

## Reviewing construction contracts in light of the effects of COVID-19

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### Background

It has been over a month since the confirmation of the first COVID-19 case in Turkey. We observe that the measures taken by individuals, companies and public institutions against the COVID-19 outbreak are getting tighter. The measures taken by states to combat the COVID-19 pandemic continue to adversely affect the construction sector, just like many other sectors.

Large-scale construction works, which involve different areas of expertise and require different technical teams and equipment to work together, are adversely affected not only by measures taken in our country but also by various measures imposed by other countries, such as travel restrictions, curfews, and export barriers. Even in the most optimistic scenario, the impacts of the outbreak and the measures are expected to continue to affect the Turkish construction industry until the last quarter of 2020.

Until now, pandemics has not been considered as an item in the parties' priority lists while negotiating construction contracts across many geographies, including Turkey. The initial reflex of the parties to construction contracts during the first weeks of the outbreak was checking the force majeure provisions and confirming as to whether the force majeure events include pandemics as well. On the other hand, we would like to draw your attention to the following additional points, which, we believe, would help you in making a thorough evaluation of your obligations and possible remedies under your construction contracts.

### Checklist for construction contracts

As institutions, administrations and individuals continue to put new COVID-19 measures in place, we think that it would be more helpful to consider the following points on a regular basis.

Since a construction contract covers complex and closely related arrangements that primarily concern different areas of expertise, such as technical, financial and legal know-how, we would recommend that you set-up a control team to evaluate the items on the checklist, if you have not already done so.

#### (a) Review your contract from the beginning to the end

This would help you in creating a list of items in the contract that you think may be affected by COVID-19 and the measures taken. In construction contracts, important issues may sometimes not be included in the main body of the contract; however, they may be included in the special conditions part of the contract or other contract schedules, or even in the notifications that the parties previously had sent to each other. For this reason, you should consider your construction contracts together with all contract documents as a whole.

#### (b) Identify the provisions that you can benefit from in the first place

As a result of this study, you can have an idea of whether COVID-19 and the measures taken so far have provided you with an exemption or flexibility to fulfil your contractual obligations. These provisions,

however, may not become effective automatically. You may need to notify your counterparty in order to exercise your rights.

**(c) List the notifications you have to make**

As mentioned above, you may need to notify your counterparty in order to exercise your contractual rights, including a relief due to force majeure events. Make a list of these notifications. Include the time limits, formal requirements, details and list of documents required for each notification that you have added to the list.

**(d) Consider provisions relating to time extension and the adjustment of the contract price**

As seen in several standard form FIDIC contracts, some construction contracts allow for a time extension or the adjustment of the contract price in cases of shortages in the availability of personnel or equipment caused by pandemic. In order to be able to benefit from these provisions, the necessary notifications stipulated in the contract must be made to your counterparty. Confirm whether similar provisions exist under your contracts.

**(e) Examine the force majeure provisions carefully**

While examining the force majeure provisions, consider the construction contract as a whole, not just the force majeure provisions in isolation.

First of all, confirm whether the force majeure events are specified in a limited number or exemplified as a general list. If "epidemics", "pandemics" or "plague" are not specifically mentioned as a force majeure event, check if the COVID-19 itself or the related measures taken lead to another force majeure event stipulated under your contract?

Identify the details required to be included and the rights you want to exercise in your force majeure notification.

**(f) Identify the measures required to reduce the effects of the outbreak**

Force majeure provisions usually require the party affected by a force majeure event to take the necessary measures to reduce or eliminate the effects of that event. Failure to take these measures can result in the inability to benefit from force majeure provisions both contractually and legally. Identify the measures you may take to reduce the impact of COVID-19 on your contractual obligations and assess the timeframe and ways you plan to take those measures.

**(g) Carefully review the "change of law" provisions**

Check whether your construction contract includes any provisions addressing change of law situations, which may enable you to renegotiate your contract to the extent your rights and obligations are affected by the new pieces of legislation that were introduced in order to control the outbreak.

In addition, also determine whether there are any measures taken by the state or by public institutions as part of the combat against the COVID-19 outbreak that affect your contract. Please, however, bear in mind that change of law provisions may also require you to notify your counterparty just like the force majeure provisions.

**(h) Carefully examine the "delay events" and "excuse events" provisions**

Some construction contracts do not include force majeure provisions or may exclude pandemics from the scope of force majeure event. However, COVID-19 and the measures taken may enable you to benefit from the "delay events" or "excuse events" provisions under your contract. Identify whether there are any of these provisions under your construction contract and, check if you need to make a notification to your counterparty to benefit from them.

**(i) Take your contracts with subcontractors into account**

If you have transferred some (or all) of your contractual obligations to subcontractors, you are likely to remain responsible for the actions and omissions of your subcontractors. Find out which of your subcontractors may have problems in fulfilling their contractual obligations towards you, and may have been affected by COVID-19 and the measures taken at a different level than you, and whether you are required to make any notification to those subcontractors.

**(j) Consider your contracts with suppliers too**

Especially under "EPC" form contracts, the contractor is obliged to supply the goods related to the construction works. However, there may also be construction contracts, under which certain goods and materials are provided by the employer. Regardless of the side of the contract that you are on, if you have an obligation to supply any good or material, determine the rights that your counterparts can use in your supply contracts, and, whether they made any attempt to exercise these rights, and whether these rights affect your obligations under your construction contract. Determine if you are required to give any notice or notification to your suppliers.

**(k) Consider the dispute resolution provisions**

Many of the issues that we have drawn attention to above require negotiations between the parties and an agreement to be made in order to reach solutions such as changing contract terms or suspending obligations. In all cases, it may not be possible to conclude negotiations and reach an agreement in a way that will satisfy both parties. Construction contracts generally set out a multi-stage dispute resolution procedure, such as amicable settlement, expert determination or dispute adjudication board decision and court order/arbitral award.

Anticipate possible dispute resolution methods under your construction contract that you may prefer in a potential conflict with your counterparty, and assess the methods that are possible or feasible due to COVID-19 or the measures taken, and consider the budget you wish to spend for dispute resolution. You may want to take a look at our alert dated [26 March 2020](#) if your contract stipulates Turkish courts as the competent court for settlement of disputes.

**(l) Follow up sectoral developments and regulations**

While evaluating your contractual rights, follow the developments and trends in the sector, which the construction work relates to. As the developments that may affect your work, and your contractual obligations, such as the decisions of the Ministry of Family, Labour and Social Services (which we have summarised in our briefing dated [10 April 2020](#)) regarding the COVID-19 measures at construction sites will keep occurring in the future, follow the developments and their effects on your contract and evaluate them with your relevant counterparties.

## Conclusion

Although COVID-19 has affected the construction sector negatively just like other sectors at the first stage, the need for more infrastructure projects to control the pandemic and its effects is emerging. We foresee that, details of the new projects that are needed for this purpose will begin to become visible in the near future. We, however, believe that it would be helpful for contractors and employers to evaluate their construction contracts taking into account the points we mentioned above to minimise loss of any rights during this temporary period.

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