

CLIENT ALERT

CONTRACT LAW | TURKEY |

APRIL 2020

EFFECTS OF CORONAVIRUS ON CONTRACTS UNDER TURKISH LAW

Besides its impact on human health and life, the COVID-19 outbreak has significantly impacted business and legal transactions and caused many individuals and companies to fail to fulfil their contractual obligations, underperform or have performance difficulties. As such, the sustainability of contractual relationships currently in force and their performance has recently become an issue. The effects of the pandemic on contracts can be assessed in light of the general concepts set forth under the Turkish Code of Obligations No. 6098 (the "**Turkish Code of Obligations**") such as debtor's default, defect liability, impossibility to perform and hardship.

In this Client Alert, our general analysis will focus on legal remedies that could be triggered in case contracts are affected by pandemic or similar extraordinary events and, especially as regards the impact of COVID-19, the implementation of Article 136 (*impossibility to perform*) and Article 138 (*hardship*) of the Turkish Code of Obligations. We also aim to address the new legislative measures taken by the Turkish government to lighten certain contractual obligations in light of the current extraordinary circumstances.

GENERAL ANALYSIS

According to the principle of contractual freedom, parties to a contract may agree on provisions relating to force majeure events and hardship situations. To the extent any contractual provision has been set forth in relation to epidemics, the assessment should be first conducted within the framework of the contract. Otherwise, the relevant articles of the Turkish Code of Obligations shall apply in the absence of any such provision.

- **Impossibility to Perform**

If the performance of a contractual obligation becomes impossible due to reasons that are not attributable to the obligor/debtor, an impossibility to perform, which also includes force majeure events, shall be deemed to have occurred as set out under article 136 of the Turkish Code of Obligations. The Court of Cassation has also considered "epidemic" as being a force majeure event in many of its decisions¹. In such case, the contractual obligation shall be deemed extinguished.

In cases where the performance of an obligation is not possible through compulsory execution (for example, if the contractual obligation that needs to be performed is an obligation to act) and the debtor cannot perform its obligation -with no fault that may be attributable to the debtor- or performs it partially due to the pandemic, the debtor cannot be held liable in relation to such obligation.

¹ "Force Majeure is an extraordinary event which occurs out of activities or enterprise of the responsible or debtor, causes absolutely and inevitably violation of a general behaviour norm or an obligation, and which is unforeseeable and irresistible. Natural disasters such as earthquake, flood, fire, pandemic could be considered as force majeure events.." YHGK., E. 2017/90 K. 2018/1259 T. 27.6.2018.

However, if the contract was concluded at a time when the impact of the COVID-19 was or could have been foreseen and the debtor fails to perform its obligation, the creditor may claim that the debtor remains liable in such case and ask the debtor to indemnify the creditor for its loss.

- **Hardship / Excessive difficulty in performance**

There may be extraordinary circumstances which, although not rendering the performance impossible, were not or could not be foreseen by the parties at the time of the conclusion of contract. In this case, hardship as set out under Article 138 of the Turkish Code of Obligations may be deemed to have occurred, provided that specific performance of the debtor cannot be expected due to disruption of the balance of the contractual obligations between the parties and such expectation would violate the principle of good faith.

For instance, as impossible performance cannot be considered for substitutable obligations (such as payment obligations), an assessment of hardship could be made.

As per the Article 138 of the Turkish Code of Obligations, hardship and its consequences shall apply provided that the debtor has not yet performed its obligations or has performed its obligations but reserved its rights arising from the hardship.

In the abovementioned situations, the parties may choose to adapt the contract based on their mutual agreements. In case no agreement can be reached and a dispute occurs, the parties may request an adaptation of the contractual terms from the court. The judge will try to restore the balance of the rights and interests of the parties in light of their respective contractual obligations and in accordance with the principle of good faith. If such adaptation is not possible, rescission of the contracts with instantaneous obligations and termination of the contracts with continuing performance obligations may be considered.

in light of the above, if the contract does not contain any provision relating to pandemics, the first assessment to be made relates to whether or not the performance of the contractual obligation is possible. The sole fact that pandemics qualify in principle as force majeure events is indeed not sufficient alone and an assessment must therefore be conducted to confirm its impact on the performance of the contract.

