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CORONAVIRUS: AN EVALUATION OF POSSIBLE LEGAL CONSEQUENCES OF THE PANDEMIC AND RELATED PRACTICES

The Coronavirus (Covid-19) pandemic, which emerged in China and spread to almost all countries in the past month, shows its effects on masses around the world and inevitably has negative impacts on our daily lives. These impacts are not due to the existence of the Coronavirus outbreak alone, but also the practices carried out by the countries for precautionary purposes in connection with this outbreak. Various practices such as quarantines, closure of country borders, import-export bans and travel bans are being adopted by more and more countries each day.

In parallel with precautions adopted by many countries, Turkey suspended flights to and from China, Iran, Iraq, the UAE and many European countries, closed some of its borders. Schools, universities, kindergartens and daycare centers are closed for the second half of March. The Ministry of Interior has recently decided to close nightclubs, bars, gyms, spas, cafes, tea gardens, cinemas, wedding halls, show centers and many other public places until further notice. Personnel employed in public institutions and agencies, who are breastfeeding or expecting a child, suffering chronic diseases or over the age of 60 are given paid leave, and this constitutes a precedent for most private entities.

While these globally adopted precautions are believed to be vital to prevent the Coronavirus' spread, they inevitably result in undesired consequences in many aspects of our lives. Among many of those aspects, in this bulletin, we will briefly touch upon the impacts on commercial relations and employment related matters, commenting on their legal consequences.

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I. COMMERCIAL RELATIONS

As a result of the practices carried out by several countries for precautionary purposes in connection with the Coronavirus outbreak, it may become difficult or impossible for parties to fully and/or timely perform their obligations. While it is undisputable that such practices have negative effects on commercial relations, to evaluate their possible legal impacts, two exceptions of the "*pacta sunt servanda*" principle must be well understood: Force majeure and hardship.

1. Force Majeure

In Turkish law, force majeure is fundamentally shaped by court precedent and scholarly opinion. The Cassation Court defines force majeure as "an unexpected, external, inevitable event that (i) occurs without the control/will of the debtor, (ii) cannot be prevented despite any measures to be taken by any of the parties and (iii) prevents the obliged party from performing its obligation(s)" and "an unavoidable phenomenon that cannot be perceived by the parties, in general". In its recent decisions, however, the Cassation Court examines whether the situation in question constitutes a force majeure for each case rather than rendering an explicit definition of the state of force majeure. In Turkish doctrine, force majeure is generally defined as an external event which (i) is objectively impossible to avoid or eliminate and (ii) prevents the relevant parties' performance of their contractual obligations.

Although the state of force majeure is not expressly regulated under Turkish law, Article 136 of the Turkish Code of Obligations regulates the "impossibility of performance", which is a reflection of force majeure. Article 136 provides that, if the performance of an obligation becomes objectively impossible due to any reason that is not attributable to the debtor, the obligation ceases to exist. If the contract in question includes mutual undertakings, the party that is released from its performance obligation due to the impossibility must return the act performed by the counterparty and, furthermore, it may not require the counterparty to perform its obligation anymore. However, the debtor whose performance is hindered, must inform the counterparty without delay and take any necessary precautions to prevent any increase in damages. Otherwise, that debtor will be liable to indemnify the counterparty's damages.

According to most scholars, a debtor will be released from its contractual obligations, if the force majeure event in question makes the performance of its obligations completely impossible. Accordingly, if there are alternative ways for performance, the debtor may not avoid its obligation by relying upon the force majeure event *per se*. In addition, if the impossibility is temporary and the timing of the performance is not of essence in the contractual relationship, the debtor's obligations must be deemed postponed, but not ceased.

Furthermore, Article 137 of the Turkish Code of Obligations provides that if performance of the debtor's obligation becomes partially impossible due to any reason that is not attributable to the debtor, the debtor will only be released from the relevant part of its obligation. However, if it is clearly understood that such contract would not have been executed if the parties had foreseen

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the partial impossibility before, then the entire obligation ceases. If the contract in question includes mutual undertakings, the counterparty's consent for partial performance is sought. Accordingly, if the affected debtor's counterparty consents to partial performance, then this counterparty itself will also be liable for proportionate performance of its obligation under the contract. However, if the affected debtor's counterparty does not consent to partial performance or the partial performance is not practically possible, then the entire obligation ceases to exist.

