

Evaluation of the Coronavirus (COVID-19) Outbreak within Contract Law

The world is witnessing an exceptional period due to the outbreak of Covid-19 Coronavirus (**Covid-19**) that began in China, spread throughout the world and declared as a pandemic by the World Health Organization. The virus, which spreads through many countries and causes thousands of deaths, is likely to have a devastating impact on business and economy. In particular, adverse events such as quarantine, travel ban, import and export restrictions and factory closures are seen as a precursor of an economic bottleneck.

In China, the world's biggest supplier of goods and services, the production had reached as low as 30% as of March 2020 and even this data itself reveal the economic importance of the situation. In this context, while there are several precautions taken by the countries to counter the virus outbreak, the legal aspect and effects of such measures are also significant. The Economic Stability Shield package announced as of 18 March 2020, has demonstrated that Turkey is also firmly prepared to take measures in this regard.

In case the foreseen conditions occur, this type of epidemic is expected to result in failure to perform or to duly perform certain liabilities due to both factual and economic reasons. Accordingly, with that outbreak coming into our lives, the main issues that we may encounter within the scope of Turkish contract law are as follows.

Is Covid-19 outbreak a force majeure?

The question of whether the Covid-19 outbreak is included in the "epidemic disease", which is included in the force majeure articles included in the agreements since the SARS virus in 2003, is discussed almost all over the world today.

Under Turkish law, there is no statutory rule that describes force majeure or sets out its objective criteria. Therefore, the Supreme Court evaluates each incident on the basis of specific circumstances and actions. In general, force majeure can be defined as the unforeseen event that is not caused by the parties, is out of the parties' control and excuses parties to non-perform their liabilities. The consequences of the force majeure in various legal systems and agreements may differ from one another. In this context, in order to make the right decision, it is necessary to analyze the agreement carefully and to take decisions within the scope of the provisions of the agreement.

However, under Turkish law, force majeure is generally considered within the scope of the principles of impossibility of performance and hardship. Within this framework, the effects of the Covid-19 epidemic on agreements and obligations should be examined separately within the impact of each concrete case and liability. In particular, as a new and latest development, the measures in the Economic Stability Shield package announced on 18 March 2020 which is mentioned in the below heading regarding the measures, will shed light on our evaluations.

Does the Covid-19 outbreak lead to impossibility of performance?

According to Article 136 of the Turkish Code of Obligations, if the performance of a debt becomes impossible for reasons that cannot be attributed to the debtor, **the debt expires**. The impossibility here is that the debt cannot be also performed by anyone other than the debtor. A disease, accident, natural events, public prohibitions are among the examples that can lead to the impossibility of performance. To give a concrete example, the performance of the obligations

become impossible in following situations; an artist whose the vocal cords are severely damaged on the concert day or the house which cannot be painted due to the fire.

As a result of the impossibility of performance, the debtor, who has been released from performing the obligation, is obliged to return the performance fulfilled by the other party and the debtor also loses the right to claim performance of an obligation, which has not been performed to him/her, yet. When the Covid-19 outbreak is evaluated in this context, it may be limited in cases where this situation leads to the impossibility of performance. For example, in cases where an export ban is imposed for a product that can only be supplied from a single country, the impossibility of performance can be mentioned. However, if it is possible for the obligation to be fulfilled by another person, the impossibility of performance cannot be in question. For instance, if a good, even at a high price, can still be supplied, impossibility of performance cannot be applicable in such cases.

Although there is a definite obstacle to the performance of an obligation at the agreed time, if the performance of the obligations will be possible at a later time, this situation is named as "temporary impossibility". In the mentioned cases, the fulfilment of the obligation at the time required by the agreement is prevented by a certain event, but in the course of time, this obstacle is removed and the fulfilment of the obligation becomes possible. Within the scope of Covid-19 epidemic, though not yet implemented in Turkey, in case measures such as ordering a curfew or closing all institutions and organizations are taken, the temporary impossibility will be in question, considering that such measures are temporary. On the other hand, even if the impossibility is temporary, if it is agreed to perform the obligation at a certain time, or if it is understood that the creditor will not benefit from the performance after this period, then the "impossibility of performance" will be in question and the debt will expire.

However, the impossibility in the performance of the debt and the difficulties in the performance of the debt (e.g., the unexpected increase in the exchange rate, inflation) are legally separate mechanisms. If the debt is possible to perform, even if the debtor is able to perform the performance, but spends more time and incur more expenditures than it should be and therefore it is causing damage, the performance is not impossible still. However, if the performance becomes difficult due to unforeseen situations, then the headings mentioned below will have to be examined.

In any case, the current situation for each act in a contractual relationship should be evaluated separately, and whether each action would be impossible or not, whether it becomes difficult or not, should be considered separately in each concrete case.

Can agreements be adapted if Covid-19 is evaluated as hardship?

Article 138 of the Turkish Code of Obligations gives the debtor the right to request from the judge to adapt the agreement to new conditions in cases where the performance of the debt becomes significantly difficult, and if this is not possible, to terminate the agreement.

