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BERKER BERKER

NEWSLETTER

COVID-19 SPECIAL ISSUE

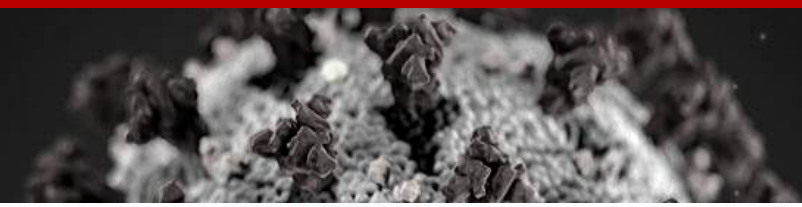
The Legal Ramifications of Covid-19 Under Turkish And English Law

The pandemic caused by the COVID-19 virus, which first emerged in Wuhan, China in late 2019 and spread all over the world, has had negative effects on a **global scale**. Although the governments have taken some precautions to prevent the spread of the disease **since January 2020**, when it was determined that the virus could be transmitted from person to person, the disease's balance sheet continued to get worse day by day. This was followed by the *World Health Organization* declaring the disease as a **pandemic** on **11th March 2020.**

After the declaration, the measures taken became stricter with many people resorting to quarantining themselves in their homes and many countries declaring a state of emergency followed by the issuance of a curfew to prevent the spread of the pandemic. With the postponements/ limitations of worldwide transportation, education, trade, industry, sports competitions, culture and arts activities, people's daily routines and regular human interactions were greatly affected. The pandemic bringing life to a standstill, has led to the need to **reconsider the legal transactions** between individual-individual, individual-company, company-company, and company-public.

The legal ramifications of COVID-19 are proving to be of great importance, especially for **ongoing business activities.** As this situation has made it impossible, or a great deal more difficult, to fulfil mutual rights and obligations in legal relations. On the other hand, the issue of determining **which party the financial loss shall be directed to** has put companies in an uncertain position and has threatened both the national and the international economy.

With the emergence of COVID-19, the economic uncertainty experienced all over the world has caused a legal debate on the performance of duties arising out of international agreements as well. It can be observed that companies operating in the international arena, such as banking, finance, construction, mergers and acquisitions or trade in Turkey has chosen **English Law** as the governing law as an alternative to Turkish



Law. In the event of a failure to comply with the rights and obligations arising out of contracts one must **also** look at the relevant provisions and legal norms of English Law when interpreting said contract.

In this regard, we have thought it appropriate to analyze the legal ramifications of COVID-19, both in terms of Turkish Law and English Law, in our **special COVID-19 issue** in collaboration with our respectable business partners **Marriott Harrison LLP** located in London, whom we give great thanks to for their valuable contributions thereof.

You may reach the **Berker Berker** legal team from the contact information listed below regarding any questions you may have on this matter or you may reach the **Marriott Harrison LLP** team for a more detailed explanation on English Law.

With our sincere wishes for healthier days for all,

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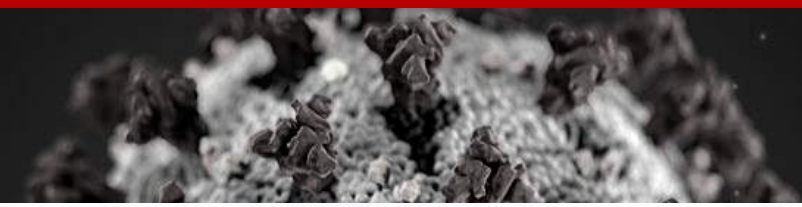

The Effects Of Covid-19 To Contracts Under Turkish Law

Companies that make mutual and appropriate declarations of intent and bring about mutual debt and obligation with the contracts they make in order to ensure a certain legal outcome, are obliged to fulfil their mutual debts and obligations **as long as the contract remains.** However, in some cases, it may be possible that the fulfilment such obligations have become **unexpectedly difficult** or **impossible** for said parties. This situation may arise out of a legal reason, a person's act as well as from a natural event.

