, the total amount of cases exceeds 50 and more claims are to be expected. Whether, and to what extent, the decision of FINE will affect other insurers operating in the Finnish market with similar products but varying wordings, remains to be seen. Many other insurers have faced claims since spring 2020 but so far without such visible effects.



## BYRD &amp; ASSOCIATES

## FRANCE

The decree of 14 October 2020 reinstated a state of health emergency owing to the COVID-19 pandemic, which was extended to 16 February 2021. The law of 15 February 2021 extended the state of health emergency until 1 June 2021 with a transitional period up to 31 December 2021.

This emergency regime made it possible to establish curfews and other restrictions by simple decree.

A second national confinement was introduced on 30 October 2020 which prohibited any movement of persons outside their place of residence, with the exception of travel for certain reasons such as professional activity. The decree also prohibited ERPs (Establishments Receiving the Public) from receiving the public save exceptions provided for by the same decree.

Since the adoption of the decree of 14 December 2020, the second confinement was partially lifted and travel was allowed during the day throughout the country without the obligation to provide a travel certificate. Shops and hotels could remain open but bars, restaurants, cinemas, theatres, museums, gyms and discotheques remained closed.

A nightly curfew has been in force in metropolitan France since 15 January 2021 between 6pm and 6am under which persons may only leave their residences for only specifically exempted reasons.



According to the government, the timing for lifting the curfew will depend on the evolution of the health crisis.

**On 29 January 2021, the government announced new restrictions which came into effect on 1 February 2021:**

- A ban on travel from or into France outside the European Economic Area (EEA), "except for compelling reasons",
- Any entry into France from an EEA country will be subject to a PCR test, with the exception of cross-border workers,
- Non-food shopping centers with a surface area of over 20,000 m<sup>2</sup> will be closed,
- Telework will be reinforced for all companies and public administrations.

According to the Prime Minister, the government is trying to avoid a third complete lockdown, but this remains to be seen.

**Government aid:**

At the beginning of the health crisis in March 2020, the French government set up a Solidarity Fund for companies particularly affected by the economic consequences of COVID-19, to which French insurers contributed. The Solidarity Fund consists of a tax-free and non-contributory aid aimed at shopkeepers, craftsmen, liberal professions and other businesses, whatever their status (company, individual entrepreneur, association...) and their tax and social regime (including micro-entrepreneurs), with a maximum of 50 employees.

By a decree dated 28 January 2021 the aid under the Solidarity Fund was increased to include additional indemnification of the fixed costs of companies that are administratively closed and to compensate businesses for loss of revenue (subject to certain conditions and limits).

As part of government aid, in parallel with the Solidarity Fund, all companies that so wish, regardless of their activity and size, will be entitled to a deferral of one additional year to begin repaying their state-guaranteed loans.

In addition to this aid, the Social Security Administration (URSSAF) has established the COVID-19 AFE (COVID-19 Exceptional Financial Aid) intended to provide aid to self-employed workers and self-employed entrepreneurs affected by a total administrative closure who meet certain cumulative eligibility conditions.

**AT THE BEGINNING OF THE HEALTH CRISIS IN MARCH 2020, THE FRENCH GOVERNMENT SET UP A SOLIDARITY FUND FOR COMPANIES PARTICULARLY AFFECTED BY THE ECONOMIC CONSEQUENCES OF COVID-19, TO WHICH FRENCH INSURERS CONTRIBUTED. THE SOLIDARITY FUND CONSISTS OF A TAX-FREE AND NON-CONTRIBUTORY AID AIMED AT SHOPKEEPERS, CRAFTSMEN, LIBERAL PROFESSIONS AND OTHER BUSINESSES, ENTREPRENEURS), WITH A MAXIMUM OF 50 EMPLOYEES.**

## BYRD &amp; ASSOCIATES

## FRANCE

**Judicial courts:**

Since the second period of confinement in effect from 30 October 2020 and the partial lifting of restrictions, the normal activity of the courts has been globally maintained, contrary to the situation in the previous period of confinement.

The court dockets are, however, overwhelmed, so there are considerable delays for hearing dates.

The judges encourage the litigants' counsel to simply submit their written pleadings rather than presenting oral arguments.

**Insurance Industry measures:**

In November 2020, the Fédération Française de l'Assurance (FFA) presented its insurance scheme called "CATEX" - a system of insurance coverage for exceptional disasters. This scheme aims to cover companies against the economic consequences of a collective closure imposed by the public authorities in the context of a pandemic or epidemic through the payment of a "resilience capital" enabling them to survive the crisis.

The CATEX is conceived as a mandatory extension to the "Fire" cover, which is taken out by companies as part of their multi-risk insurance policies (similar to the Natural Catastrophe cover).

The trigger for the system would be a state of pandemic declared on part or all of French territory by a specially designated organization, imposing a total or partial administrative closure by the public authorities.

However, in a 7 December 2020 statement, the Minister of the Economy, Bruno Le Maire, announced the abandonment of the project of compulsory coverage of administrative closure in favor of "optional individual solutions". The government would propose an option for companies who wish to build up reserves should another pandemic occur that will benefit from a particularly advantageous tax regime.

Accordingly, the CATEX project as presented by the FFA appears to be dead on arrival, at least under the present administration. Nevertheless, it remains to be seen what precisely the government will be proposing in lieu of it.

**Legal actions:**

During the course of 2020, there were numerous legal actions in France resulting from COVID-19. Whilst there are certainly a number of unpublished claims made for event cancellation, delayed construction claims, etc., most published claims to date in France involve business interruption.

The business interruption claims result from an administrative order of 14 March 2020 which, inter alia, restricted public access to many establishments open to the public such as: restaurants, bars, cafés, camping sites, shops, etc. These restrictions were partially lifted by a subsequent administrative order issued on 1 June 2020 but many businesses remained closed.

These decisions have either been rendered by lower commercial courts in summary proceedings by a single judge (*référé*) or by a full court on the merits (*au fond*).

Most of the published decisions given media attention to date primarily concern the validity of a specific exclusion clause contained in AXA's standard multi-risk policy: which provides for an exclusion of a pandemic claim "when at least one other establishment (...) in the same department as the insured's establishment, has been subject to the same administrative closure".

To date, approximately half of the court decisions have ruled in favor of AXA, finding the exclusion to be clear and limited (the most recent being a decision rendered by the Commercial Court of Bordeaux on 11 January 2021), whereas the other half have found the exclusion to be invalid (the most recent being a decision rendered by the Commercial Court of Nice on 13 January 2021) on the grounds that it was not explicit and limited and deprived the insured of the substance of the cover of business interruption losses in the case of an epidemic, which by definition could affect other establishments outside the department where the insured had its premises.

There are a number of other legal actions and a few published court decisions on business interruption claims involving other insurers which have likewise been inconsistent but which again deal with specific wording in their policies without ruling on the broader general issues of cover, such as the requirement of material damage to trigger cover of business interruption claims.

All of these decisions are likely to be appealed so it will be interesting to observe how the appellate courts will rule.



ARNECKE SIBETH DABELSTEIN

## GERMANY

In Germany the court system is not particularly affected by COVID-19. It is admitted that certain court hearings can also be conducted as videoconferences, however, the courts are reluctant to make use of this. Most court hearings therefore continue to take place in person and in compliance with individual coronavirus safety measures.

### What industry regulatory changes are you seeing?

Coronavirus-related changes in insurance regulatory law have not yet occurred and are still not in sight.

### Any early considerations on where claims will fall?

In the first year of the pandemic, event insurance and business shutdown insurance were the focus of attention. It is striking that event cancellation insurance was much less in the focus of the general public than the business shutdown insurance.

A considerable increase in coronavirus-related D&O claims is expected for the second pandemic year. In addition, credit default insurance could also be increasingly affected by claims.

**THE INSURANCE INDUSTRY IN GERMANY HAS APPARENTLY SUCCEEDED IN ADAPTING TO THE CHANGED FRAMEWORK CONDITIONS RELATIVELY EASILY. COMPARED TO OTHER SECTORS OF THE ECONOMY, THE INSURANCE INDUSTRY IS THEREFORE LESS AFFECTED.**

### Business shutdown insurance

Prior to the coronavirus pandemic, business shutdown insurance was known only to specialists in Germany. Now, due to COVID-19, this insurance has become the focus of attention and is being field-tested nationwide, as it offers cover if an insured business is shut down by an official order to prevent the spread of communicable diseases. Although market estimates show that even in relevant economic sectors (e.g. gastronomy and hotel business) only about 10% of companies have business shutdown insurance, this insurance product became the most discussed insurance topic of 2020 in Germany, not only among specialists but also among the general public. The main reason for this widespread attention is probably that the insurance industry's knee-jerk rejection of policyholders' claims has been met with little understanding, especially because of the existential threat to policyholders.

