

A REMINDER FOR CO-OPERATION

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Allocation of the burden of proof between the parties to a coverage dispute, in particular insurer and policyholder, is a matter of endless debate for the courts and scholars. Those under the influence of the former insurance provisions advocate that insurer is under the burden to prove that the insurance claim is not included in the insurance coverage. On the other hand, the contemporary view advocates a more democratic solution, first requiring the claimant to prove that the insuring clause does respond to the claim. This view encumbers the insurer with the duty to prove the reasons for denying the claim, provided that the claimant successfully fulfils its burden of proof.

In a recent dispute resolved by the Turkish Court of Cassation (11th Civil Division, Case no: 2021/1797, Decision no. 2022/424, 19.01.2022), the insurer rejected the insurance claim as the insured device was not suffering from external damage but from the exhaustion of its commercial life. This time, the Turkish court was lucky not to be required to discuss conclusively whether the insured should prove the external damage as named under the insuring clause. Turkish court instead discussed the insured's duties to enable the insurer to prove its reasons for denying the claim.

As the court has noted in its reasoning, the insured embraced the view that the burden of proof to resolve the coverage dispute lies entirely with the insurer. This was why the insured contented itself with advancing the claims under the policy without presenting any scenario, let alone evidence, as to the root cause of the mechanical breakdown. What discharged the court from deciding on the burden of proof was that the insured prejudiced the insurer's position by sending the device to the manufacturer abroad for diagnosis even before notifying the insurer about the occurrence. Moreover, the insurer's position was prejudiced even further when the insured failed to disclose the manufacturer's diagnosis reports.

Given the insured's non-cooperative attitude, the court preferred to not take a side in this debate and evaluated whether the insurer could fulfil its burden of proof if any. To that end, the court relied on particular provisions of the Commercial Code and stressed that the insured was obliged to maintain the damaged device and keep all the relevant documents available to be inspected by the insurer (Art. 1447).

According to the court, violation of this duty does not have a bearing on the debate of the burden of proof. But it enables the insurer to reduce the payment amount by

considering the insured's negligence and its causal nexus with the insurance payment. After considering that the insured was in gross negligence when preventing the insurer's access to the device, the court decided to relieve the insurer from all its liabilities under the insurance policy and dismissed the claim. Accordingly, the court considered that any contrary deliberation would mean appreciation of the insured's abuse of its rights.

This judgment brings a new impulse to discussions about the burden of proof. It aptly draws attention to the insured's duty to deploy a cooperative attitude while the insurer investigates the occurrence and its root cause. Otherwise, even the most insured-friendly interpretations about allocating the burden of proof may be helpless to ensure the insured's entitlement to its insurance claim.

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