

Legal Impacts of Covid-19 on Turkish law governed Contracts

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Speed Read

*With its exponential spread around the world, the Covid-19 pandemic (**Pandemic**) has affected many aspects of people's lives and businesses, as well as the financial markets. While the Turkish government (**Government**) continues to implement certain precautions to tackle the direct and knock-on consequences of the Pandemic, these measures have not yet reached to a point where the Government has taken drastic actions (e.g., all-encompassing curfew or state of emergency).*

*The current uncertainty of how the Pandemic and the resulting Government measures will play out, however, inevitably, calls in the question of the faith of existing contracts. The response to this much-wondered query for Turkish law governed contracts (**Contracts**) is, unfortunately, not outright and turns on the facts of each specific Contract, with possible outcomes being (i) breach of contract; (ii) automatic termination; (iii) partial discharge of obligations; (iv) suspension of the obligations; and, (v) adaptation of the contract.*

This newsletter is to provide you with an overview of the legal concepts that may be applicable to your Contract, and its performance, in connection with the Pandemic. Since invocation of each concept will only enable the invoking party to get relief, if such invocation corresponds with the underlying facts, we hope this newsletter guides you through these difficult times to take necessary actions for your Contracts.

Step 1: Has the Pandemic rendered performance of the Contract partially or entirely impossible or, otherwise, resulted in delay or excessive burden for the affected party to discharge its obligations?

Given that the Pandemic may have different impacts on each Contract, the first question to address is whether the Pandemic has rendered performance of the Contract partially or entirely impossible or, otherwise, resulted in delay or excessive burden for the affected party to discharge its obligations.

- If yes, please proceed with Step 2.
- If no, the Contract is still in place and you are expected to perform your obligations thereunder. To the extent you fail to do so, this would amount to breach of contract and may, depending on the severity of the non-performed obligations, entitle the non-breaching party to: (i) seek damages; and/or, (ii) repudiate the Contract.

Step 2: Does the Contract contain a specific provision dealing with force majeure?

Under Turkish law, rules applicable to force majeure events are of complementary nature and parties are allowed to contract out of these rules by determining the scope and mechanics of force majeure under the Contract in accordance with the principle of freedom of contract. In this respect:

- If the Contract contains a specific provision dealing with force majeure, then interpretation of such provision would dictate whether force majeure has been triggered and, if so, its legal consequences.

- If the Contract does not contain such provision, please proceed with Step 3.

Step 3: Does Pandemic, in the case of your Contract, amount to a force majeure event from a Turkish law perspective?

The definition and principles of force majeure are not specifically defined under Turkish law. In the absence of such regulations, the Court of Appeals precedents and doctrine set the framework for the scope of its implementation.

Mainly, the requirements for an event to be considered as force majeure are as follows:

- the event must not be reasonably foreseeable as at the date when the Contract has been entered into;
- the event must take place beyond the parties' control; and
- the performance of the contract must be impossible despite all measures being taken.

While covid-19 outbreak is an unprecedented disease, a number of Court of Appeals decisions consider epidemic diseases as examples of force majeure events. The recent decision of the General Assembly of Civil Chambers of Court of Appeals numbered E.2017/1190 K.2018/1259 defines force majeure as follows: "*Force majeure is an inevitable event that occurs beyond the control of obligor and cannot be foreseen or prevented, which inevitably results with non-performance of the contractual obligations. Events such as earthquake, flood, fire and epidemics shall be considered as force majeure*".

In light of the above, subject to particularities of your Contract, under which performance of obligations may well be possible notwithstanding the Pandemic, it is highly likely that the Pandemic and the precautions taken by the government could be considered as triggering force majeure under Turkish law. If so, please proceed with Step 4.

Step 4: Which Turkish law ground does the Pandemic's impact on your Contract fall under?

In the absence of any contractual provisions on force majeure, the parties to the Contract affected by the Pandemic may benefit from the following remedies, depending on the effect of the outbreak on the performance of their obligations:

(a) **Where the performance of obligations has permanently become impossible in its entirety**

If the performance of obligations objectively becomes impossible in its entirety, due to the Pandemic, the affected party will be released from its obligations, as governed under Article 136 of the Turkish Code of Obligations No. 6098 (TCO).

(b) **Where the performance of obligations has temporarily become impossible in its entirety**

In case where the timing of the performance is not of essence and the affected party would be able to perform its obligations subsequent to cessation of the Pandemic, impossibility is considered as temporary and the affected party's obligations would be suspended until after the termination of the Pandemic.

(c) Where the performance of obligations has become partially impossible

Pursuant to Article 137 of the TCO, where the Pandemic results in a partial impossibility, the affected party would be discharged of its obligations to the extent they have become impossible. That being said, if it is interpreted that the parties would not have entered into the Contract, had they foreseen such partial impossibility in advance, then all of the obligations would be discharged, and accordingly, the Contract would be terminated.

(d) Where Pandemic results in excessive burden for the affected party to perform its obligations

According to Article 138 of the TCO, a party whose obligations have not been rendered impossible, but rather exacerbated in an excessive manner as a result of Pandemic, may request the following from the court:

- I. adaptation of the Contract in accordance with the changed circumstances; or
- II. if the foregoing route is not possible, terminate the Contract.

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