In the meantime, there have been numerous court decisions on business shutdown insurance, but unfortunately they have not brought any conclusive clarity. One of the reasons for this is the great differences between the various insurance conditions. In addition, there are no court model cases as in other jurisdictions. As a result, there now exist numerous - at first glance contradictory - court decisions. Thus, there is still no clarity about the coverage in terms of reason and amount.

However, in the synopsis of the various decisions, it can at least be seen that the knee-jerk rejection of all claims by insurers will not stand up in many cases. In particular, the Munich Regional Court has now ruled in favour of the policyholder in various cases or has persuaded the insurers to agree to generous settlements.

For 2021, it is to be hoped and expected that the first higher court decisions will be issued and that these will further unify the line of jurisprudence. Furthermore the German Association of Insurers has since published new model terms and conditions for business shutdown insurance [HERE](#) which, according to the insurers, are intended to provide greater clarity on coverage issues. However, only the occurrence of the next pandemic will show whether this has actually been achieved.

### D&O Insurance

In the course of 2020, the D&O market in Germany continued to harden. This is on the one hand still a consequence of an ever-increasing expansion of cover and rising claims expenditure in the decade before. On the other hand, the pandemic-related uncertainty has also contributed to a strengthening of the trend. Particularly towards the end of the year, insurers increased premiums and further reduced their capacities. In addition, there are now also first signs of a limitation of coverage (e.g. insolvency exclusions). Most market participants expect this trend to continue in 2021 and anticipate a further raise of premiums.

Furthermore, it is still to be expected that numerous claims in the area of D&O insurance will also arise in connection with COVID-19. A scenario that in Germany is of greatest relevance within the scope of D&O insurance anyway is the insolvency of the policyholder. For in nearly each insolvency case liability claims are raised against directors and officers due to a delayed filing for insolvency.

**UNTIL THE BEGINNING OF THE CORONA PANDEMIC, BUSINESS SHUTDOWN INSURANCE WAS KNOWN ONLY TO SPECIALISTS IN GERMANY. NOW, DUE TO COVID-19, THIS INSURANCE HAS BECOME THE FOCUS OF ATTENTION AND IS BEING FIELD-TESTED NATIONWIDE. AS IT OFFERS COVER IF AN INSURED BUSINESS IS SHUT DOWN BY AN OFFICIAL ORDER TO PREVENT THE SPREAD OF COMMUNICABLE DISEASES. ALTHOUGH MARKET ESTIMATES SHOW THAT EVEN IN RELEVANT ECONOMIC SECTORS (E.G. GASTRONOMY AND HOTEL BUSINESS) ONLY ABOUT 10% OF COMPANIES HAVE BUSINESS SHUTDOWN INSURANCE.**



## ARNECKE SIBETH DABELSTEIN

## GERMANY

As the German government has temporarily suspended the obligation to file for insolvency in 2020, if the pandemic is responsible for the insolvency maturity, for the years 2021 and 2022 an increase of claims in this field is expected. In addition, an increase is also expected in the field of so-called “event-driven litigation” and in the area of “environmental, social and governance”.

#### Credit insurance

Germany as a trading country relies heavily on credit insurances and according to the German Insurance Association's information, the trend up until 2019 showed that credit insurers were doing well, reflecting the decrease in business insolvencies in Germany. Now, however, these numbers have increased and are expected to further increase due to COVID-19 in 2021. In order to enable credit insurers to uphold insurance cover of this kind, and thereby avoid major disruptions of trading chains, credit insurers and the German Federal Government on 16 April 2020 agreed on a 30 billion Euro protective shield. This has contributed to a stabilisation of the market.

Furthermore, COVID-19 also influences credit insurers with regard to the prerequisites of cover: A credit insurance covers the assured's risk in case of default of payment of its contract partners.

The insured event usually occurs when the customer becomes insolvent (and particularly when insolvency proceedings are opened) or when he is in default of payment (so called “protracted default”).

With the coronavirus, the German Legislator, made changes to insolvency laws on several occasions to avoid unnecessary insolvencies. However, this can affect the prerequisites for the insured event under the credit insurance, as it can postpone the duty to file for insolvency. Consequently, situations are likely to arise more frequently where the contract partner of the assured is de facto insolvent, but the insolvency proceedings can neither be started nor rejected for lack of assets, because the application for insolvency proceedings is not filed (nor can be filed by the creditors). To what extent these situations affect obligations under the credit insurance, remains to be seen.





## KHAITAN LEGAL ASSOCIATES

## INDIA

With the rapid outbreak of the COVID-19 pandemic, the country has seen an unprecedented lockdown which amongst other things, has gravely impacted the functioning of Courts and Tribunals across the country. Some of the key impacts are as follows:



- As a most natural consequence of the lockdown, physical hearings of ordinary matters (which were originally scheduled to take place during the lockdown period) have been cancelled and adjourned to further dates. The Bombay High Court has directed that ad-interim and interim reliefs in such matters are to continue. The Bombay High Court on its own motion vide an order dated 26 March 2020, the Bombay High Court extended the interim reliefs in all the matters. Thereafter, vide subsequent orders dated 15 April 2020, 15 June 2020, 15 July 2020, 31 August 2020, the interim reliefs were further extended up until 30 September 2020.
- Physical hearings have been restricted to only those matters where there is extreme urgency for grant of reliefs and select Benches have been constituted for this purpose. This is being implemented very seriously and several Courts across the country have been seen imposing costs on litigants who approached the Courts for physical urgency when there was no emergent issue to be adjudicated upon.
- In addition to the above, the Supreme Court as well as various other courts across the country are hearing urgent matters via video-conferencing. For instance, the Bombay High Court has conducted hearings on "Zoom" where hearings were held with almost 500 people (Advocates, Litigants and Court Staff) participating remotely. Even the High Courts at Delhi, Kerala, Manipur & Rajasthan have been successfully conducting urgent hearings through video conferencing.
- In fact, the Supreme Court of India has commenced hearing of extremely urgent matters using this video conferencing facility and has issued guidelines to streamline the functioning of the proceedings through such video conferencing. For the purposes of video conferencing, the Supreme Court has designated the 'Vidyo' app for conducting the hearing of such urgent proceedings. The Supreme Court vide a circular dated 16 May 2020 has issued a Standard Operating Procedure for e-Filing, Mentioning, Listing and Video Conferencing Hearing.

## INDIA

**What industry regulatory changes are you seeing?**

- The Insurance Regulatory & Development Authority of India (IRDAI) has directed insurers that all the claims reported of COVID-19 will be thoroughly reviewed by the claims review committee before repudiating the claims.
- The IRDAI has provided grace periods for payment in premiums.
- IRDAI has prescribed various reporting requirements in respect to COVID-19. For example a report every fortnight is required to be submitted to the IRDAI giving the details of offices fully/partially closed with duration and steps taken in this regard. Data in respect of claims related to COVID-19 is to be maintained separately to be submitted to IRDAI as and when called for.
- The Ministry of Corporate Affairs has relaxed the requirements of physical board meetings and meetings for specific matters may be held in audio visual form. This has further been enforced by IRDAI specifically for the insurance industry.
- IRDAI has provided an option of condonation of delay in renewal without considering it a break in policy.
- Regulatory requirements such as filing of returns, cyber security audit filings, have been given extensions.
- IRDAI has directed insurers to set up a Crisis Management Committee, comprising of key personnel to monitor the current situation on a real-time basis and to take timely decisions on issues pertaining to safety of staff, policyholders, intermediaries and agents; assessing new challenges that may emerge on a day-to-day basis and measures to mitigate them; and adopting necessary measures to minimize business disruption.
- Insurers have been asked to take special efforts to enable policyholders to pay premium using digital methods by educating them through SMS, emails, etc.
- Though the normal response time for policyholder complaint redressal is 15 days, an additional 21 days has been allowed in respect of all complaints which are received on or after 15 March 2020 and up to 30 April 2020. However, this additional response time is not available in case the complaints pertain to COVID-19 complaints.
- In the case of insurers who hold travel insurance policies which were/are valid between 22 March 2020 and 30 April 2020, an option to defer the date of travel without any additional charge is to be provided.
- IRDAI has clarified that indemnity-based health insurance products that cover the treatment costs of hospitalization offered by all general and health insurance companies will cover the costs of hospitalization treatment on account of COVID-19.
- IRDAI has issued guidelines on Standard Health Insurance Policy called 'Arogya Sanjeevani'. The IRDAI has issued clearance to 29 identified General and Health Insurance companies to market this Health Insurance Product. It was further clarified that the product 'Arogya Sanjeevani' will also cover the hospitalisation treatment costs of COVID-19.

- Insurers are urged to take a conscious call to refrain from dividend pay-outs from profits pertaining to the financial year ending 31 March 2020, till further instructions. This position shall be reassessed by the Authority based on financial results of insurers for the quarter ending 30 September 2020.
- A one-time relaxation was given on the general condition in the Standard Fire and Special Peril policy where the insureds' premises are unoccupied for more than 30 days during the national lock-down period between 25 March 2020 and 3 May 2020. The relevant clauses would apply post 3 May 2020.