When observing the effect COVID-19 has had on the world, it can be seen that almost all commercial relations which started **before** the pandemic, has become **impossible** or has faced **severe interruptions** during this period. As a result of the deterioration of the supply chain of goods and services, the imports and exports between countries, the restrictions on trade, delays in the completion times of the construction, problems in the tourism and retail sector compels us to **re-evaluate** the contracts signed between the Parties within this scope.

According to the **Turkish Code of Obligations** (**"*TCO*"**) principles, the effects of COVID-19 on contracts shall be determined according to **the results it creates**. Namely;

1. Where the resulting situation has made the fulfilment of obligations **completely or partially impossible** in the relationship between the parties, in other words, given that the parties are no longer able to fulfil their actions due reasons not attributable to the parties, the **"impossibility of performance"** regulated under Articles **136** and **137** of the TCO shall be applicable and the debt shall be considered to have **expired.** However, in order to reach such a conclusion it will be absolutely necessary for the debtor to have **no fault** in this regard. Supposing that the debtor is in fault, then the debt shall continue, and the debtor will bear the obligation to compensate for the loss of the creditor. The lawmaker, on the other hand, stipulates that in the event of the debt expiring, any act/performance received from the other party must be **returned** and the r**ight to request unfulfilled acts shall be lost** (*TCO Art.136*). In some cases, the impossibility of performance may be **partial** in which case, the debtor will only be released from the part of the debt that has become impossible, granted that it could be clearly understood **from the circumstances of the case** whether the party was able to predict this situation beforehand, such a contact would not have been made, then the party shall be able to be **released of the debt in whole.**

2. On the other hand, where initially it was possible for the parties to fulfil their obligations arising out of the contract or a commercial relationship, but due to reasons which can **not be attributable to the debtor** (for example, an extraordinary situation which was **not and could not be expected to be foreseen** by the parties at the time of the contract), the concept of ***"hardship"*** shall arise (*TCO Art. 138*) In this case, adapting the terms of the contract to the new situation or in the event that such is not possible, the rescission or termination of the contract shall be possible. In *continuous performance contracts*, the debtor shall use the right to terminate, as a rule, **instead** of the right of rescission.

The concept, referred to as **"hardship"** in the TCO, mostly comes into question with terms such as ***"force majeure"*** and ***"frustration".*** In fact, although the concept of hardship is stipulated in **Article 138** of the TCO the situations which causes this **has not been defined individually** in the law, but it is possible to make a general definition in light of the decisions made by the Turkish Supreme Court and the consequences attached to such an event under special laws. In accordance with the Turkish legal doctrine, also adopted by the Supreme Court, the concept of *force majeure* can be defined as:

"...an unexpected event unavoidable by any means or persons that occurs outside of the activity and operation of the debtor, which leads to the violation of a general norm of behaviour or debt in an absolute and inevitable manner, which cannot be foreseen and resisted. Natural disasters such as earthquakes, floods, fires and ***epidemics*** *are considered as force majeure events."*

When looking at the definition as a whole it can be argued, provided that the event in question meets the hereinafter laid down criterions, then it could be defined as a *force majeure* event under Turkish Law:

1. The event must be due to reasons **not attributable to the party/parties**, which has occurred outside of the activity and operation of the debtor.
2. The event must be **impossible to foresee or to prevent.**
3. The event must **inevitably and certainly prevent** the party/parties from fulfilling their contractual obligations.
4. A **casual link** between the event and a failure to comply has been established.

Conclusion

In light of these explanations, it seems possible to characterize the Covid-19 outbreak as a *force majeure* event under Turkish Law. As the occurrence of the pandemic and its impact on life and human activities evaluated together, shows that the conditions sought for *force majeure* has been met. However, the effect this situation will have on contracts and the results accordingly, will need to be considered on a **case-by-case** approach by evaluating the rights and obligations of each Party and whether the COVID-19 outbreak causes impossibility of performance or hardship in fulfilling such obligations.

With the current situation of the world and the effects COVID-19 has on businesses it will be useful to keep in mind the following points of discussion with your respective in house counsel or other law firms;

- Determining the effects and consequences of the pandemic in your company. *(Commercial contractual obligations, employee-employer relations, disruption in supply chains, lease contracts, financial liabilities, tax liabilities, current litigation/follow-up processes etc.)*

- Taking the necessary actions in a timely manner in order to prevent/minimize the harm caused by the pandemic. *(Amending contracts, preparing notices, organizing the litigation and enforcement proceedings for after 30 April 2020, etc.),*

- Reviewing the entire process in depth in order to be prepared in case a similar situation in the future arises.

