THE CORONAVIRUS PANDEMIC AS A FORCE MAJEURE EVENT

A. CORONAVIRUS PANDEMIC and ITS EFFECT AS FORCE MAJEURE

The term force majeure (mücbir sebep) is not specifically defined under Turkish statutory law but is considered, according to case law, to be "an extraordinary event, which has happened outside of the activity or business of the debtor or of the responsible person, could not have been foreseen and prevented, and caused in an absolute and unpreventable way breach of a norm of action or breach of an obligation. Natural disasters such as earthquake, flood, fire and **epidemic disease** constitute an event of force majeure" (Decision of the General Assembly of the Court of Appeal for Civil Law Matters, Decision dated 27.6.2018, 2017/11-90 E., 2018/1259 K).

Although the event of an epidemic disease is accepted as a force majeure event, each case must be evaluated separately based on its facts and the legal relationship. As the above quoted definition clearly states, in order to qualify as a force majeure event, the said event (in this case an epidemic disease) must be the reason for the breach of the contract and must have caused the breach in an unpreventable way.
The consequences of a force majeure event depend on the contractual stipulations and the facts of the case.

B. CONTRACTS WITH A FORCE MAJEURE CLAUSE

Many agreements contain a force majeure clause, which regulates the consequences of a force majeure event, in particular in the form of a right to terminate, an exemption from liability, and from duty to perform the contractual obligations. It is important to assess such clauses for each contract in order to identify the specific rights and duties (eg notification periods). Turkish courts evaluate the facts of each case and the provisions of the contract when they assess a force majeure case. It is important to note that force majeure events that do not have any impact on the contractual obligations are not relevant. Therefore, a separate assessment must be made taking into account the provisions of the contract and the impact of the Coronavirus pandemic as well as the official measures taken to combat against the Coronavirus (eg shutdown of the operations, quarantine measures, travel bans and restrictions) on the contractual obligations.

C. CONTRACTS WITHOUT A FORCE MAJEURE CLAUSE

If the contract does not contain a force majeure clause or if an epidemic or pandemic does not fall within the definition of the force majeure clause contained in the contract, the legal situation will be assessed pursuant to the rules under the applicable law. Under Turkish law, the rules on impossibility and hardship are relevant.

1. Impossibility

According to Article 136 of the Turkish Code of Obligations ("TCO"), if the fulfillment of an obligation becomes impossible for reasons not attributable to the debtor, the obligation expires. Services that have already been performed by either parties under such contract must be returned, and the transaction is effectively unwound. If the fulfillment of the contract becomes partially impossible (Article 137 of the TCO), the debtor is relieved from the performance of the part of the obligation that has become impossible, unless the debtor proves that the contract would not have been executed, had the partial impossibility been foreseen before the execution. In any case, the debtor must notify the impossibility as soon as possible and take all measures to mitigate the damages.

2. Hardship

Article 138 of the TCO provides for the adaptation of all types of contracts under the name "hardship". If an unexpected event, which was unforeseen and could not have been foreseen by the parties and is not attributable to the debtor, occurs and changes the circumstances at the execution of the contract to the disadvantage of the debtor in a way that the performance of the contract by the debtor would be against the principle of good faith, the debtor can claim:

- adaptation of the contract in accordance with the changed circumstances, or,
- if the adaptation is not possible, the debtor may revoke or cancel the contract,

provided that the debtor has not fulfilled his obligations or has performed his obligations by reserving his right arising from the hardship.

Because of the principle of pacta sunt servanda, the adaptation of the contract in accordance with the changed circumstances is the primary remedy and requires the intervention of a judge. Although revocation or cancellation does not require intervention of a judge, because the adaptation as the primary remedy requires the intervention of a judge and revocation or cancellation is only possible in case the adaptation is not possible, it is prudent to exercise the right to revoke or cancel the contract through court.

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