**Any early considerations on where claims will fall?**

The more imminent impact is on life and health insurance policies.

We are seeing a number of business interruption claims being made. However, most conventional business interruption policies cover business interruption only if it is caused due to material damage covered by the policy which requires physical loss or destruction. Policies with revised endorsements including shut down etc may prove to have more luck in such claims.

Event cancellation / sports event policies are expecting to see a rise in claims and work from home / remote working is expected to increase the number of cyber claims too.

Inability to perform, restriction on movement of goods, blocking of borders, is also likely to give rise to claims under trade credit insurance.

**WE ARE SEEING A NUMBER OF BUSINESS INTERRUPTION CLAIMS BEING MADE. HOWEVER, MOST CONVENTIONAL BUSINESS INTERRUPTION POLICIES COVER BUSINESS INTERRUPTION ONLY IF IT IS CAUSED DUE TO MATERIAL DAMAGE COVERED BY THE POLICY WHICH REQUIRES PHYSICAL LOSS OR DESTRUCTION. POLICIES WITH REVISED ENDORSEMENTS INCLUDING SHUT DOWN ETC MAY PROVE TO HAVE MORE LUCK IN SUCH CLAIMS.**

**Any other comments?**

It may be too early to assess all potential claims but every passing day is opening up new avenues and this is a critical time to wait and watch.

## ITALY

The Italian Government enacted several decrees in order to manage the COVID-19 emergency. Firstly, a temporary suspension of court activities in connection with ongoing civil, criminal, tax, administrative court proceedings until last 11 May 2020, with certain limited exceptions concerning the fields of family and criminal law or proceedings for provisional relief. The same applies to mediation procedures.

In addition, each court has been authorized to adopt special measures to carry out proceedings and court activities.

Statute of limitations and forfeiture terms are tolled for the period of time in which the commencement of court proceedings is prevented because of the emergency legislation or because of specific measures adopted by each court as a result of the emergency legislation.

E-trial measures have been implemented and used for any type of court activity, both civil and criminal. Each court is allowed to establish its own practices and procedures in this regard.

#### What industry regulatory changes are you seeing?

Due to the COVID-19 emergency, the Italian Insurance Supervisory Authority (hereinafter, "IVASS") has adopted various measures to help insurance undertakings and distributors meet the deadlines set by primary and secondary legislation, especially as below:

- On 17 March 2020 it postponed deadlines for insurance distribution networks' reports (IVASS Regulation No. 40/2018), for mandatory implementation of home insurance (IVASS Regulation 41/2018) and for reports on complaints (Regulation 24/2008);
- On 23 March 2020 it temporarily extended the periods for replies to complaints (from 45 to 75 days) and for requests for information (from 20 days to 35 days);
- On 30 March 2020 it granted further extensions, regarding reporting Solvency II duties in accordance with EIOPA. It also prorogated terms for trimestral communications on controlling stakes, on reinsurance cessions schemes and in respect of several other duties. On the same date, IVASS also recommended caution in distribution of dividends, in view of the high level of volatility in financial markets.

Considering the importance of complaint procedures, the IVASS has reintroduced – as for 1 July 2020 – the ordinary compliant deadlines.

Note also that, just like banks, insurance companies have been consistently exempted from having to suspend their business in order to limit COVID-19 contagion: this has required much organizational effort by the industry and has led to special dispensation.

**STATUTE OF LIMITATIONS AND FORFEITURE TERMS ARE TOLLED FOR THE PERIOD OF TIME IN WHICH THE COMMENCEMENT OF COURT PROCEEDINGS IS PREVENTED BECAUSE OF THE EMERGENCY LEGISLATION OR BECAUSE OF SPECIFIC MEASURES ADOPTED BY EACH COURT AS A RESULT OF THE EMERGENCY LEGISLATION.**

#### Any early considerations on where claims will fall?

The COVID-19 contagion has affected several lines of risk (above all the life and health insurance sector).

One of the major issues is cover provided by business interruption policies, as lockdown measures have forced many (indeed, in Italy, almost all) businesses to suspend their activities, or at least to operate in a very different way.

Business interruption insurance generally covers loss of gross profit or loss of income if the business is interrupted or adversely affected due to reasons beyond the policyholder's control. Conventional business interruption cover is subject to a "material damage proviso", which is that for an interruption to be covered it must be caused by physical damage that is insured under the policyholder's property damage policy, such as fire or flood.

In this regard, please note that for the general term "material damages" the case-law of the Italian Supreme Court provides useful indications in this sense: in judgment no. 5541 of 2012, the Court, referring to "material damages", qualifies them in an excerpt of the judgment as "alteration of the structural elements of the asset in such a way as to make it different from the original one".

Since COVID-19 is an infectious viral disease attacking animals and humans, it is difficult to detect possible "alterations in the structural elements" of the insured movable and immovable assets.

Also, there are common exclusions which apply to losses arising out of "loss of use" of premises (e.g. due to virus contamination), as well as contamination exclusions which can relate to a virus, communicable diseases or biological pollutants. However, depending as always on policy wording, interruptions caused by COVID-19 may in some cases be covered.

Coverage questions may also arise in relation to decontamination and clean-up, prevention and mitigation costs.

Some property policies include "civil authority" coverage which covers losses as a result of a government or civil authority restricting access to the policyholder's premises. Generally, civil authority coverage applies when there is a direct link between the civil authority's order and the policyholder's loss. So for places where the state or local government has ordered a shutdown or curtailment of businesses to curb the spread of COVID-19, policyholders might recover under civil authority coverage. As ever, the wording should be scrutinised, as some policies only cover losses due to restrictions expressly directed at the policyholder, who may be just one among many to whom a general lockdown applies.

Having said that, it remains to be seen whether court decisions over coverage disputes may somehow change the picture, also considering the contra proferentem principle embodied in Italian Insurance Law, which may help insured-oriented interpretations of policy clauses.



## ITALY

In relation to D&O policies, lawsuits relating to COVID-19 might allege that the company did not take adequate steps to prevent its spread, or did not have contingency plans, or did not activate or execute those plans appropriately. Claims for financial losses incurred by the business, or shareholders, may be covered, as well as the costs of defending securities fraud allegations. Here, note that, first of all (and possibly before litigation has started, and before any insurance renewal), policyholders would need to examine carefully what circumstances and information should properly be notified under the terms of the relevant policy.

Furthermore, the increase of bankruptcy procedures will lead to an expected increase of legal actions against former directors and officers.

As for Employer's Liability (EL) insurance, the largest impact will be on insurers providing workers' compensation coverage to first responders (hospitals, police, fire, EMT) and workers in high-risk sectors, such as entertainment, manufacturing, transportation and retail. The Government and INAIL (the National Institute for Occupational Accident Insurance), have designated workplace COVID-19 contagion as a work "injury" (accident), thus triggering EL insurance, unless there is a specific epidemic or pandemic exclusion. The extent of EL insurers' liability will depend on the insured's compliance with the health and safety measures stipulated by Italian Civil Law, as well as by the various emergency decrees enacted by Government.

One of the main points of debate in the Italian insurance sector is in particular, whether the COVID-19 infection constitutes an "accident" rather than a "disease". The answer has a significant impact on personal accident policies, which do not normally provide coverage for death or personal injury due to "sickness" or "disease".

To date, no public position has been taken either by the Italian government, the Italian Regulator (IVASS), or the Italian Association of Insurers (ANIA).

The debate remains open and, due to the relevance of interests at stake, it may become more intense in the months to come, as disputes make it to court.

**ONE OF THE MAIN POINTS OF DEBATE IN THE ITALIAN INSURANCE SECTOR IS IN PARTICULAR, WHETHER THE COVID-19 INFECTION CONSTITUTES AN "ACCIDENT" RATHER THAN A "DISEASE". THE ANSWER HAS A SIGNIFICANT IMPACT ON PERSONAL ACCIDENT POLICIES, WHICH DO NOT NORMALLY PROVIDE COVERAGE FOR DEATH OR PERSONAL INJURY DUE TO "SICKNESS" OR "DISEASE".**

**Any other comments?**

Another increasing risk is related to the massive recourse to remote working.

Also in Italy there has been an increase in the number (and severity) of data breaches, IT vulnerabilities and ransomware attacks.

With the adoption of restrictive measures, such as social distancing and stay-at-home orders, people are required to work remotely and may be under stressful circumstances and with perhaps makeshift arrangements - hence increased cyber risk. Increased remote working offers more opportunities for cyber-attackers, and any organization that is just starting out with using remote desktop protocols may be more susceptible to a cyber-attack. We are currently working to adapt the policy wording of cyber policies to these particular needs.

Another issue to be taken into consideration is the reinsurance perspective.

The question is whether all the losses might be aggregated under "the proximate cause" COVID-19 outbreak or under "an originating cause". In the absence of specific Italian case law on the matter, the solution has to be found case by case and upon a deep contract wording analysis.