Accordingly, the effects of the COVID-19 outbreak on contracts should be specifically assessed on a case-by-case basis, regardless of the fact that the COVID-19 qualifies as a force majeure event.

ANALYSIS OF IMPACT ON SPECIFIC TYPES OF CONTRACTS

- **Real Estate Lease**

Pursuant to various circulars focusing on Coronavirus Measures, the Turkish Ministry of Internal Affairs temporarily suspended the activities of many workplaces that are engaged in entertainment and social activities.

As for workplace rents other than the ones mentioned above, Provisional Article 2 of Law No. 7226 for the Amendment of Certain Laws ("Law No. 7226") which entered into force on 26 March 2020, introduced a principle whereby the non-payment of commercial rents during the period 1 March 2020 to 30 June 2020 shall not be considered as grounds for termination and eviction. However, this new provision should not be interpreted as a green light not to pay any rent during this period. It should indeed rather be seen as a flexibility granted to lessees so as to avoid that failure of payment occurring within this particular period of time constitutes grounds for termination and eviction, without affecting in principle the payment obligation.

It should be noted that this new principle is not applicable for non-commercial premises (e.g. residential rents) and therefore, lessees of such premises shall remain liable to fulfil their rent payment obligations and legal consequences resulting from any failure to pay will still apply. However, it is worth mentioning that in light of the Decision on Suspension of Execution and Bankruptcy Proceedings No. 2279, lessors of non-commercial premises may not initiate any proceedings before 1 May 2020 (unless this deadline is extended in the future) if the lessee is late in paying its rental fee.

Law No. 7226 has also introduced new provisions into the Law on Foundations regarding the rent of foundations' immovable properties. In this respect;

- as from 1 January 2021, the rent of the first 6 (six) months of first year of the operating period regarding the lease of immovable properties belonging to the General Directorate of Foundations or to fused foundations in return for repair or construction, shall be deposited as a guarantee and will be interest-bearing;
- the guarantee amount will be returned to the lessee at the end of the contract following the deduction of possible damage to the leased property;
- the General Directorate of Foundations shall, within 15 (fifteen) days from the date on which the rent of 3 (three) months is not paid within the lease period, be entitled to notify the lessee that the entire rent shall become payable within 30 (thirty) days. Unless the lessee pays the entire rent within the given period, the leased property shall be evacuated with the support of the local authorities and the lessee's contract shall be terminated.

Furthermore, pursuant to the amendment made to the Law on Amendment to the Digital Service Tax and Certain Laws and Decree Law No. 375, the effective date of the 2% accommodation tax has been postponed from 1 April 2020 to 1 January 2021.

- **Air Transportation**

The General Directorate of Civil Aviation has amended the Regulation on the Rights of Passengers Traveling by Air ("Air Travel Regulation") by adding a new provisional article. Pursuant to this new article, in the event of cancellation of any flight as of 5/2/2020 due to the COVID-19 pandemic, the air transportation firm performing the flight or undertaking to perform the flight shall not be held liable under the obligations listed under the Articles 8 (*Indemnification right*), 9 (*Reimbursement and rerouting right*) and 10 (*Service rights*) of the Air Travel Regulation until the end of two-months period following the removal of the flight bans.

In addition to the foregoing, passengers whose flights are cancelled due to the COVID-19 pandemic, have the right to postpone or change their ticket for another date, subject to seat availability. Passengers may request a refund for their unused open-date tickets from the air transportation firm, after the end of a two-months period following the removal of the flight bans.

- **International Sales Agreements**

Certain hygiene products and raw materials, the demand of which has increased due to the COVID-19 pandemic, were added to the List of Products Subject to Export Registration by the Undersecretary of Foreign Trade.

In this amendment, the customs declarations of such products shall be recorded by the relevant General Secretary of the Exporters' Union subject to the pre-approval of the General Directorate of Exports of the Ministry of Trade.

The products requiring pre-approval for export are as follows:

- Ethyl alcohol
- Cologne
- Disinfectant
- Hydrogen peroxide
- Meltblown fabric (used in medical mask production)

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In compliance with Turkish bar regulations, opinions relating to Turkish law matters that are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

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