

MEASURES REGARDING COVID-19 (CORONA VIRUS) AND THE IMPACT OF THE PANDEMIC ON THE CONTRACTS IN FORCE

Corona virus pandemic had negative effects on companies operating in various important sectors, in particular those in the supply chain. For this reason, we believe that it would be useful for them to follow up the latest developments about the restrictions imposed by the public authorities on exports, customs and transportation activities for the purpose of the prevention of the pandemic. Furthermore, they need to obtain local consultancy and legal services about the legislation of each country where they carry out their commercial activities and assess the potential risks before starting any new commercial activity. Besides, the companies must examine the potential negative consequences of the measures to prevent the spread of the pandemic in respect of the fulfillment of their potential obligations arising from their continuing commercial contracts with their customers and suppliers.

A. Main Measures Taken by Public Institutions and Organizations

We would like to draw your attention to the following main restrictions on customs and transportation as well as imports and exports imposed by the public institutions and organizations under the scope of the measures to prevent the threat of pandemic.

- All international flights with the exception of cargo flights have been suspended beginning from March 28, 2020.
- The announcement made by the General Directorate of Customs titled "Corona Virus Measures" dated March 24, 2020 states that the conduct of some services which were fulfilled by the Customs Administrations up to the present time will be accessible through the internet site of E-State or Ministry of Trade.
- The announcement of the General Directorate of Customs with the subject "Authorized Applications of the Obligants for Corona Virus Measures" dated

March 29, 2020 and numbered 52856264-106.03 has been issued.

- The Amendment of the Communiqué on the Export of Goods subject to prior registration has been issued in the Official Gazette dated March 18, 2020 and numbered 31072. Ethyl alcohol, cologne, disinfectants etc. have been added to the list of the goods whose export is subject registration.
- The Circular Note of the General Directorate of Maritime Affairs of the Ministry of Transport and Infrastructure on the corona virus (Covid-19) measures numbered 2020/2 stipulating amendments on the declarations to be made by Turkish and foreign vessels before entering the port area through the Single Window System dated March 16, 2020 and numbered 19370 was issued.
- The Ministry of Agriculture and Forestry has decided to suspend the entry of exotic animals and invertebrates and amphibian animals, dogs, cats, weasels, aquarium fish, reptiles rodents, domestic rabbits and all birds from foreign countries into Turkey together with the passengers or under commercial scope for any reason on March 13, 2020.
- The announcement of the General Directorate of Customs about the Requests for an Additional Period of Time pursuant to the Article 46 of the Customs Law due to the Corona Virus Pandemic has been issued on March 12, 2020.

B. Issues To Be Paid Attention to Under the scope of the Special Law

I. Force Majeur Clause in the Contracts

In order to make an evaluation of the impact of corona virus pandemic on their ongoing business relations, the parties must first of all control whether there are clear provisions in their contracts regulating the state of force majeure and examine how con-

¹ Updated information is provided on the website of the Ministry of Commerce of Republic of Turkey, International Transporters Association (UND).

² <https://www.utikad.org.tr/Images/DosyaYoneticisi/26032020liste.pdf>, Date: 27 March 2020.

taguous diseases may be evaluated under the scope of those provisions. In particular, as far as a contract containing a provision on force majeure is concerned, the affected party must pay attention to the time periods and requirements as well as to the form issues in order to give notice to the counter party about the fact that the occurrence of force majeure had made it impossible for the affected party to perform its obligations beginning from the occurrence thereof. If the party negatively affected by force majeure does not send a notice in time pursuant to the requirements laid down in the respective contract, it shall be possible to hold this party liable for the losses incurred by the counter party. The force majeure clause under the respective contract signed between the parties, the existence or non-existence thereof and its intertwining with the adaptation clause are discussed in detail below.

II. The Concept of Force Majeur in the Turkish Law

Turkish Law of Obligations does not provide a clear definition of force majeure. However it is possible to see that some cases are shown as examples of force majeure in the article 13 of the Tax Procedure Law No. 213.

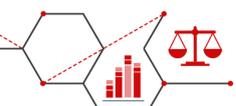
The elements of force majeure were specified as follows by the decision of the Court of Cassation Assembly of Civil Chambers numbered 2017/444 E, 2019/1083 K. Accordingly, force majeure is a a compelling incident. It may be a natural, social or legal situation or a man-made incident. In addition to that, the above mentioned decision poses the force majeure as a cause of contrariety against the obligation and makes it conditional to the occurrence of a contariety against the obligation. The Court of Cassation Assembly of Civil Chambers also considers natural disasters like earthquake, flood, contagious diseases etc. as examples of force majeure in its decision numbered 2017/90 E, 2018/259 K.

Pursuant to the decision of the Court of Cassation Assembly of Civil Chambers, the description of an incident as a case of force majeure requires the occurrence of an unpredictable incident beyond the control of the parties that makes the performance of the obligations of the affected party impossible under all circumstances.