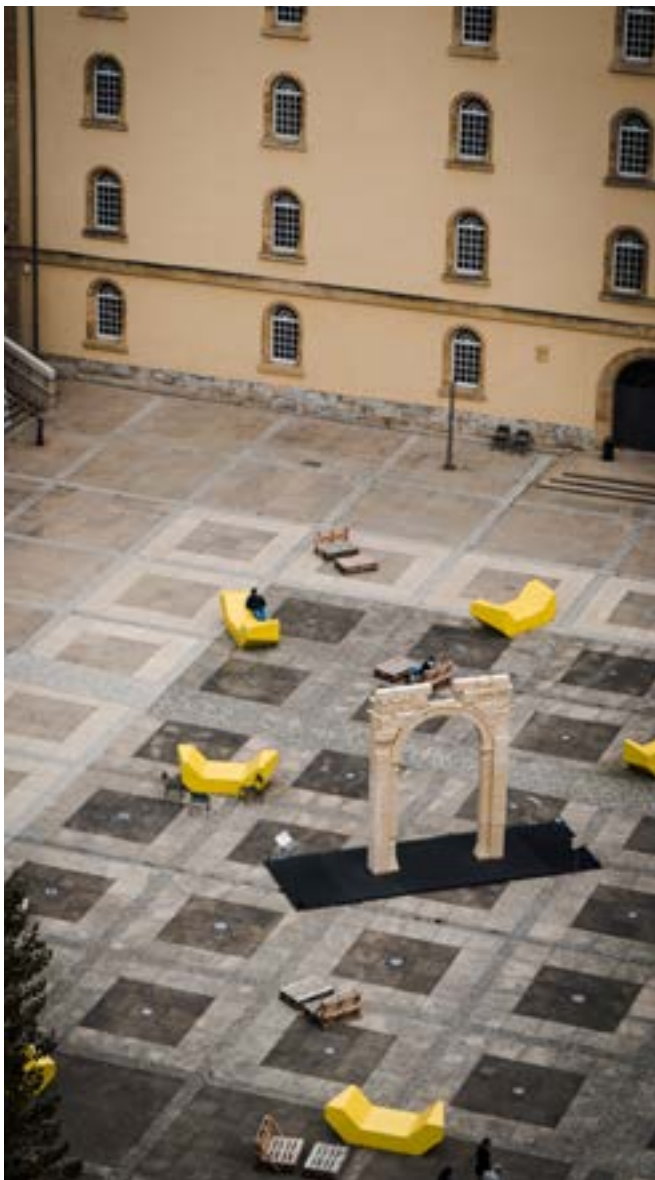
## MOLITOR AVOCATS A LA COUR

## LUXEMBOURG

The state of constitutional crisis caused by COVID-19, extended by the law of 24 March 2020, legally ceased to exist on 23 June 2020 at midnight, according to magistrate Mr Thierry Hoscheit (as per his quote in the August 2020 publication of the Journal des Tribunaux).

The end of the state of constitutional crisis, as Mr Hoscheit rightly points out, gave rise to legal uncertainty, despite interventions of the legislator, with regard to the application over time of the various legislations (the two laws that came into force at the end of the state of crisis and the eighteen laws that came into force on 25 June 2020).

Practical consequences are inevitable. For example, the suspension of procedural deadlines ceased on the date the state of constitutional crisis ended, leaving a one-day gap before the new laws came into force on 25 June 2020, and thereby creating a legal grey area. There is therefore a risk that any proceedings or appeals lodged on 24 June 2020 could be considered as having been filed too late, and therefore be inadmissible.



Since the end of the state of constitutional crisis, the divisions of the Cité Judiciaire have had to organise themselves in order to allow a resumption of judicial activity, adapted to the constraints inherent as a result of the health crisis.

A circular n°412019-2020 of 27 April 2020 discusses ways in which the courts can continue to function and hear legal proceedings. It provides for:

- the deconfinement of law firms,
- the obligation to wear a mask when entering Cité Judiciaire buildings or courts;
- as well as the obligation to wear a mask during hearings;
- service by a bailiff is again permitted in its normal mode of operation; and
- a more systematic use of the barreau.lu e-mail address of lawyers registered at the Luxembourg Bar, for communications between lawyers, but above all for communications with the court, in order to avoid travelling and physical deposits of files or documents at the courts.

Judicial practice has of course profoundly been disrupted in its daily functioning.

From now on, pending cases where written briefs have been submitted and no further pleadings are required (in writing or to be presented orally) before the Constitutional Court, the Court of Cassation and the civil and commercial courts may be taken under advisement without the physical presence of representatives, with the latter's agreement, in accordance with the law of 19 December 2020 ("the December 2020 Law") on the temporary adaptation of certain procedural arrangements in civil and commercial matters.

This means that the usual pleading hearing, at which lawyers hand-deliver their procedural files to the court, no longer exists today. More generally, for the above-mentioned written proceedings, the entire procedure, from the issuance of legal proceedings until a judgment is reached, may take place without the presence of the parties.

That same law introduces a series of rules derogating from the traditional judicial system in order to limit people physically attending court as much as possible, and giving priority to electronic communications.

By way of illustration, a provision is made for the possibility of sending, by electronic means, exhibits and briefs to the Court of Cassation.

The December 2020 Law provides that these rules also apply to the appeal procedure. It also further amends the law of 20 June 2020 on the temporary adaptation of certain procedural rules in criminal matters by introducing, in article 3, the option to validly lodge an appeal by e-mail.

Consequently, it follows from all of the above that the courts of the Cité Judiciaire of the Grand Duchy of Luxembourg have successfully resisted total closure, even if it has required adapting judicial activity.

## MOLITOR AVOCATS A LA COUR

## LUXEMBOURG

**What industry regulatory changes are you seeing?**

In addition to the measures presented in our previous edition, it is worth noting the recent circular letter 21/1 of the Commissariat aux Assurances ("CAA") relating to the recommendation of the European Systemic Risk Board ("CESR") of 15 December 2020 on the restrictions applicable to distributions during the COVID-19 pandemic. In essence, the CAA has recommended that until 30 September 2021, Luxembourg insurance and reinsurance undertakings should refrain from taking any of the following measures where such measures would have the effect of reducing the quantity or quality of their own funds, unless extreme caution is applied in deciding on such taking those measures and does not give rise to a breach of the approved risk tolerance limits: (a) making a dividend payment or irrevocably undertake to make a dividend payment; (b) repurchasing ordinary shares; (c) creating an obligation to pay variable compensation to a significant risk taker. The CAA considers that the distributions in question must not result in a breach of the company's approved risk tolerance limits as defined in their own risk and solvency assessment ("ORSA"). If the entities concerned wish to take one of these measures, they must either send a notification file at least 15 days before the date of the decision of the proposed measure to the CAA in case of compliance with the above-mentioned rules or send a derogation file at least 30 days before the date of the decision of the proposed measure to the CAA in case of non-compliance with these rules.

Through its circular letter 20/10, the CAA, in an effort to avoid hindering insurance companies and brokers as much as possible in maintaining and developing their sales networks, set up a temporary approval regime as an insurance agent or sub-broker in the context of the COVID-19 crisis. This temporary approval, which lasts 12 months, is subject to several conditions, including training, knowledge and good reputation, and in particular the candidate's undertaking to attend the first examination session to which he or she is invited. The temporary approval converts to a definitive agreement as soon as the candidate passes the examination. It should be noted that (i) temporary approval is only valid in the Grand Duchy of Luxembourg and the CAA will not provide notifications for agents and sub-brokers to operate in other Member States in accordance with the freedom to provide services regime, and (ii) the temporary approval regime will end as soon as organising examination sessions on the usual dates are re-established, and there are no more waiting lists for these sessions.

**Any early considerations on where claims will fall?**

In this context, we highlight the importance of EIOPA's call to action for insurers and intermediaries to mitigate the impact of COVID-19 on consumers (EIOPA-BoS-20-261 published on 1 April 2020). The measures contained therein (and in particular the provision by insurance undertakings of clear and timely information to consumers on contractual rights and, more specifically, the scope of their coverage, the exemptions that apply and the impact of COVID-19 on their insurance policy) will undoubtedly be beneficial for policyholders, to whom generic advice cannot be given and who therefore remain

invited to check their general conditions to ensure that they are effectively covered against risks associated with COVID-19. In Luxembourg, where important measures have been taken to limit public travel and economic activity, there are many insurance policies that may be useful to policyholders directly or indirectly affected by COVID-19, both in the context of their private life (travel cancellation insurance, extended stay insurance, supplementary health contracts, pension schemes, home insurance) and their professional life (directors' liability insurance, business interruption insurance, event cancellation insurance and civil liability contracts, etc.). To date, and to the best of our knowledge, our courts and tribunals have not yet had to deal with any litigation against an insurance company in relation to COVID-19.



