

Coronavirus Disease

From The Perspective Of Force Majeur

Covid-19 Coronavirus (“**Coronavirus**”) disease, which first appeared in Wuhan/China by the end of 2019, then detected and quite rapidly spreading in Turkey, has been negatively affecting the commercial life. Potential difficulties, and even impossibilities, in fulfilment of the obligations under the contracts have brought into question the application of “force majeure”, which is a notion that exists under most jurisdictions. The main discussion is whether the Coronavirus disease can be treated within the concept of *force majeure* and how the performance of obligations under contracts will be affected.

We have assessed under this short note the legal consequences of Coronavirus disease from the perspective of the notion of “force majeure”.

1- What Does Force Majeur Mean?

Force majeure is a situation whereby the execution of the parties’ obligations under a contract becomes objectively impossible for reasons unpredictable to and out of the control of the parties. The Supreme Court has defined the *force majeure* in its decisions as follows: “*this is an extraordinary event that is not possible to predict and resist to and that results in the breach of the debtor’s obligation in an inevitable and absolute manner*”. Accordingly, even though the concept of *force majeure* has not been defined under Turkish laws, there is no disagreement in doctrine or Supreme Court precedents as to the definition and conditions of *force majeure*.

2- Qualification of Coronavirus Disease as a Force Majeur Event

Coronavirus disease has very rapidly spread around the World since the date it first appeared and has been defined as a “pandemic” by the World Health Organisation on March 11th, 2020. Coronavirus disease has caused such a global crisis that some European leaders see it as the most major crisis since the 2nd World War.

In Turkey, each day several measures are taken in order to fight against the Coronavirus disease, such as the closure of several workplaces, the curfew for over 65 years old persons, etc. From this perspective, the Coronavirus disease should be treated as an extraordinary event as previously defined by the Supreme Court.

3- Impact of Coronavirus Disease on Contracts

The existence of Coronavirus disease by itself will not result in application of *force majeure* provisions to each contract. In order to claim *force majeure* based on the disease, there should

be a causal link between the disease and the breach of the contract. In our view, force majeure will be applied to contractual relationship where it is determined that the performance of the obligation arising out of the contract became impossible. This will only be possible if an assessment is made for cases specific to each contract.

In cases where the contract between the parties includes a *force majeure* provision, this will be helpful and advantageous for the party affected by the *force majeure* event. However, we would like to underline that it is not necessary to have a *force majeure* provision in the contracts in order to make such claim. On the other hand, if the contract between the parties includes a *force majeure* provision, the relevant parties shall comply with the conditions thereunder, such as notification terms, deadlines, etc.

Concerning commercial contracts, in case the parties cannot comply with their obligations, the provisions on “impossibility of performance” under Article 136 of the Code of Obligations or provisions on “excessive hardship” under Article 138 of the Code of Obligations may apply, depending on the case. The determination of the applicable provision shall be subject to an assessment specific to each contract, based on its parties, execution date, qualification of the obligations, applicable law, place of execution and impact of the Coronavirus disease on the exercise of each party’s obligations. Any conclusions shall be made following such an assessment. Accordingly;

- a. in case the execution of an obligation becomes impossible, the parties’ obligation will be terminated based on impossibility of performance,
- b. in case, given the current circumstances, it will not be fair to expect the execution of an obligation by the debtor based on good faith principle, the affected party may request an adjustment based on excessive hardship. Here, the execution of an obligation is not impossible; however, the debtor would face a tremendous difficulty if s/he were to perform her/his obligations under the contract.

Since the existence of an unpredictable extraordinary event is required for the application of both provisions above, these provisions will not be applied in cases where the contract is signed after the emergence of the Coronavirus disease or once it was known to public.

4- Assessment Under Certain Contracts and Obligations

Having mentioned that an assessment shall made for cases specific to each contract, we hereby present a few examples under this Section concerning sale and purchase, supply, rent, service and employment contracts:

- Assuming that a product is imported from abroad under a supply agreement, in case shipment of the product from the relevant country is prohibited, this event shall be considered a *force majeure* event and provisions on impossibility of performance shall be applied.

- As sale of medical masks have recently been subject to prior approval with an administrative decision, if such approval is not obtained for a contract regarding exportation and sale of medical masks, the seller may rely on application of “impossibility of performance”.

- In a contract for work, if the raw material is imported from abroad and shipment of such material from that country is prohibited, this event will be considered a *force majeure* and provisions on impossibility of performance can be applied.

- In a sales agreement, the purchaser shall not benefit from impossibility of performance and shall not be able to refrain from executing the payment because of the nature of the payment obligation.

- Due to the Coronavirus disease, most people stay at home and the sales figures of many shops have decreased. The lessee of such shops may have difficulties in making the payment of the rent fees. This situation may be defined as an excessive hardship. In such case, the relevant lessee may request an adjustment of the rent fee for the term of the force majeure event. If the relevant shop is in a shopping mall and if shopping malls are closed based on administrative measures, the provisions on impossibility of performance can be applied.

- In case a store is temporarily closed based on the recommendation of the administration or based on the discretion of its owner, the rent payment obligation shall remain as it is for the term when the store is closed. In such a case, the provisions of excessive hardship may be applied depending on the circumstances of the case.

- In case stores are temporarily closed based on administrative measures, this will constitute impossibility of performance for the parties of the rent agreement. In such a case, the rent payment obligation of the lessee shall be suspended during the relevant period.

As for employment contracts; they will be subject to following practices/arrangements after an evaluation within the framework of employment legislation in effect:

- In case stores are temporarily closed based on administrative measures, Article 40 of the Labour Code may be applied. According to this provision, for the period up to one week where the employee did not work due to Coronavirus disease, it will be possible for the employer to pay half of its salary to the employee. If the non-worked period exceeds one week, both the employer and the employee shall have the right to terminate the employment agreement relying on the relevant provisions of Labour Code regulating the termination of employment agreements.

- In case a store is temporarily closed based on the recommendation of the administration or based on the discretion of its owner, as a rule, the employer's obligation to pay salaries to the employees shall remain as it is.

- Workplaces may decide on their own to take certain measures due to Coronavirus disease. Asking the employees to use their annual paid leaves, making the employees to take their unpaid leaves after first obtaining their consents and implementing remote teleworking (home office work) practice (as per article 14 of Labour Code) again after obtaining their consents are among these measures.

- It may also be possible for workplaces that meet the required legal conditions to implement short-time working practice at the workplace due to Coronavirus disease. Turkish Employment Agency declared on its website on March 22, 2020 that the Agency will accept short-time working applications based on periodical act of god caused by external events. Short-time working practice may be applied where weekly working hours at the workplace have temporarily decreased by at least one third or if the activities of the workplace have been fully or partially halted for at least four weeks (even if not continuously). In such a case, if the application of the employer is accepted by the Agency, short-time working allowance may be provided to the employees at the workplace from the Unemployment Insurance Fund for a period up to three months.

We wish that Coronavirus pandemic will disappear as soon as possible with fewest losses of lives. We wish you health and wellness.

Please do not hesitate to contact with us should you have any queries.