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**Abstract: This article discusses force majeure clauses and other legal remedies available under Turkish law in respect of the difficulties or inability in performing contractual obligations due to COVID-19 epidemic.**

**Difficulties or Inability in Performing Contractual Obligations Due to COVID-19 Epidemic**

The coronavirus (“COVID-19”) epidemic, which is seen globally and declared as “pandemic” by the World Health Organization, negatively affects national and international business life. COVID-19 makes it difficult for companies and commercial enterprises to fulfil their contractual obligations in Turkey, as well as around the Globe. Difficulty in performing these obligations occurs in a variety of ways, such as the inability to supply or deliver goods, the inability to perform services, or delays in such performances. We discussed below the legal remedies available under Turkish law to overcome these difficulties.

**1. In General**

Force majeure events can generally be described as events that occurred beyond the control of the parties that are; (i) unpredictable, (ii) unavoidable, and (iii) impossible to overcome or eliminate, such as, earthquakes, floods, natural disasters, terror, war, embargos, or pandemics etc..

There is not a clear definition of “*force majeure*” concept under Turkish law, and the law does not regulate the consequences of a force majeure event as a separate concept either. Nevertheless, there are certain legal remedies that can be used in cases of force majeure under Turkish law. We will describe these legal remedies in the following sections of our article.

**a. If there is a Force Majeure Clause in the Contract**

Although there is no clear regulation in the law, force majeure clauses are included in various contracts as valid and binding provisions. Force majeure events and their consequences may differ in each contract. Therefore, companies and commercial businesses should first make the following assessment in relation to their contracts:

- Is there a specific force majeure clause in the contract?
- If yes, are the epidemics such as COVID-19 defined as a force majeure event in such clause? (If the force majeure clause is defined by certain criteria and force majeure events are counted as examples, COVID -19 is more likely to fall under such definitions.)

If the answers to these two questions are yes, then the legal provisions of the contract will apply. However, in order to benefit from the force majeure arrangement, the force majeure condition must be notified to the other parties of the contract. Also, the provisions of a contract that transfers the risk on a certain party, or the provisions stating that the obligations of the parties will not be affected even though there is a force majeure event, will also be considered as valid and enforceable provisions under Turkish law.



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**b. If there is not a “Force Majeure” Clause in the Contract**

If there is not a “force majeure” clause in the contract, or if COVID-19 is not covered by the definition of the "force majeure event", the parties should make the following assessment:

- Is it possible to fulfill the obligations in the contract despite the COVID-19 outbreak?

If it is possible to perform the contractual obligations during the COVID-19 outbreak despite certain difficulties, the parties must perform the contractual obligations. Otherwise, the non-performing party would be considered to be defaulting under the contract. In such cases the parties cannot argue that COVID-19 caused an inability in performance of the contract, and the defaulting party may be required to pay compensation.

- Is it impossible to perform the contract, or are there partial impossibilities? Or is it extremely burdensome to fulfill the contractual obligations?

If the fulfilment of the contractual obligations due to COVID-19 has become partially or completely impossible, the parties may benefit from the legal remedies in Section 2 below. If the performance of the obligations is extremely difficult or burdensome, the relevant party may request from the judge to adapt the terms of the contract to the new conditions as explained in Section 3 below.

It is important to note that the legal remedies described below are general provisions available under Turkish Code of Obligations (“TCO”), and there may be special provisions in the law applicable to specific types of contracts. In such cases, these special provisions will prevail. For example, TCO provides more specific provisions for lease contracts and purchase and sale contracts. For this reason, it is important to make an accurate analysis by retaining professional legal support for assessment of the contracts and take action accordingly.

**2. Inability to Meet the Contractual Liabilities without Fault**

**a. Inability to Perform all Obligations under the Contract**

Article 136 of the TCO regulates the situations where the performance of the contract becomes completely impossible (after the execution of the contract), without the fault of the party which is unable to perform. Accordingly, if the contractual obligations of a party become impossible for reasons which cannot be attributable to the obligor, then such liabilities will terminate pursuant to Article 136 of the TCA. For example, destruction of the goods as a result of natural disasters, the closure of businesses such as restaurants and shopping malls due to the COVID-19 epidemic, or inability to perform export due to closure of borders can be given as an example to this.

However, as the performance of the debt becomes impossible, the party that is released to perform the liabilities cannot demand from the other party its corresponding receivable. If the party, which became unable to fulfil its obligations, has already collected its receivable corresponding to its debt, shall return back the money, assets or value to the other party. For example if certain medical equipment sold by Party A is confiscated by the government in Party A’s jurisdiction before they were delivered, and it becomes impossible for Party A to deliver these goods to the purchaser, Party B, Party A will be released from its obligations, but will not be able to collect the purchase price, or if already collected, Party A will be obligated to return back the purchase price.



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The party who suffers an impossibility to perform, shall notify the other party of the contract without any delay. He/She should also take the necessary precautions to prevent any increase in the damage.

**b. Partial Impossibility in Performance of the Obligations**

Fulfilment of the contractual obligations may become partially impossible due to reasons, such as COVID-19, that cannot be attributable to the obligor. In this case, the obligor can terminate the contract partially by using the remedy available under Article 137 of the TCO. In such a case, the other party's obligations such as payment obligations, will also be decreased on a pro rata basis. However, if it is clear that the parties would not have executed the contract if the partial impossibility was foreseen at the time of the execution, then the whole contract may be terminated as well. In this case, the Parties can benefit from Article 136 of the TCO as explained under paragraph (a) of this Section above.

**3. Excessive Aggravation of the Liabilities (Adaptation)**

Parties to a contract can benefit from "adaptation" if an extraordinary situation, which makes the performance extremely burdensome, arises after the execution of a contract, due to causes that cannot be attributable to the obligor. In such a case, the obligor may ask the judge to adapt the contract to the new conditions. The most typical example of this situation was experienced during the banking crisis in 2001, and the currency crisis in 2018 in Turkey. It was requested to convert debts in foreign currency, such as rent and loan debts, to Turkish Lira, and in many cases this request was accepted by the courts. If the contractual obligations of the parties become extremely burdensome due to COVID-19 outbreak, adaptation can be used to mitigate the difficulties. To be able to benefit from this concept, all of the following conditions must exist:

- An extraordinary situation that could not have been foreseen by the parties during the execution of the contract must have occurred:
- This extraordinary situation cannot be attributable to the obligor.
- The extraordinary situation must have changed the circumstances against the obligor to the extent that it would be against good faith to expect the obligor to perform its contractual obligations under such circumstances.
- The obligor must not have performed his obligations yet, or she/he must have performed them by reserving her/his rights arising due to excessive difficulty in performance.

If adaptation is not possible, the contract can be terminated, provided that the above four conditions exist.

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As a final note, COVID-19 outbreak may not necessarily be regarded as a force majeure event or a ground for benefiting from legal remedies explained above in all circumstances, and for all kinds of contracts. Each contract must be assessed on a case by case basis by considering, *inter alia*, the legal nature, content and obligations, and the parties of each contract by retaining professional legal advice.

Below is a chart that summarizes the above analysis:



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