**THE CAA CONSIDERS THAT THE DISTRIBUTIONS IN QUESTION MUST NOT RESULT IN A BREACH OF THE COMPANY'S APPROVED RISK TOLERANCE LIMITS AS DEFINED IN THE OWN RISK AND SOLVENCY ASSESSMENT ("ORSA").**

OCAMPO 1890

# MEXICO

The Mexican Government imposed a lockdown on 16 March 2020, with varying levels of restrictions based upon a “traffic light” indicator related to the capacity of hospitals within each zone. A ‘red light’ indicates 80% of beds with mechanical ventilators are occupied and a ‘green light’ indicates a low level of occupied beds.

Since August 2020, the strictest lockdown measures seem to have passed, and previously prohibited activities are now permitted, which has resulted in a new resurgence of the virus, peaking in December. As Mexico is a very religious country and December coincided with many religious celebrations, the governments’ advice was widely ignored during this time.

The informal commerce sector also tends to defy guidelines, however the authorities are also not enforcing measures as this activity provides the only source of income for those in this sector.

Since the peak in December, Mexico has been in a stricter lockdown once again, with the levels of infection continuing to rise. Thus, the Mexican economy is rather weak and the Government has taken new measures to allow activities with some restrictions.

It is uncertain how this lockdown will progress over the coming weeks and months, as the Government struggles to try to control the spread of the disease, whilst also trying to minimize unemployment and stimulate the economy. The latest government measures indicate that economic concerns will drive the lockdown decision-making process.

## Are courts open or closed?

Federal Courts are closed. Local courts are open or closed upon the “traffic light” indicator, however most jurisdictions are closed.

Unions have been an important factor in courts as they claim for their members in relation to working conditions and health & safety, which is almost impossible due to the written court system in Mexico. This results in a large flow of people through the Courts.

It is also important to mention that in just under a year the Mexican Judicial System has developed its systems in a record time and in several states it is now possible to litigate online using freshly implemented software. This software implementation has also made virtual hearings possible.

## What government or insurance regulation changes have been introduced?

Changes have been made to the Federal Labour Law to regulate home offices. The boss is obliged to pay some employee bills related to electricity, internet and telephone. Employers must also provide their employees with an ergonomic chair, desk and the devices needed for work.

In the insurance market, insurers have also faced regulatory intervention. At the start of the pandemic some health insurance carriers were analysing COVID-19 claims in order to deny coverage. The regulator rapidly responded to clarify why they were denying coverage and this resulted in all health insurance carriers paying claims.

The regulator has also made their process accessible online, such as the visits they perform.

There are not yet any amendments to the law.

## Number and value of claims and are claims growing / shrinking.

### Plus info on success of claims / versus received

Health and life Insurance is growing and has increased significantly year-on-year.

## What trends are emerging which impact on insurers?

Property insurance is experiencing a high rate of claims as insureds are trying to claim against Business Interruption policies. Despite insurers stating that BI is not covered, there are some insurance contracts that might cover these claims due to a lack of clarity in excluding the risks or stating that the risk must be linked to a physical damage.

The Mexican market is ruled by reinsurers who have been strict in their decision that COVID-19 is not covered by BI or any other insurance. Therefore Mexican insurers are following what reinsurers state by not putting their coverage in risk. It is too soon to say how cases that have already been filed will develop.

Surety Insurance is likely to have a big impact too. Due to the courts being in lockdown it hasn't been possible yet to determine how many cases will be filed for default coverage. But the discussion will be on how the pandemic impacted in each party in Mexico and if so can it be considered as force majeure.

## Classes of business seeing claims

The tourism Industry has been heavily impacted by pandemic and these companies are exploring their possibilities to claim for BI.

## Developments in the market since COVID-19 (eg new products, increase in health insurance uptake, increased digitalisation, nationalisation of insurance categories)

Sales of health insurance in Mexico have increased since the pandemic began as buyers seek additional coverage due to COVID-19.

Digitalization has also increased as people follow social distancing. Hopefully, this will result in a law amendment to allow the flow of information, documents and signatures in a digital way.

**IN THE INSURANCE MARKET, INSURERS HAVE ALSO FACED REGULATORY INTERVENTION. AT THE START OF THE PANDEMIC SOME HEALTH INSURANCE CARRIERS WERE ANALYSING COVID-19 CLAIMS IN ORDER TO DENY COVERAGE. THE REGULATOR RAPIDLY RESPONDED TO CLARIFY WHY THEY WERE DENYING COVERAGE AND THIS RESULTED IN ALL HEALTH INSURANCE CARRIERS PAYING CLAIMS.**



# NETHERLANDS

In a decision of 19 June 2020 (ECLI:NL:HR:2020:1088), which has been confirmed in a later judgment, the Supreme Court held that the way in which bailiffs have been serving writs since the start of the coronavirus pandemic is legally valid.



**THE DUTCH GOVERNMENT HAS TAKEN A SUBSTANTIAL NUMBER OF MEASURES THAT, IN GENERAL, PERTAIN TO LIMITING THE IMPACT OF THE CORONAVIRUS PANDEMIC ON DUTCH SOCIETY.**

For writs that were issued as of 16 March 2020, there is a “de facto impossibility” within the meaning of Article 47(1) DCCP if the bailiff observes in a specific case that the service of the writ is not responsible under Article 45(1) DCCP, given the guideline of the National Institute for Public Health and the Environment (RIVM) to social distance due to a risk of infection with COVID-19, as is also laid down in the Emergency multi-purpose Act in response to COVID-19. In that case, it is sufficient for the bailiff to state in the writ that service in accordance with Article 46(1) DCCP is impossible due to the risk of infection with COVID-19 or to include words to that effect in the writ. This means that a bailiff can leave a copy of the writ in a sealed envelope if it is not responsible to hand over the writ in person due to the risk of infection with COVID-19.

In this way, it is safeguarded that writs and other important legal documents can be served on the parties safely and in time. The Netherlands has therefore not opted for a legal extension of limitation periods, as is the case in other jurisdictions.

## The course of proceedings

The courts, courts of appeal and special tribunals have continued to work throughout the pandemic, observing social distancing and using digital technology as much as possible. One of the most striking changes is that since the start of the coronavirus pandemic, communication can take place with the courts via secured e-mail and procedural documents can be submitted via e-mail, provided

that the original will be forwarded by post. Their working method was continuously modified during the pandemic.

A temporary general arrangement has been established for the way in which cases are handled since the start of the coronavirus pandemic, which is regularly modified based on changing circumstances. The current arrangement is valid until 1 February 2021, or as much longer as the Judiciary is in line with the extension of the current COVID-19 measures taken by the government. Specific rules apply to a number of fields of law.

In phase 1 (the period from 17 March up to and including 6 April 2020) only the highly urgent cases – the list 1-cases – were heard online via Skype or videoconference or by telephone. In phase 2 (the period from 7 April up to and including 10 May 2020), in addition to the highly urgent cases, the urgent cases – the list 2-cases – were also heard online or by telephone. In addition, during phase 1 and 2 the courts handled a large number of cases in writing.

As of 11 May 2020, the Judiciary is in phase 3 and hearings are conducted at which the parties to the proceedings and other participants in the proceedings are physically present. The assumption in phase 3 is that the courts will hear as many cases as possible, with due observance of the guidelines of the RIVM, the temporary arrangements per jurisdiction and the aforementioned prioritisation, physically or online via Skype, unless the case can be settled in writing. If it is impossible to hear the case physically or online, the hearing can take place by telephone.



The courts themselves determine the maximum number of visitors per court building, depending on the layout of the building. In order to gain access to a court building, one has to present an invitation from the court registry that was received in advance. Opening hours for courthouses have been extended, so that hearings can also be conducted early in the morning or at the start of the evening.

As of 1 December 2020, wearing a non-medical face mask in public indoor spaces is obligatory. After taking a seat in the courtroom, the facemask can be removed. As of 23 January 2021, there will be a curfew in the Netherlands from 9 p.m. There is a curfew exemption for people involved in legal proceedings who must travel in the evening in connection with their hearing.

More information can be found at [https://www.rechtspraak.nl/coronavirus-\(COVID-19\)](https://www.rechtspraak.nl/coronavirus-(COVID-19)).

#### **What industry regulatory changes are you seeing?**

The Dutch government has taken a substantial number of measures that, in general, pertain to limiting the impact of the coronavirus pandemic on Dutch society. The goal is to protect jobs and incomes in addition to protecting health and to minimise the consequences for self-employed workers without employees, SMEs and large enterprises. This package offers millions of euros in support for as long as necessary. The measures ensure that companies can continue to pay their staff, offer bridging to self-employed persons and allow the companies to retain money through relaxed tax schemes, compensation and additional credit opportunities.

Specifically with regard to the insurance business we point out that it is possible for insurers and intermediaries to request deferment of payment of the insurance premium tax.

In addition, following the ESM, the AFM (the Dutch supervisory authority), has adopted consumer protection as a special point of attention during this time of crisis. In June 2020, inter alia, the AFM called for extra attention for careful customer processing in product development and evaluation. Offerors of financial products must check whether their products and information provision still comply with the needs of their target group during the coronavirus pandemic.