As examined in detail below, the impact of COVID-19 pandemic that we are currently going through on the contracts confronts us in two forms. Firstly, the fulfillment of the contractual obligations becomes impossible due to force majeure and secondly the fulfillment of the contractual obligations does not become impossible but becomes extremely difficult.

Taking into consideration the jurisprudence of the Court of Cassation and the measures taken by the public institutions and organizations for the purpose of the prevention of the spread of corona virus pandemic including the suspension of the periods of time related to trial processes like the litigation time, period of time for initiating enforcement proceedings, the suspension of enforcement and bankruptcy proceedings, we deem the evaluation of this pandemic within the scope of force majeure in deed justifiable. However, it is also true that each specific case must be evaluated seperately based on the relevant contract, parties and the commercial field in which the parties operate, and it must be discussed whether the situation currently experienced is a state of force majeure or only a extreme difficulty of the performance of the obligations under the contract. For instance, according to the announcement made by the Ministry of Treasury and Finance on March 24, 2020, the industries classified under the scope of the force majeure have been determined by the general communique on taxpayers who will benefit from the provisions on force majeure in respect of the tax procedures as part of the measures called "Economic Stability Shield" introduced against the economic destruction caused by corona virus pandemic. This fact alone points out to the importance of the commercial fields in which the parties operate in respect of giving a decision about whether the current situation must be described as a force majeure or extreme difficulty of the performance of the obligations under the contract. For that reason, it has now been very clear that the pandemic that we have been recently going through shall be deemed as a force majeure in terms of the performance of the contracts due to the fact that it has become impossible for the companies operating in the above mentioned sectors to perform at least some of their obligations for reasons caused by an unforeseeable pandemic that broke out outside their enterprises and is totally beyond their control.

³ Ş. Barış ÖZÇELİK, Legal Impossibility and Results in the Performance of Debts Arising from the Contract, AÜHFD, 63 (3) 2014: 569, 571.



III. The Impact of the Current COVID-19 Pandemic on the Contracts and Force Majeur

The most important point of extreme difficulty of performance and the state of impossibility for which the obligant is not hold responsible is the release of the obligant from the obligation to perform its contractual obligations as it has undertaken them pursuant the Articles 138 and 136 of the Turkish Law of Obligations. Turkish Code of Obligations stipulates that if a situation arises that makes it impossible to perform a contractual obligation like the force majeure, general provisions need to be considered. The Article 136 stipulates that if the fulfillment of the obligation become impossible due to reasons which are not attributable to the obligant, the obligation shall expire. In this context, the impossibility means the impediment of the performance of the obligation due to a continuous material or legal condition and, according to the predominant view, this condition may be an objective or subjective one (which is relevant only for the obligant). For that reason, if the measures taken under the scope of the prevention of the pandemic has made it totally impossible to perform the obligation, it may be considered that the obligation has expired. However, if the obligant is able to perform its obligations even under the conditions of pandemic according to objective criteria, it would not be possible to accept the impossibility to perform the obligations for the parties and consequently, the termination of the obligation. Furthermore, if that impossibility is of temporary nature, it shall not, as a rule, lead to disappearance of the obligation, it only causes the performance of the obligation to delay (for example the temporary prohibition of the sale of the product). However if the obligation may be performed only at a definite time or the performance time is important for the creditor, the state of impossibility occurring at that time shall be evaluated as a strict impossibility and the obligation disappears even if the impossibility later ends. Likewise in cases where it is impossible to foresee how long the impossibility shall last, it is accepted that the obligation ends due to the impossibility to perform it. Needless to mention - all the provisions of the contract must be considered and interpreted as a whole in order to determine the impact of the current pandemic on contractual basis. That interpretation shall shed light on how the risk incurred shall be shared between the parties. The first important point in terms of the examination of the entire contract is to assess

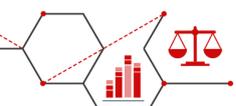
whether the contract contains force majeure and adaptation clauses, since the party that shall take over the risk in case of the non-existence of such provisions in the contract is to be decided on the basis of all data contained in that contract. Based on this evaluation, the determination of how the provisions of Turkish Law of Obligations shall be applied to the relation of commercial contract between the parties.

If there is no provision of force majeure or adaptation under the scope of the contract signed between the parties the provisions of Turkish Code of Obligations on the default of the obligant (Turkish Code of Obligations, Article 117 and others), the impossibility of performance not attributable to the obligant (Turkish Code of Obligations, 136) and extreme impossibility of the the performance of obligation (Turkish Code of Obligations, Article 138) is to be discussed in respect of the obligant who has difficulty in performing his obligation. It goes without saying that the obligant is not responsible for the pandemic currently suffered, nor is the pandemic has emerged from his field of effect. Consequently it is, as a rule, impossible to speak of an impossibility of the performance of obligation for which the obligant is responsible.

On the other hand, even if the contract contains a force majeure or adaptation clause they might not provide a clear and definite solution for the actual situation because it is seen that the provisions contained in the contracts under this scope are sometimes intertwined with each other.

