

EVALUATION ON THE IMPACT OF COVID-19 PANDEMIC WITHIN THE CONTEXT OF FORCE MAJEURE

COVID-19 (Coronavirus), which has been detected in December 2019 in Wuhan China, has spread to 110 countries as of 10 March 2019 and became a substantial threat to human health and life. The concerns regarding the virus manifest itself primarily in the areas of health, social life, economy and international trade.

Undoubtedly, the biggest debate and issue that will arise in the field of law shall be the question of **how the coronavirus may affect the fulfillment of contractual obligations and whether it may be considered as a case of force majeure to that aim.**

Article 136 of the Turkish Code of Obligations regulates the impossibility of performance concerning the termination of the obligation in cases whereby the performance of the obligation becomes impossible due to reasons that the obligor/debtor cannot be held responsible for. The provisions regarding the impossibility of performance may generally be applied in cases where a force majeure may occur. However, the concept of “*force majeure*” has neither been defined by the Turkish Code of Obligations nor any other legislation.

In the legal doctrine, it is generally defined as an imperceptible, irresistible occurrence that was unforeseeable at the time of the execution of the contract, and that prevents the fulfillment of the obligation undertaken. The existence of force majeure depends on certain conditions. Such conditions may be listed as follows;

- a) The party claiming force majeure shall not have caused the force majeure by its own fault,
- b) The force majeure shall make the performance of the commitment impossible,
- c) It shall be impossible for the party claiming force majeure to prevent the force majeure,
- d) The grounds for the force majeure to be put forward shall be found sufficient in consideration with the circumstances of the relevant case.¹

The Supreme Court has defined force majeure in one of its decisions, numbered 2018/1259 and dated 27.06.2018 as follows; “*an extraordinary event that cannot be foreseen and resisted and which leads to the absolute and inevitable breach of the performance or obligation of the obligor or the debtor.*”

Additionally, the cases, which shall constitute force majeure, have been listed in Article 3 of the Force Majeure and Hardship Clause published by the ICC (“International Chamber of Commerce”) in 2003. An epidemic is one of such cases.

¹ Prof. Dr. Turan YILDIRIM, “*Danıştay Kararlarında Mücbir Sebep Kavramı*”, Marmara University Law School Journal of Legal Researches, Volume 25, No. 2, Page 3.

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e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought.²

It has also been indicated that natural disasters such as earthquakes, floods, fires and epidemics shall be considered as force majeure in a decision of the Supreme Court dated 27.06.2018.³

As such, while it may be considered that the Coronavirus, which has taken the entire world under its influence, may be regarded as force majeure in general terms, it shall be beneficial to evaluate the more concrete approaches of the Supreme Court related to the issue.

Likewise, the Supreme Court in a decision dated 2016, rejected the defendant's claim that the bird flu constitutes force majeure on the following grounds; *"this defense shall not be admitted given the content of the agreement between the parties and given that the parties are merchants, and that the impact of the events are limited."*⁴

However, we believe that the spreading rate of the Coronavirus, its easily transmissible nature, and the consequent rate and rigidity of the measures taken shall prove that *"the impacts of the event are NOT limited"*.

According to the World Health Organization's report dated March 11, 2020 and numbered 51, Coronavirus cases has occurred in a total of 110 countries. According to the data disclosed to the public; 80955 people in the People's Republic of China, 7755 people in the Republic of Korea, 10149 people in Italy, 8042 people in Iran, 1774 people in France, 1296 people in Germany, 1629 people in Spain and 373 people in the UK were diagnosed with Coronavirus. 4292 people have died and 118.312 people have been diagnosed with Coronavirus around the world.⁵ Immediately following this situation report, in March 10 and March 11, Congo and Turkey also reported confirmed cases.

In order to prevent the spread of the Coronavirus, many universities and international organizations such as the Council of Europe and the World Trade Organization have canceled their meetings and events. Travel restrictions and quarantine practices were imposed to individuals. Companies are experiencing difficulties especially in the supply chain and production processes. In an article published on the basis of an evaluation⁶ by the

² International Chamber of Commerce, Force Majeure Clause, 2003: <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>.

³ Supreme Court decree dated 27.06.2018 and numbered 2018/1259

⁴ Supreme Court, Civil Chamber No. 23 decree dated 11.02.2016 and numbered 2016/719

⁵ World Health Organization, Coronavirus Disease Situation Report: https://www.who.int/docs/defaultsource/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_6.

⁶ OECD, "Interim Economic Assessment Coronavirus: The world economy at risk", 2 Mart 2020, <http://www.oecd.org/berlin/publikationen/Interim-Economic-Assessment-2-March-2020.pdf>.

Organization for Economic Co-operation and Development of the European Union (OECD), the impact of the Coronavirus to the world economy is estimated to be 2.7 trillion USD.⁷

Coming back to the topic of our information notice; it has been stated in an announcement⁸ by the Turkish Republic Ministry of Trade dated March 6, 2020 that the Coronavirus pandemic is being considered as force majeure within the scope of the package tour contracts pertaining to the countries that have discontinued flights and have official warnings issued against travel due to the Coronavirus pandemic.

This matter lays down the existence of force majeure regarding the impossibility of the performance of the contract or the extreme danger present for human health as a result of state practices to protect public health. Additionally, the existence of a force majeure may be claimed in cases where the occurrence of a travel ban makes it impossible to perform the personal performance (*persona intuitae*) within service agreements.

Consequently in our opinion; the Coronavirus pandemic shall be regarded as force majeure in contractual relationships where the *“the fulfillment of the contractual commitment is prevented as a direct result of the pandemic”*.

Kindest Regards,

Koyuncuoğlu & Köksal Law Firm

* As the explanations given in our newsletter are prepared pursuant to the legislation in effect in the Republic of Turkey and the disclosures made to the public by the relevant official authorities, in case of uncertainty, we advise you to seek advice and support from us before the final transactions are carried out. Otherwise, our Law Firm cannot be held responsible for the actions to be taken on the basis of the explanations contained herein and the consequences of such actions.

⁷ Bloomberg, “Coronavirus Could Cost the Global Economy \$2.7 Trillion. Here’s How”, 6 Mart 2020, <https://www.bloomberg.com/graphics/2020-coronavirus-pandemic-global-economic-risk/>.

⁸ Turkish Republic Ministry of Trade, “The Announcement Regarding the Cancellation of the Package Tours Due to the Coronavirus”, March 6, 2020, <https://ticaret.gov.tr/haberler/bakan-pekcanan-koronavirus-nedeniyle-paket-tur-iptali-aciklamasi>.