#### **Any early considerations on where claims will fall?**

It is impossible to predict exactly where claims will fall. In the Netherlands there have thus far only been a few proceedings under insurance law in which COVID-19 played a role. Two proceedings have been published about the cover under event insurances. The fact that COVID-19 was the reason why this insurance was invoked did not, however, lead to a special or deviating outcome.

It is possible that the number of D&O claims and the number of claims under credit insurances will increase in the future. An important driver for this type of claims is the number of bankruptcies. Even though the number of bankruptcies in the Netherlands has not been this low in years, a catching-up process is expected as soon as the peak of the crisis is over and the government's support measures come to an end.

Expectations are that the number of bankruptcies will then increase.

The number of employer's liability claims is also expected to increase, especially if the pandemic lasts longer. Employees could hold their employers liable for personal injury resulting from infections at work or because employees develop medical complaints like burn-out, depression or RSI due to working at home for a long period of time. In the Netherlands, employer's liability is set out in Article 7:658 DCC. An employer is liable towards its employee for harm which the employee has demonstrably suffered from activities performed in the course of his work. The employer does not have to compensate the harm of the employee only if it demonstrates that it has complied with its duty of care or if there is no causal link between the activities and the harm of the employee. Even though it will be difficult for an employee to demonstrate that they contracted COVID-19 in the course of performing their activities, liability for harm that was caused by working from home is more easily conceivable.

Claims under business interruption insurance are less obvious in the Netherlands. Most of the Dutch business interruption insurances only provide cover for business interruption loss as a result of material damage to an insured property caused by a specified event (a 'named peril'). Business loss resulting from COVID-19 will therefore in principle not be covered under the standard Dutch Business Insurances. This could however be different in the case of a customized policy in which the wording of the cover description might be broader or which is taken out in foreign markets.

After the renewal as of 1 January 2021, a number of insurers did include a COVID-19 exclusion in the All Risk policies. However, this is no indication that the risk related to COVID-19 was covered under these insurances before this time.

In other fields an increase of the number of claims is expected as well, such as claims under cyber insurances, health insurances and travel and cancellation insurances.

#### **Any other comments?**

A number of insurers temporarily and voluntarily expanded the cover of specific insurances, such as the cover for delivery services and the cover for medical and paramedical professions.

**IT IS IMPOSSIBLE TO PREDICT EXACTLY WHERE CLAIMS WILL FALL. IN THE NETHERLANDS THERE HAVE THUS FAR ONLY BEEN A FEW PROCEEDINGS UNDER INSURANCE LAW IN WHICH COVID-19 PLAYED A ROLE. TWO PROCEEDINGS HAVE BEEN PUBLISHED ABOUT THE COVER UNDER EVENT INSURANCES.**

## NORWAY

The immediate effect of COVID-19 in March 2020 was that almost all court proceedings were postponed. The only exception was cases of imprisonment, forced admissions, and other matters of particular urgency.



The courts were, however, quick to adapt to the lockdown situation. As soon as May 2020 a temporary law with modifications to the litigation regulations was put in place to help reduce the effect of COVID-19.

Among the remedies was a wide possibility for the court to decide that court meetings would be held by video, telephone and/or just in writing. In addition it was confirmed that judges could sign and confirm verdicts and proclaim decisions of the courts electronically.

The Norwegian Court Administration started several years ago to digitalize the courts and as of 2018 every court in Norway had implemented the use of Aktørportalen, an internet portal for all written contact between lawyers and the courts. This portal has undoubtedly made the COVID-19 restrictions less challenging for the courts.

Still, a lot of cases were postponed during the spring of 2020, and a major backlog developed over the summer. The courts were given additional grants by the government for employment of additional judges and investment in technical equipment as a remedy.

As of today, the courts are more or less back to normal in regards to case processing time. Most cases are heard as scheduled, with both judges and lawyers showing a pragmatic and flexible attitude to adjust to litigation by video. Often the cases will be a combination of physical attendance by lawyers and parties, with the majority of witnesses giving statements by video.

All in all, the litigation process seems to work satisfactorily under the given circumstances. There are, however, disadvantages with litigation on video. Many raise questions about whether or not witnesses find it easier to lie when their statements are given by video.

### What industry regulatory changes are you seeing?

There have not been many regulatory changes up until now, however there has been an effect on the industry due to changes made to the "sickness list" for worker's compensation insurance.

COVID-19 was taken into the list early in April 2020, and then retroactively in effect from 1 March. This means a large risk exposure for the insurance carrier, without them having the ability to take that into consideration for rates for the ongoing insurance period.

The consequences and the long-term effects of being infected

are yet to be discovered and the potential risk could be very high. This has led to some insurers having withdrawn from the worker's compensation insurance market. Protector Forsikring stated that they, as a direct consequence of the changes to the sickness list, would stop selling insurance to in the health and care sector.

On the other hand, other insurers have stated that the provision of insurance policies for those in high risk employment is a matter of social duty.

### Any early considerations on where claims will fall?

Some sectors of society have been severely affected by the coronavirus, such as the travel and tourism sector. There have been a high number of insurance claims related to cancellation of trips when many countries experienced a similar, or more severe, incline of COVID-19 infections in the late half of 2020. This is likely to continue when we approach summer, as many Norwegians tend to travel abroad from late spring until fall.

In general, insurance policies do not cover loss due to COVID-19 and related governmental restrictions. This limits the pandemic's effect on insurance claims.

One area that has seen an increase in claims is the Norwegian System of Patient Injury Compensation, for those people who have been infected with COVID-19 while being in hospital or in municipal health and care institutions.

The Government has currently suggested a prolonging of the period a business can layoff employees from 52 weeks, until 1 July 2021. If the vaccination project is delayed or less effective than expected, this might be further prolonged hence, putting a substantial strain on government costs.

Until now, there have been fewer Norwegian companies filing for bankruptcy than expected at the early stages of the pandemic. This is partly due to the government's postponed collection of company taxes and direct financial support for several industries severely affected by the pandemic, i.e. companies operating in travel, tourism, dining and culture. A coming wave of bankruptcies is however not unlikely due to the potential duration of restrictions, and this will most probably affect insurance claims.

# SPAIN

The state of alarm for the COVID-19 health crisis was decreed on 14 March 2020 and remained in effect until 21 June of the same year.

For a period from March to June 2020 judicial activity was paralysed throughout the Spanish territory, agreeing to maintain only the celebration of minimum services similar to strike days, such as actions with cases with convicts, matters of gender violence or prison supervision actions in order to avoid irreparable harm to citizens.

From June 2020, the court system has worked normally, although some of the trials (40%) are being held via videoconference. Prior to 2020, no trials or statements were held via videoconference even though this practice was provided for in procedural laws since 2003. We could say that COVID-19 has accelerated the modernization of the judicial system.

Nevertheless, over 15% - 20% of the personnel at the service of the Justice Administration are on leave due to COVID-19 and, consequently, judicial activity is slowing down.

## What industry regulatory changes are you seeing?

Several months have passed since the declaration of the state of alarm, we are now able to see that the insurance industry has implemented technological measures in order to maintain its daily activity. Among these measures both insurers, insurance brokers and agents have implemented teleworking (including customer service or call centres), video meetings and video appraisals to assess the damages to be compensated for claims occurred in minor risks (insurance cars, home, devices, etc.).

On the other hand, regarding the core business of the insurance industry, we are seeing an increase in the online contracting of policies and through internet insurance comparators. In addition, there are insurance lines that are experiencing high growth, such as cyber insurance and personal lines (life, health, and death). This is leading to an aggressive practice in terms of premium offers, with high competition among insurers in these sectors.

On the contrary, certain lines of insurance are experiencing an increase in their premiums with coverage equal to or even lower than those previously offered. Some examples can be found in D&O, professional civil liability or all-risk material damage insurance (in addition to BI coverage).

One of the insurance lines that has been most affected by COVID-19 has been credit. Moreover, the UNESPA Association (Spanish Union of Insurance and Reinsurance Entities) and the large companies in this sector have asked the Government on several occasions to grant public support to maintain credit policies to companies. Despite this, and contrary to what many European governments have agreed to in relation to this type of policy in their respective countries (Germany has provided €30bn in non-refundable funds, France the amount of

€10bn, etc.), the Government proposes only assistance in the form of loan in the amount of €300m to insurers, which they would have to return in a couple of years.

In this sense, not only has the Government not granted any help to the sector, but it has also decided to raise taxes on insurance premiums from 6% to 8% for 2021.

## Any early considerations on where claims will fall?

The insurance lines that will be most affected are, above all, business interruption, D&O, healthcare, travel and event cancellation, property liability insurance for public administrations and credit insurance.

Having said the above, we must start from the idea that Spanish law gives a period of two years to file a claim against an insurance company, so this is the reason why we are not seeing yet many claims due to COVID-19.

