

# Supreme Court view on adapting contracts due to fluctuation in currency exchange rates

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### Introduction

Under Turkish law, contracting parties should be bound by the terms and conditions of the contract under the sanctity of contract principle. However, following the conclusion of a contract, a change in circumstances may affect the performance of contractual obligations and applying the sanctity of contract principle could be against the principle of good faith.

Turkey has recently faced higher currency exchange rates, which has raised the question of whether this increase constitutes a change in circumstances that affects the fulfilment of contractual obligations.

### Relevant legislation

Under Turkish law, if parties cannot agree on a revision of the terms and conditions of a concluded contract, they are entitled to apply to the courts and request the adaptation of the contract in view of the new circumstances as per Article 138 of the Code of Obligations, provided that the following conditions are met:

- An extraordinary event which was not anticipated or could not have been anticipated when the contract was concluded should have occurred.
- The party requesting adaptation should not have caused the extraordinary event.
- The extraordinary event should have changed the circumstances to such an extent that requesting performance of the contract would violate the good-faith principle.
- The party requesting adaptation should not yet have performed its obligation.

As per Article 138(2) of the Code of Obligations, the article also applies to foreign currency debts.

### Supreme Court view

Pursuant to Supreme Court precedents, for a court to accept an adaptation request:

- the new conditions must be extraordinary and objective;
- the obligations of both parties must be excessively and explicitly imbalanced due to changing circumstances and conditions;
- there should be no provision in the contract stating that one of the parties undertook the risk that arose due to the changing circumstances and conditions;
- the party that requests the contract adaptation should not cause the changing circumstances and conditions; and
- the changing circumstances and conditions should be unpredictable or unexpected.

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The party that requested adaptation must prove that the abovementioned conditions have been met. If the court determines that the conditions required for adaptation have been met, it may decide to revise the content or term of the contract. If these revisions are insufficient to balance the performances of the parties, the court may decide to terminate the contract.

Long-term lease contracts and foreign exchange loan agreements constitute the majority of the Supreme Court's precedents regarding adaptation requests. For adaptation requests based on the higher currency exchange rates, the Supreme Court has contradictory precedents. In some of its decisions, the Supreme Court overruled the decision of the first-instance court due to the insufficient examination of whether the exchange rate fluctuation had caused an unpredictable event. There are also precedents where the Supreme Court has refused adaptation requests by stating that the fluctuation in currency exchange rates is predictable when the economic structure and dynamics of Turkey are considered.

### **Comment**

The contradictory nature of the Supreme Court's precedents has been criticised by scholars who argue that:

- each case should be based on its own circumstances; and
- it must be decided whether the fluctuation in currency exchange rates is an unpredictable event for the contract in dispute.

It appears that the recent higher currency exchange rates in Turkey will increase the number of adaptation requests before the courts. As there is no settled Supreme Court precedent regarding whether a fluctuation in currency exchange rates requires the adaptation of contracts, first-instance courts will need to examine the circumstances of each case.

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