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Force Majeure and Frustration of Contracts Under English Law

The Covid-19 pandemic has had an unprecedented impact on every aspect of life, including the ability of many parties to perform their contracts in the way intended. With some contracts being more difficult, if not impossible, to perform questions arise as to whether the contracting party in difficulties can rely on a force majeure clause in the contract or, if not, whether the doctrine of frustration is applicable.

Force majeure

Many contracts include a force majeure clause which may entitle a party to be relieved of the consequences of its breach of contract in the event that certain extraordinary events or circumstances have prevented or hindered performance of the contract. The scope of each force majeure clause will turn on its particular wording. Force majeure clauses generally list specific events such as wars, hurricanes, acts of government, epidemics, pandemics, etc.

If a clause specifically mentions a “pandemic” then the Covid-19 outbreak would be an event covered by the clause. If a clause refers to “acts of government” then this could potentially cover the lockdown rules introduced by the UK Government to stop the spread of the virus.

Force majeure clauses may also include sweep- up wording which refers to events “beyond the parties’ reasonable control”.
In view of the unprecedented nature of the outbreak, and the uncertainty surrounding the UK Government’s response to it, it is possible that the courts may take a lenient approach in their interpretation of this wording so as to cover the current situation.

However, it is not enough that the particular event is specifically referred to in the clause. The party’s ability to perform must also be hindered or prevented such as to satisfy the particular requirements of the clause. If the force majeure clause specifies that the force majeure event must “prevent” performance of the contract, the performing party will need to demonstrate that it is physically or legally impossible to perform the obligations under the contract. This is a high standard. By contrast, if more lenient wording is used eg. that the force majeure event “hinders” or “delays” performance, the performing party can invoke the force majeure clause if performance is substantially more onerous. In either case, however, unprofitability and increased expense in performance are unlikely to be sufficient to pass the test.

A party trying to invoke the force majeure clause must demonstrate that it has taken all reasonable steps to avoid or mitigate the event and its effect on the party’s contractual performance, even if those steps are commercially more onerous and expensive.

The force majeure event must be the cause of the inability to perform or the delays in performance. If the force majeure event is not the sole cause for the failure to perform the contractual obligations and there is a further reason for this, then a party will be precluded from relying on the force majeure clause.

Depending on the wording of the clause, a force majeure clause may suspend the obligations under the contract while the force majeure event exists and may remove the liability of the non- performing party for non-performance or delay of performance.

Frustration

If a force majeure clause cannot be relied on, the doctrine of frustration may be considered. This doctrine applies very narrowly and is not readily invoked by the courts as it operates to terminate the contract.

It applies where, after the formation of the contract, an unforeseen event occurs, at no fault of either party, that renders further performance of the contract impossible, illegal or something radically different from what was contemplated by the parties when they made the contract. The foreseeability test is objective which means that if a reasonable person could have foreseen the event, even if the parties had not actually foreseen it, the doctrine of frustration may not be relied upon.

It is arguable that an epidemic or pandemic is not unforeseeable, given previous recent epidemics. However, the measures put in place by governments all over the world are unprecedented and may well satisfy the unforseeability test.

Straightforward examples of frustrating events include impossibility of performance as a result of physical destruction of the subject matter (eg. destruction of a concert hall which made the performance impossible); illegality; destruction of the common purpose of both parties eg. the so called “coronation cases” in which contracts became devoid of purpose after King Edward VII’s coronation celebrations were cancelled due to his illness; and impracticability where the performance of the obligations is still possible, but it imposes a burden far beyond and quite different from that contemplated at the time of contracting.

Conclusion

Force majeure and the doctrine of frustration may be available to parties in view of the unprecedented set of circumstances and the unexpected global governmental response due to Covid-19. In some instances, parties might want to seek a more collaborative approach before relying on force majeure clauses and frustration. Parties should seek prompt legal advice as to the best way forward in the current circumstances.

Marriott Harrison LLP