Nevertheless, we are expecting during this first semester of 2021, a barrage of claims against companies for BI coverage insurance once insureds have quantified their loss of profits (normally these types of insurance have a coverage of twelve months for BI).

Moreover, we are experiencing a notable increase in bankruptcy due to the coronavirus crisis, so this will lead to an increase in claims against directors and officers due to their management in response to the pandemic.

With regard to health and life policies, we are not seeing too much movement as insurance companies are compensating in general without much opposition. Some insurers have tried to introduce modifications in insurance contracts due to COVID-19 and in the middle of the insurance period, but they have retreated promptly. One example of this was found in sick leave insurance. Due to the pandemic, many workers have been taken to ERTE's (Temporary Employment Regulation File) and, therefore, the insurers claimed lack of insurable interest (because they were not really working). Various associations have condemned this type of practice and insurance companies have had to rectify this immediately.

Finally, the government, having decreed the state of alarm, must assume administrative liability. The massive forced closure of companies has caused multimillion-euro losses to the hospitality, travel, etc... sectors, with which, logically, these companies will be directed against all acts emitted by the authority (both at local level and State level). We are seeing now this type of claims being filed, but yet no ruling has been issued.

## Any other comments?

The COVID-19 crisis has accelerated the digitalization process in the insurance sector by approximately 4 or 5 years. It has not been possible to stop the arrival of operators with artificial intelligence to help automatically resolve simple customer inquiries. Thus, it has been possible to free the human resources group from contact centers and mediators to attract new clients. In the future, digitalization is being foreseen in the subscription, supplements, and premium collections, that is, the implementation of smart contracts/ blockchain: without papers it increases reliability, transparency and security.

**WE WILL NOT SEE AN INCREASE IN THE NUMBER OF CLAIMS FOR COVID-19 UNTIL SEPTEMBER.**

## GBF ATTORNEYS-AT-LAW LTD

## SWITZERLAND

On 25 September 2020, the Swiss parliament adopted the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic, the so-called "COVID-19 Act", to provide the legal basis enabling the Swiss Federal Council, which is the highest executive authority of Switzerland, to maintain the measures adopted by emergency decree earlier in the year, which are still necessary to manage the COVID-19 pandemic.

Pursuant to art. 7 of the COVID-19 Act, in order to guarantee the operation of the justice system and the procedural guarantees under the Federal Constitution, the Swiss Federal Council may issue provisions that derogate from the federal procedural law on civil and administrative matters in certain areas, such as suspending, extending or restoring statutory or official limitation periods and deadlines; using technical solutions or aids such as video and telephone conferencing in judicial procedures that involve the participation of parties, witnesses or third parties; the form and service of submissions, communications and decisions and the use of online auction platforms in debt enforcement and bankruptcy proceedings.

Based on that provision, the Swiss Federal Council extended the validity of its COVID-19 ordinance on justice and procedural law until 31 December 2021, which details the circumstances in which videoconferencing can be used in civil proceedings. The ordinance also requires the courts to implement the recommendations of the Federal Office of Public Health on hygiene and social distancing, such as the obligation for everyone to wear face masks during hearings. Contrary to the measures they had adopted in the Spring of 2020, the Swiss courts, however, decided not to reduce the judicial activity.

#### What industry regulatory changes are you seeing?

In March 2020, the Swiss Financial Market Supervisory Authority (FINMA) initiated a series of interim surveys regarding technical reserves and coverage ratios of tied assets. Insurers with coverage ratios below a comfortable threshold were put under so-called intensified supervision and were required to submit interim reports on their financial condition on a frequent basis.

In addition, FINMA conducted surveys on certain insurance programmes prone to risks materializing due to the COVID-19 pandemic (e.g. business interruption, pandemic exclusions, health insurance etc.) in order to assess the impact of COVID-19 as a major underwriting event. Where necessary, FINMA ordered an increase of the risk-bearing capital and tied assets.

#### Any early considerations on where claims will fall?

As mentioned in our last report, the losses and expenses related to the COVID-19 pandemic and the ensuing government responses have the potential to impact multiple different lines, whether that be for life or non-life cover. While we see an increase of claims being filed on behalf of business owners due to losses in connection with business interruption, it is as yet too early to see a trend on how such claims will be decided.

There has been an increase in claims notifications to reinsurers under excess of loss, surplus and umbrella treaties. Discussions revolve around the questions of coverage under primary insurance policies and aggregation. It is becoming apparent that certain reinsurance coverage issues will have to be decided by courts or arbitration tribunals.

It should also be mentioned that COVID-19 has apparently been used as an opportunity to launch massive cyberattacks by many cybercriminals and other actors. As a result, huge losses were reported under cyber insurance policies, and FINMA has introduced a reporting obligation for all financial market participants supervised by FINMA regarding cyberattacks.

#### Any other comments?

Since many Swiss insurers usually exclude the risks associated with pandemics in their general insurance conditions or have taken the position that only business interruption in connection with a localised outbreak of a pathogen - such as salmonella in a restaurant - can be insured, but not a worldwide pandemic, the Swiss Federal Council has initiated a project to introduce pandemic insurance supported by the state in conjunction with the insurance industry.

The Federal Department of Finance is currently discussing the feasibility of such a functioning, practicable and cost-efficient pandemic insurance; the first results are expected in the first quarter of 2021. In this context, it should be mentioned that Switzerland already has a comparable solution with its unique and highly regulated natural hazard insurance, which aims at a fair risk distribution on the basis of nationwide solidarity among insureds and insurers.





## DURUKAN

## TURKEY

Since February 2020, different laws and regulations have been published by the Turkish parliament to control the effects of the COVID-19 pandemic.



One of the most notable restrictions, which applied at the early stages of the pandemic was the mandatory lockdowns on weekends and holidays. In addition to this, social gatherings, domestic and international travel have been prohibited, as well as certain businesses such as hairdressers, restaurants, cafes and entertainment places were officially shut down.

With the decline in the number of cases, these restrictions have been eased in the summer of 2020 but in December, the restrictive governmental measures came back into force, save for certain exemptions (i.e. lawyers and doctors are permitted to travel, cafes and restaurants are only allowed for take-away and etc).

Additionally, the Ministry of Health introduced a location tracing application, namely HES code, which enables the government to monitor individuals, who have been tested positive or contacted. Since November 2020, HES code is mandatory in nearly all public places such as courthouses, shopping malls, high schools, hotels and etc.

According to government records, there were up to 33,200 cases per day in late 2020, while as of today, the number of cases has regressed as low as 7,200 per day.

All of these of course affected the judicial system in Turkey.

#### How is COVID-19 affecting the court system?

The mandatory suspension on all legal proceedings was lifted as of 15 June 2020 and the court system is operating as much as possible. As long as there are no COVID-19 cases, all the chambers at the courthouse are operating daily business. However, in case of an infection, the chamber is urgently disinfected and personnel are isolated with administrative leave of absence. In the meantime, the Justice Commission appoints temporary staff during the quarantine

period, which allows the legal proceedings and time periods to operate routinely.

The other most notable developments are the introduction of an e-hearing system and the digital transformation of the Insurance Arbitration Commission.

Below briefly details the changes in the Turkish court system:

#### Introduction of E-Hearing

During the pandemic, the courts of Ankara initiated an “electronic hearing” in Turkey for the first time. With this system, lawyers can request an e-hearing on Turkey’s National Judiciary Informatics System (UYAP) and will be able to access the hearing through video conference if the judge approves the appeal.

On 26 January 2021, the Minister of Justice announced that the e-hearings have begun to be applied in almost all courts in Istanbul Courthouse, which is the biggest courthouse in Turkey.

#### Insurance Arbitration Commission applications

Prior to the pandemic, the Insurance Arbitration Commission was working semi-digitally and semi-physically, where the applications were only being made in person by hand and the same was applicable for appeals procedures.

The pandemic was a key reason the digital transformation programmes have been shifted up, and since 14 January 2021 all the applications, reply motions, communications with arbitrators and objection petitions are now digital.

This is a major efficiency creating solution for insurance dispute resolution industry and millions of hours will be saved with this innovative development going forward.

## DURUKAN

## TURKEY

In addition, apart from the changes in court system, we have seen a large increase in the rate of settlements in disputes, especially in insurance litigation cases. We believe that COVID-19's effect on the economy has indirectly affected lawsuits due to the long trial processes in Turkey and the fact that claimants are late to receive their receivables. Within that scope, we can say that settlements are emerging trend during the pandemic. The increase in settlement rates has also had a positive impact on insurers. Settlements are saving insurers from high indemnity payments that they would pay in the future and allows the insured to get their receivables more quickly.

#### Change of the working hours in courthouse

On 1 December 2020 Turkish courthouses working hours are shortened with Presidential Directorate of Administrative Affairs' circular to 10:00 AM – 04:00 PM from 2 December 2020.

#### What industry regulatory changes are you seeing?

Even though there are no direct laws or regulations concerning the mitigation of COVID-19's effects on insurance contracts, most of the legislation and administrative circulars introduced in that sense affect the insurance industry.

