

IMPACT OF CORONAVIRUS ON CONTRACTS AND FORCE MAJEURE

The Course of Coronavirus Outbreak and Its Economic Impacts

Coronavirus, first seen in December 2019 in Wuhan, China, and causing Covid-19 (coronavirus disease), has spread to all continents except Antarctica and 127 countries in as little as three months, and as of the date of this article, the number of confirmed coronavirus cases worldwide has exceeded 134.000 while the number of deaths has exceeded 4.900. On March 12, 2020, World Health Organization declared coronavirus outbreak a global pandemic. Two days after Turkey announced the first coronavirus case on 11 March 2020, the second case was confirmed by the Ministry of Health. Turkey has already temporarily closed border crossings with Iraq and Iran and temporarily halted flights to countries where number of coronavirus cases are high, such as China, Italy and South Korea.

Forced measures taken as a result of the unexpected rapid spread of coronavirus have affected various sectors and trade relations around the world. It seems that the closing of border crossings, blocking of transportation and stopping the activity of factories and businesses in countries where the virus is concentrated may have serious economic consequences, especially for companies dealing with tourism, export and import. Although experts say that it is too early to measure the economic impact of the outbreak in the upcoming period, it is being discussed that a possible slowdown in the Chinese economy, in particular, could cause the global economy to slow down.

The debate about the current and future economic impacts of coronavirus outbreak brings to mind questions about whether the outbreak should be considered as force majeure in terms of contractual relations with customers and suppliers, and whether failure to perform obligations due to the outbreak would constitute a breach of contract.

Can the Coronavirus Outbreak Constitute Force Majeure in terms of Contractual Relations?

Since the definition and principles of force majeure are not stipulated in Turkish legislation, doctrine and Court of Appeals precedents set the framework for the scope of implementation. Given the relevant Court of Appeals precedents, it can be said that the existence of force majeure is assessed individually in each concrete case and is generally -especially in terms of merchants- narrowly interpreted. However, the conditions for an event to be considered as force majeure can be listed as follows within the framework of the doctrine and the decisions of the Court of Appeals:

- The event that constitutes force majeure should take place outside the control areas of the parties,
- It should not be possible to foresee force majeure at the date of commencement of the legal relationship or to predict that the concrete effect of the event should be so great even if the event is foreseen,
- The party should fail to prevent force majeure from making the performance of the contract impossible despite all measures being taken, and
- The related event should be stipulated as force majeure in the contract.

In addition to these fundamental criteria, the Court of Appeals also considers criteria such as whether the alleged force majeure event is effective throughout the country, its impact on similar legal relationships and whether the parties are merchants.

In Turkish law, in the case of a situation, such as force majeure, which makes it impossible for one of the parties to perform its obligations, Article 136 of the Turkish Code of Obligations (“TCO”) relating to the impossibility of performance will be applied. In accordance with the said article, if the performance of the debt becomes impossible due to reasons for which the debtor cannot be held accountable, the debtor shall be released from its obligation. In this case, there will be no breach of contract.

As of today, there is no official declaration, announcement or promulgation stating that coronavirus may constitute force majeure in Turkey, nor is there a Court of Appeals decision. Nevertheless, it must be acknowledged that coronavirus is spreading at a more unpredictable rate worldwide compared to other epidemics such as swine influenza and avian influenza, which have been the subject of the Court of Appeals current decisions. Therefore, it may be considered as force majeure in terms of companies and individuals that are in commercial relations with the countries affected by the outbreak to a large extent especially like China, Iran, South Korea and Italy. However, as mentioned above, the Court of Appeals renders decisions on the basis of each concrete case when evaluating force majeure; also the circumstances of the case and the provisions of the contract between the parties shape the Court of Appeals assessment to a large extent. In particular, the Court of Appeals seems to place great importance on how force majeure is defined in the contract and what kind of events it covers when it comes to merchants who are expected to act prudent in all cases.

If the impacts of coronavirus are not considered to reach the extent of qualifying as force majeure, requesting adaptation of the contract from the court within the scope of the Article 138 of the TCO may also be one of the options that can be applied for the healthy maintenance of commercial relations.

Conclusion

Although it is on the agenda of the whole world, it is not possible to foresee the effect of coronavirus on contractual relations in the current situation and to make a clear comment on whether it can be considered as force majeure, as coronavirus is a very new issue and there is no case law on it yet. Nonetheless, it would not be wrong to say that the course of coronavirus has progressed differently compared to other epidemics subject to case law. Therefore, the way in which the force majeure clause of the agreement is written and the characteristics of the concrete case will be important in case of possible disputes and will determine the chances of success in the trial.