

Effects of COVID-19 Pandemic on Contracts

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As the relative measures taken to prevent COVID-19 outbreak caused disruptions in the production, logistics, and international supply chains, it raised the question of whether the outbreak would be considered a force majeure in terms of contracts between merchants.

The Concepts of Impossibility of Performance and Force Majeure

The concept of the force majeure is not defined in Turkish Law, and whether or not any situation is considered a force majeure is evaluated within the framework of the case-law of the Turkish Court of Appeals and doctrine. According to the Turkish Court of Appeals and the doctrine, force majeure can be considered as inevitable, irresistible, external, extraordinary and unforeseen events that occur outside the control of the parties and that do not occur from their negligence and that make the performance of the contract impossible. Natural disasters, legal strikes, epidemics, partial or general mobilization announcements are all examples of force majeure.

Also, in practice, the parties define force majeure within the scope of the contract and count the occasions which they accept as a force majeure through sampling. In addition to the general regulations stated in the Turkish Code of Obligations Numbered 6098 ("**TCO**"), rights such as suspending the contract or giving additional time for the performance are granted to the affected party or parties in case of a force majeure by a clause added in the contracts. In that case, in the light of the principle of freedom of contract, the provisions of the contract should be applied, and it should be determined whether or not the force majeure has occurred and there is sufficient causal link between the act that constitutes force majeure and inability to fulfil the contract for each concrete case.

In case the parties do not define the acts that may constitute force majeure in the contract, then the TCO should be applied. As per the TCO, after the signing of the contract between the parties, in cases where the parties cannot fulfil their obligations, such as the above-mentioned force majeure conditions, the affected party will be able to rely on the provisions of "impossibility to perform" under the article 136 of the TCO.

In this context, if the performance of an obligation is completely impossible, the obligor shall be released from performing the related obligations. If the performance only becomes partially impossible, the obligor is released from performing the part of his obligations that become impossible. However, even if the performance of the obligation does not become impossible, if it is against good faith to expect a party to fulfil its obligations, the obligor has the right to apply to the court requesting adaptation of the contract according to the new conditions and if this is not possible, he can also use his right of rescission of the contract as per Article 138 of the TCO. Again, in this case too, there should be a sufficient causal link between the act that constitutes a force majeure and the inability to fulfil the contract.

Whether COVID-19 Can Be Accepted as Impossibility of Performance

Examples of the measures in terms of contractual obligations can be listed as follows:

- As of 17 March 2020, with the circulars issued by Turkey's Ministry of Interior; the activities of night clubs, bars, discotheques, theatres, cinemas, show centres, concert halls, engagement/wedding halls, music restaurants and cafes, casinos, pubs, taverns, coffeehouses, cafés, cafeterias, country gardens, hookah lounges, hookah cafes, internet halls, internet cafes, all kinds of game halls, all kinds of indoor playgrounds (including the ones in shopping malls and restaurants), tea gardens, association lounges, amusement

parks, swimming pools, baths, saunas, spas, massage salons, SPA, and sports centres have been temporarily suspended.

- As per the Communiqué on the Amendment of the Communiqué of the Products subject to Export Registration published in the Official Gazette numbered 31072 and dated 18 March 2020, ethyl alcohol, cologne, disinfectant, hydrogen peroxide, and meltblown cloth/fabric to be only used in medical mask production were added to the List of Products Subject to Export Registration.
- As per the announcement of the Turkish Medicine and Medical Devices Authority dated 19 March 2020, product promotion representatives' promotional activities of visits to doctors, dentists and pharmacists in all health organizations and institutions, including pharmacies have been suspended until a second notification.
- As per the Presidential Circular numbered 2020/3 on the postponement of meetings and organizations published in the Official Gazette numbered 31704 and dated 20 March 2020, all national and international science, cultural, art and similar organizations or meetings held in open or closed areas have been postponed until the end of April.
- As per the Law on the Amendments in Certain Laws numbered 7226, published in the Official Gazette numbered 31080 and dated 26 March 2020, it was regulated that the failure to pay the workplace rental fee from 1 March 2020 to 30 June 2020 will not constitute a reason for evacuation and termination of the lease contracts.

However, it should be noted that the sole presence of a COVID-19 pandemic does not always result in the impossibility of performance for all contracts. In each concrete case, it should be determined if the performance of the contract becomes impossible and whether there is a sufficient causal link between the force majeure and impossibility of performance.

Hardship

In some cases, although the performance of the obligation does not become impossible due to force majeure, but might become too difficult. Therefore, expecting it from the parties may be against the good faith. In this case, the obligor can benefit from the hardship provisions stipulated in Article 138 of the TCO. To enforce hardship provisions, the following four conditions must be met:

- An extraordinary situation, which was not foreseen or expected to be foreseen by the parties at the time of the contract, must have occurred.
- This situation must not have originated from the obligor.
- This situation must have changed the existing facts at the time of the contract against the obligor to the extent that requesting to perform would be against the rules of honesty.
- The obligor must not have performed his obligation yet or he must have performed it reserving his rights arisen from the hardship.

According to the article, if all the conditions have been fulfilled, the obligor may ask the judge to adapt the contract to the new conditions. In practice, it is often required to adapt the provisions of the contract regarding the money debt until the extraordinary event ends.

Consequently, the evaluation of each contract in terms of COVID-19 pandemic, the implementation of the aforementioned provisions will be done considering whether the restriction measures have been taken at a level that will affect the performance of the contract in terms of the place where the contract will be executed or not.

Related Practices

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