

CORONAVIRUS IMPACT ON COMMERCIAL CONTRACTS

Following the outbreak and spread of the Coronavirus (Covid-19), we expect to see a flow of force majeure or similar claims in various types of commercial contracts, ranging from supply to sales and from construction to regular service contracts.

The term "force majeure" is not explicitly defined under Turkish legislation, and parties often contractually agree on a force majeure clause in their contracts typically as a part of a standard boiler plate. Where companies do not have such explicit contractual protection, the Turkish Code of Obligations may still provide certain relief for parties' performance of their obligations. Nonetheless, to evaluate and manage the impact of Coronavirus on commercial contracts, companies should consider carrying out an internal assessment of their existing contracts, and also adopting a strategy to negotiate the contractual terms of any future transactions.

What is a force majeure clause?

A "force majeure" clause is normally used to describe a contractual term by which one or both of the parties is entitled to suspend performance of its affected obligations or to claim an extension of time for performance, following a specified event or events beyond its control. It may also entitle termination of the contract, usually if it exceeds a specified duration.

WHAT IS EXPECTED?

Coronavirus's impact on particular transactions is not easy to analyse given the uncertainties. This does not, however, excuse companies from adopting plans and strategies around performance of their existing and future contractual obligations.

Given the potential impact on all sectors and businesses, we expect companies to first adopt an amicable approach and try to re-negotiate in order to have back-to-back arrangements across their commercial contracts to the extent possible (especially around timing, delivery and payment terms). A discussion as to what contingencies the parties should have is likely to be preferable to an unpleasant surprise later on.

As a part of these strategies, we also expect some companies to adopt a more aggressive approach, and trigger or test termination or force majeure (if any) provisions of their contracts at the outset in an effort to kickstart the re-negotiation of the commercial terms (such as pricing and timing).

WHAT SHOULD BE DONE AS AN INITIAL STEP?

There is an uncertainty as to the course that Coronavirus will take. As such, planning should be made to include how to handle existing transactions that may be at risk, as well as the protections required in transactions being negotiated now.

For the existing contracts, an internal due diligence would be useful to analyse the impact of the Coronavirus. Among others, particular focus should be on the following in due diligence:

- What are the termination conditions? Does any of the parties have a right to seek termination for convenience? If so, are there any notice periods to observe?
- Does the contract have a force majeure clause? If so, is the epidemic specifically covered as a force majeure event in the contract? Even if so, the contract may still require the satisfaction of other requirements to constitute force majeure.

- If epidemic is not specifically covered, is the event of a nature which would fall under general force majeure wording or has there been a government decision/administrative action preventing performance which meets the political interference language commonly included in definitions of force majeure?
- Does the contract have any change in law clauses? Parties may argue that Coronavirus controls imposed by law might fall within this type of clause.
- Are there any specific notice requirements in the contract? For instance, is there is a specific notice period as a contractual condition precedent to relief or not?
- What are the consequences of triggering the force majeure clause? Does it provide a relief from performance (i.e., avoid the risk of a default termination) and an extension of time to target dates? How the split of costs is designed in case the force majeure clause is triggered? Does the force majeure clause ultimately lead to termination, and if so what are the conditions for termination?
- Even if the commercial contract does not directly capture impact of Coronavirus, the contract itself may contain limitations on, or exclusions of, liability. Such limitations should be particularly assed as a part of the internal due diligence.

At this stage, negotiating the future transactions would be relatively easier compared to renegotiation of the existing contracts. How might Coronavirus affect your ability to perform your obligations, and what are the potential risks? (supplier dependency, availability of staff, timing etc.). Once the risks have been mapped out, the next step is to consider what contractual protections are required. For example, if the potential is for delay, at what point should delay have any consequences (e.g., financial consequences or walkaway right)?

WHAT IF THERE IS NO FORCE MAJEURE CLAUSE TO RELY IN THE CONTRACT?

It would not be surprising to see where some commercial contracts do not contain a force majeure clause or a specific one covering an epidemic. Where contracts do not have such protection, seeking a contractual relief based on force majeure might not be straightforward in practice, despite there are court precedents considering epidemics as force majeure events.¹ In such case, a specific case by case analysis would be required to ascertain whether a party would be entitled to make such contractual claim. On the other hand, Turkish law may still provide certain statutory relief for parties in relation to their performance of their contractual obligations in such an extraordinary case.

Under Article 136 of the Turkish Code of Obligation (the "TCO"), a party will not be obliged to fulfil its obligations, if the performance of the obligations becomes objectively not possible due to grounds that are not attributable to such party seeking such relief (*ifa imkansızlığı*). Having an explicit force majeure clause/event under the contract is not required to seek relief under Article 136 of the TCO, to the extent such event objectively makes the performance of the obligation impossible. In case of a dispute, and depending on the specifics of the particular case, party seeking the relief may be required to establish the causation between the event and the failure to perform the particular obligation. Nonetheless, for commercial contracts, utilising Article 136 of the TCO may not be clear cut as the Court of Appeals is rather inclined to apply a higher standard of proof raised by commercial parties.

The TCO also requires the party seeking such relief to make prompt notification to the counter party and adopt measures to mitigate the damages, failure of which would result in compensation of damages of the counterparty. Accordingly, parties should also observe notice and mitigation obligations in seeking such relief from the court.

¹ High Chamber of Court of Appeals had defined "*force majeure*" as extraordinary events, which are unforeseeable and unopposable, and result in absolute and unavoidable default in an obligation; and explicitly considered epidemics as a force majeure event, alongside earthquake, flood and fire (*High Chamber of Court of Appeals (Yargıtay Hukuk Genel Kurulu) 2017/1190 E. and 2018/1259 K.*).

The TCO also provides another hardship relief where the performance of the obligations does not become impossible but would be significantly cumbersome. Under Article 138 of the TCO, a party (i.e., the obligor) may seek adaptation of the terms of the contract considering the new conditions (or otherwise its termination) from the court, if an extraordinary event enforceable or not expected to be anticipated by the parties at the time of the contract:

- i. arises from a reason not attributable to obligor, and
- ii. changes the facts at the time of the contract in a manner detrimental to the obligor in so far that the obligor's performance of the obligation results in breach of the rules of honesty.

To seek such relief from the court, the obligor should either not have performed its obligations or performed its obligations by reserving its right to seek this relief.

CONCLUSION

Regardless of the remedies and reliefs available, preparation is key to overcome risks in a timely and cost efficient manner. Given that the global escalation of the Coronavirus pandemic has come at a critical time for businesses, companies should primarily consider conducting a case by case analysis of their existing commercial contracts, and map out the impact scenarios of available contractual and statutory protections and remedies; while also adopting pre-emptive strategies and plans to negotiate the terms of the future commercial contracts.

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