In contractual relations, which are the building block of commercial life, in order to maintain the commercial relations in the determined term, it should be preferred to comply with the period determined between the parties and to ensure the performance of the obligations, to keep the agreement alive with the applicable provisions. However, the Covid-19 epidemic and the measures applied to prevent this, may aggregate the execution of the agreements and create hardship. In this case, if the performance of the debt cannot be expected from the debtor in accordance with the good faith, the debtor may request from the judge to adapt the agreement,

and if this is not possible, request the termination of the agreement. Debtors may request adaptation of the agreement in sectors that are directly affected by the Covid-19 epidemic and therefore the measures taken and the performance of their contractual obligations are therefore difficult. In addition, if this epidemic affects the general economic situation in the country beyond the extent to be expected from a trader, adaptation of the agreement may be preferred if this causes hardship.

In what cases of similar epidemics, did the Supreme Court decide in what direction?

Although it was stated in the decision of the Supreme Court Assembly of Civil Chambers dated 27.06.2018, that the natural disasters such as earthquake, flood, fire, epidemic disease are accepted as force majeure, the effect of the Covid-19 epidemic on the agreements should be evaluated on a case-by-case basis.

In the decision of the 13th Civil Chamber of the Supreme Court numbered E. 2009/9255 K. 2010/1706 and dated 15.02.2010, avian influenza caused a decrease in the sales of chickens and related by-products, the egg market was negatively affected and the egg prices decreased considerably; however, it was decided by the court that these situations constitute a difficulty in performance, not an impossibility of performance. Here, the Supreme Court ruled that it was compulsory to accept that the debtor as prudent merchant, was bound by the terms of the agreement. Although Covid-19 has begun to have a greater impact than the effects of avian disease, the decision is a concrete example to understand the perspective of the Supreme Court.

What are the precautions taken so far for Covid-19 in Turkey?

Ministry of Commerce; announced on 6 March 2020 that the Covid-19 epidemic is considered as a force majeure event within the scope of package tour agreements which include countries where flights were suspended as a result of the Covid-19 epidemic and were officially alerted against travel. Precisely, the destination of the tour will be decisive on the cancellation of the purchased tour due to the Covid-19 epidemic. Ministry of Commerce emphasized that the situation would be considered as a force majeure event if the tour will be made through a country where flights were suspended or officially alerted and customers may cancel the package tour even if there is less than 30 (thirty) days before the travel.

In the additional circular sent to the governorates by the Ministry of Interior; it is stated that places functioning as "Public Recreation and Entertainment Areas" will increase the risk of transmission of the disease, where people would be together at a very close distance, consequently cinemas, theaters, gyms, discotheques, bars and nightclubs will be temporarily closed effective 10 am on 16 March, within the assessments made with the Ministry of Health in order to protect citizens from the Covid-19 epidemic and to prevent the spread of the epidemic. Plenty of question marks aroused from this discontinuation precaution, concerning the future of the situation such as payment of rents of the relevant recreation and entertainment areas and the collection of service fees within the scope of services they provide.

Furthermore, there were other precautions as follows; restrictions on crossing the borders of land, rail and airways, the obligation of those coming from hazardous areas to comply with the quarantine rules, the school outbreaks and transition to distance education, postponement of overseas duties of public employees, postponement of sports competitions, postponement of non-emergency hearings and other judicial proceedings.

Besides, as a breaking new; the "Economic Stability Shield" package was announced on 18 March 2020 that includes the precautions to be taken about the economy to reduce the effects of the Covid-19 epidemic and has a 100,000,000,000 Turkish Liras value. The package includes nineteen separate precautions.

Notedly, precautions that may affect the assessments made under this note may be counted as follows:

- i. The stoppages of the Concise and VAT and social security contributions of April, May and June being postponed for 6 months for the retail, shopping mall, iron-steel, automotive, logistics-transportation, cinema-theater, accommodation, food-beverage, textile-garment and event-organization sectors.
- ii. accommodation tax not to be applied until November,
- iii. the credit principal and interest payments to the banks of the companies whose cash flow is impaired, as they are affected by the epidemic precautions, to be delayed for at least 3 months,
- iv. The credit debts and interest payments to Halkbank for April, May and June to be postponed for 3 months without interest, of the tradesmen and artisans who demanded by declaring that their works were adversely affected, ,
- v. Ensuring that companies that have defaulted in April, May and June due to the measures taken against the spread of the virus, have a "force majeure" grade in their credit registry.

Thus, it can be said that the precautions taken with this package have brought us closer to the interpretation of assessing the virus as a "force majeure" event. As it could be understood from the precautions, there are solutions similar to the adaptation, in the background of each particular precaution, the acceptance of the debtor's difficulty in perform, and therefore the maturities should be postponed.

Conclusion

Consequently, the effect of the Covid-19 epidemic on contractual obligations should be evaluated on a case-by-case basis. In this evaluation; the possibility of the fulfillment of the performance that subject to the agreement in terms of time, place and cost should be examined. At this stage, the Covid-19 epidemic may lead to the impossibility of performance only in limited situations, therefore to end the debts and adaptation of agreements, especially in the sectors that are directly affected by the epidemic and related precautions, particularly those described in the Economic Stability Shield package. In the forthcoming days, secondary regulations would highly take place regarding the details and implementation of this package.

We will be following the developments within the process and would be delighted to answer any questions of our esteemed clients and friends about the matter.

King regards,

Gokce Attorney Partnership

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