Detailed below are the effects of COVID-19 in relation to Turkish legislation on the Insurance industry in Turkey:

#### Employers' liability insurance

On 7 May 2020, Turkish Social Security Institution published a circular ruling that COVID-19 related physical damages shall not be deemed as a cause for occupational accidents. This means that employers and thus the employer liability insurers are very likely not to be deemed as the faulting party because of COVID-19 related losses, save for very exceptional cases. However, there is no Court of Appeals decision in this regard yet.

#### Health insurance

According to the Private Health Insurance Regulation, any loss arising from transmissible diseases is within the insurance coverage, unless it is specifically excluded under the policy.

During the COVID-19 pandemic, most of the major insurance companies included COVID-19 related physical treatments in their policy coverages. Besides, some of the insurance companies declared that COVID-19 related treatments shall be paid ex-gratia to maintain customer satisfaction and retain customers.

In addition, during the COVID-19 outbreak, we are seeing an increase in group health insurance policies provided by employers and a decrease in personal health insurance due to the increase in hospital costs and therefore associated increased premium rates.

#### Motor liability and SCDW insurance

Within the scope of the circulars regarding lockdowns and other COVID-19 measures, traffic accidents decreased significantly compared to the same period last year.

According to the balance sheet announced by the Turkish Traffic Education and Research Department of the General Directorate of Security traffic accidents have decreased by 52% in 2020.

This situation positively impacted insurance companies as due to the decrease in traffic accidents, there was also a decrease in indemnity payments.

#### COVID-19's indirect impact in terms of underinsurance

In Turkey, the average exchange rate of the USD was TRY 5,90 on 1 January 2020. As of 22 January 2021, the average USD rate is TRY 7,41. In one year, the USD rate increased approximately 32%.

The FX fluctuation, an indirect effect of COVID-19 in addition to many other aspects, will have an impact on all property insurances, which are denominated with Turkish Lira but insuring products, which have variable market value subject to FX rates.

#### New policy products

In recent months, new insurance policies have started to be produced by insurance companies under different names such as COVID-19 travel insurance and COVID-19 health insurance. These insurance policies almost provide the same coverage and they have been created directly to provide coverages related to COVID-19 such as inpatient treatment costs, the costs regarding stay extensions on foreign trips due to border closures or flight postponements and costs for return of the funeral to the country.

In addition to above, we are seeing that some insurers have started to provide PCR and/or antibody tests as a promotion to policyholders in addition to some insurance policies such as property, traffic and fire insurance.

#### Any early considerations on where claims will fall?

##### Cyber insurance claims

Cyber-attacks have increased significantly during the COVID-19 pandemic in Turkey. In the summer of 2020, some giant Turkish companies with different lines of business were paralyzed by cyber-attacks. In addition to that, we are seeing an increase in e-theft and fraud caused by cyber-attacks in Turkish companies.

Before COVID-19, cyber insurance was not a well-known product in Turkey but after the increase on cyber-attacks, the demand for cyber insurance began to be expressed more. Therefore, the need for cyber insurance has become much clearer.

**ACCORDING TO THE PRIVATE HEALTH INSURANCE REGULATION, ANY LOSS ARISING FROM TRANSMISSIBLE DISEASES ARE WITHIN THE INSURANCE COVERAGE, UNLESS IT IS SPECIFICALLY EXCLUDED UNDER THE POLICY.**

Within that scope, we can say that damages caused by cyber-attacks are rising day by day and we expect that claims regarding cyber insurance indemnity will rise accordingly.

#### **Business interruption claims**

According to the circulars regarding lockdowns and shut down of public recreation and entertainment places, we strongly believe that the most affected coverage will be the business interruption insurance coverage. Due to lockdowns, the earnings of many businesses in Turkey have decreased by a considerable amount. Also, along with the shutdowns for public recreation and entertainment places, many of the businesses became unable to work.

Even though business interruption policies generally do not cover non-physical interruptions or interruptions occurring as a result of governmental regulations, we expect that the claims and disputes regarding insurance coverages will increase.

#### **Developments in the market**

In July 2020, government banks began issuing low-interest mortgage loans to boost real estate sales. This temporary governmental intervention to the economy ended in late August, when the interest rates started to gradually increase.

Since September 2020, average commercial TRY interest rate is approximately 20% per annum, which does not make life easy for companies, who are looking for investments.

High interest rates and FX fluctuation along with decline in the purchasing power makes everybody think twice before going into long-term investments.

For instance, our economy is dominated by the construction industry and its sub-sectors and the uncertainty caused by these economic downfalls has an indirect impact on Employers' Liability insurance where the employment rate is facing a regression and therefore the insurance sales and the number of claims is also affected.

Also other lines of insurance products are seeing a decline in sales. According to Insurance Association of Turkey's statistics there was approximately 6,50% decrease on health insurance, 59% decrease on travel insurance and 19% decrease on accident insurance policies between September 2019 and 2020.

#### **Conclusion**

With the laws and regulations that were published during the COVID-19 pandemic in Turkey, it is seen that COVID-19 has a direct effect on the court system and indirect effect on the insurance industry.

COVID-19's effect on the courts is ongoing with e-hearing application and we can say that we have taken another step in the digitalization of our legal system.

The indirect effect of COVID-19 in the insurance industry has come up with changes in the insurance policies, newly produced insurance policies and increase on certain insurance indemnity claims. Within that scope, we can say that insurers have adapted to the COVID-19 changes and continue to do so.





# UNITED KINGDOM

The higher civil courts in England & Wales have been better able to adapt to conducting hearings remotely or in hybrid form (ie partly remote, partly in person) hearings. For example, hearings in the UK Supreme Court have taken place remotely since before Easter 2020.

County Courts, however, have fewer resources available and it has proved more difficult to progress cases here, leading to backlogs and delay. Fewer cases are entering the County Courts, with issued claims down by 47% in July to September 2020 when compared to the same period in 2019.

Certain specific procedural changes introduced in response to the pandemic remain in place but the limitation amnesty in personal injury claims agreed at the start of the crisis has lapsed.

There is increasing evidence that senior judges are looking to build from their experience of remote justice and work where possible to develop a 'digital first' approach for the future. The newly-appointed Head of Civil Justice (Sir Geoffrey Vos) is a strong advocate of this. We expect matters to move forward in 2021.

## What industry regulatory changes are you seeing?

The Financial Conduct Authority used its regulatory powers to pursue, on behalf of policyholders, a high-profile test case relating to coverage, under business interruption (BI) insurance policies, for losses due to COVID-19 and the official restrictions imposed to contain it. Proceedings were instituted in the Commercial Court in May, the case was heard (remotely) in July and judgment was delivered in September. The outcome was that cover should, in principle, be available under most of the representative policy wordings scrutinised by the court. The case then 'leap frogged' to the Supreme Court, where it was heard in November. The Supreme Court also decided that BI losses were covered and on a wider basis than the decision below. In addition, the decision overturned a previously important case that had restricted the quantification of BI losses (that being the 2010 decision in *Orient Express Hotels v Generali*, which related to BI losses caused by hurricanes Katrina and Rita).

The regulator has now issued detailed guidance to insurer CEOs setting out its expectations about how policyholders' claims stayed pending the decision should now be resolved.

The test case potentially affects around 370,000 businesses and total indemnity has been estimated at over £1 billion. It has been the single stand-out piece of civil litigation in England & Wales in 2020/21.

## Any early considerations on where claims will fall?

Aside from business interruption, claims are emerging slowly. Few liability claims have been notified but it is expected this will change. There has been a good deal of debate about the potential for liability for occurrences of the disease in employers' and public liability settings, with care homes housing the elderly being a particular area of real concern. There has also been commentary on EL and PL risks associated with employers' and service providers' decisions to impose vaccination as a mandatory requirement. There are also data security risks in storing and processing sensitive personal data relating to the testing or vaccination of employees and/or customers.

The Coronavirus Act 2020 introduced a statutory state indemnity for COVID-19 contracted during the provision of clinical services by the National Health Service (NHS). This does not apply to care homes, but in early 2021 the government sought to put in place two further state indemnity arrangements, in respect of clinical risks in the provision of vaccines by pharmacies and in respect of liability risks around COVID-19 positive patients being discharged from NHS facilities and back into care. It is not yet clear how the latter might operate.

## Any other comments?

Although there has been criticism of the insurance industry's stance in resisting the test case, it may be able to restore some of the reputational harm it has suffered in that respect if it can respond promptly and transparently to the challenge of resolving outstanding claims.

On the consumer insurance side, a handful of insurers had offered rebates or reductions on motor policies because people were driving far less due to the lockdown restrictions. It is unclear if this will become more widespread across the market.

The claims sector could face real strains during winter 2020/21 if COVID-19 related difficulties are compounded by serious adverse weather incidents and by supply chain issues related to the ending of the UK/EU Brexit transition period on 31 December 2020.





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