As a result, if the provision of a contract on force majeure contains a specific regulation related to the adaptation of the commercial relation between the parties, then this provision on force majeure shall have to be taken into consideration. Consequently, it is important for the parties to avoid unambiguous expressions while drafting a commercial contract and draw clear limits between the relevant clauses in order to ensure avoiding the uncertainties that may arise in the future. For instance, the Chinese Council for the Encouragement of International Trade ("CCPIT") has started issuing force majeure certificates due to the pandemic that we are going through and it is expected that the legal nature of those certificates and their impact on the commercial contracts will be discussed in the near future.

⁴ Kemal Oğuzman/Turgut Öz, Law of Obligations General Provisions Volume 1 2012, S. 401.



On the other hand, as far as contracts imposing mutual obligations are concerned, the obligant who has been relieved of its obligations due to the impossibility to perform its obligations, is obliged to return the performance that it has received from the counter party due to the provisions of unjustified enrichment and loses its right to request the performance which has not been fulfilled. The cases, where the damages arising before the fulfillment of the obligation are imputed to the creditor by law or contract, are outside the scope of this provision. Furthermore, the sub-paragraph 3 of the Article 136 of the law stipulates that if the obligant does not inform the creditor that the performance of the obligation has become impossible without delay and does not take the necessary measures for the prevention of the increase of the loss, it shall be obliged to compensate the losses that shall thereby arise.

On the other hand, the Article 137 of the Turkish Law of Obligations has only regulated the state of the partial impossibility of the performance of obligations and stated that the obligant is released of its obligations only to the extent of that part thereof the performance of which has been impossible. However it is accepted by the same article that if it clear that such a contract would not be concluded if this partial impossibility of the performance of obligations could be anticipated by the parties in advance, then the obligation would totally expire.

Another issue not regulated by the Turkish Law of Obligations is the “temporary impossibility of the performance of an obligation.” This issue is in dispute both in the doctrine and Court of Cassation. According to a view, the temporary impossibility of the performance of an obligation does not lead to release the obligant from the obligation, but, as a principle, only causes the obligant to go into default, while another view stipulates that if the temporary impossibility of the performance of an obligation is in compliance with the intent of the parties, the date of the performance must be adjourned until the disappearance of that impossibility. This second view that we also support has been adopted by the Court of Cassation.

The implementation of the provision titled “the extreme difficulty to perform an obligation” as provided for by the Article 136 of Turkish Law of Obligations may be possible if the performance of an obligation has in deed not become impossible, but has become

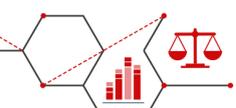
extremely difficult due to the spread of an epidemic. Accordingly, if an extraordinary situation, which was unpredictable and was not expected to be predicted by the parties during the execution of the contract occurs due to a reason not attributable to the obligant and changes the state of the facts existing during the execution of the contract unfavorably to such an extent that it would be contrary to the rules of good faith to request the obligant to perform its obligations, the party thereby negatively affected shall be entitled to request the judge to rule for the adaptation of the contract to the new conditions and, if this is not possible, to terminate the contract, if it has not already performed its obligation or performed it by reserving its rights arising from the fact that the performance has grew extremely difficult. As far as contracts with permanent obligations are concerned, the obligant, as a rule, exercises his right to terminate the contract instead of the right to renege on the contract.

C. Conclusion

So far, no official statement has been made up to now about whether COVID-19 pandemic is accepted as a force majeure in Turkey, nor there is a decision of the Court of Cassation regarding this issue. Taking into consideration other contagious diseases like swine influenza and bird influenza which have been the subject of the existing decisions of the Court of Cassation, we must accept that the current pandemic is spreading rapidly all over the world. However, it must not be forgotten that the Court of Cassation has put importance to the concept of prudent merchant in each case, adopted the principle of *pacta sunt servanda* and paid attention to the scope of the concept of force majeure defined in the contract.

Consequently, the parties must examine whether their contracts contain a clear force majeure provision and evaluate whether the respective force majeure negatively affecting the performance of the obligations falls within the scope of that article. After that, the parties should take the necessary steps pursuant to that article in the respective contract and the necessary negotiations.

The companies negatively affected by the above-mentioned contagious disease should agree on a specific provision regulating such issues in their future contracts. Furthermore, if their contracts currently in force do not contain any provisions concerning the



force majeure and its consequences, the parties may eliminate these uncertainties that may emerge due to the recurrence of such a situation in the future through an addendum to their current contract.

It must be stated that the impacts of the pandemic that we are currently going through have not come to daylight in the fullest sense of the term. Since the pandemic is spreading all over the world, it is still uncertain how the basic legal principles examined above will impact the legal issues. For that reason, it would be the most practical solution for the parties currently having difficulties in the performance of their obligations to negotiate on their current contracts in the first place.

For further information and inquiries please contact:

Att. Dr. Ata TORUN - ata.torun@hansu.av.tr

en.hansu.av.tr | +90 216 464 12 12

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