While dealing with force majeure in the context of a commercial relationship, if there is an underlying contract, that contract's force majeure provisions (if any) should also be taken into consideration. Such provision should be evaluated together with the concept of force majeure described in doctrine and regarded as a guideline on how to deal with the force majeure event at hand.

2. Hardship

In some cases, the performance of the debt may not be impossible, but it may have become very difficult and may have brought a much more severe financial burden than the performance of the contract. In this case, instead of force majeure the concept of "hardship" regulated under Article 138 of the Turkish Code of Obligations may be applicable. According to Article 138, if an unforeseen and unforeseeable extraordinary event that is not attributable to the debtor occurs and adversely changes the circumstances that existed at the time of the contract's execution, and so the debtor can no longer be reasonably expected to perform its obligations as designated under the contract, the debtor can request from the competent court adaptation of the contract to such new circumstances. The debtor must exercise this right either before its obligation becomes due or after performing its obligation, by reserving its right to request adaptation. If adaptation is not possible or relieving, then the debtor can terminate the contract.

II. EMPLOYMENT RELATED MATTERS

1. Employer-Employee Relations

Many employers, either at their own discretion or based on a governmental decision, have been temporarily closing their businesses for an unforeseeable period, due to the Coronavirus outbreak.

When employers close their businesses at their own discretion, or due to governmental decision, their obligation to pay wages to employees continues. In this case, the following actions may be considered by employers to alleviate their obligations towards employees:

(a) Use of Annual Paid Leave

In principle, employees are required to submit their annual leave requests to the employer and the employer is entitled to evaluate this request based on operational grounds. That said, there is no uniform regulation that allows employers to force employees to use their annual paid leaves. Although one might argue that employers may force employees to use

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their annual leaves within the scope of the employer's management right, by considering the present conditions and uncertainty of the matter, this practice would not be in line with Turkish Labor Law's general employee friendly approach, thus employees' consents need to be sought. In addition to the general rule, the collective annual leave concept set forth under the Regulation on Annual Paid Leave allows employers to assign all / certain employees to use their annual leave days within a period between April and October. We recommend employers to obtain their employees' written consents for use of annual leave days until the end of March, and assign employees to use their remaining annual leave at their discretion after of April.

(b) Use of Unpaid Leave

Turkish law requires the employee's request for using unpaid leave. If this cannot be the case, scholars almost unanimously opine that employers are at least required to obtain the employee's written consent to this effect.

(c) Make-Up Working System

Under the Turkish Labor Law, if a business' operations are suspended due to a force majeure event, the employer can request performance of overtime work in the form of make-up work. The make-up work must be performed within two months following the suspension of work. The employer can designate the make-up work dates and must announce these dates to the relevant employees. The make-up work to be performed in addition to the regular daily working hours cannot exceed three hours daily and, in any event, the total hours worked on the relevant day cannot exceed 11 hours. In addition, an employee may not be forced to perform make-up work during holidays.

On 18 March 2020, President Recep Tayyip Erdoğan declared that, within the scope of the recently unveiled Economic Stability Shield, the term for make-up work will be increased from two months to four months, to maintain continuity of employment. A legislative temporary amendment is also expected in this respect.

(d) Short Term Working

Employers may assign their employees to short term working arrangement for up to three months, if the working hours (whether in the entire workplace or part of it) are temporarily reduced for at least 1/3 or the operation is completely or partly ceased for at least four weeks (without seeking the continuity condition) as a result of a force majeure event. In this case, the employer is required to apply to the Turkish Labor Agency, submitting the grounds for the force majeure event. If the Turkish Labor Agency approves the employer's request, employees may be entitled to receive short term working allowance from the Turkish Labor Agency. This allowance is calculated based on 60% of the employee's daily income and in any event cannot be more than 150% of the minimum wage.

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Along with the possible actions applicable for employers that temporarily shut down their businesses at their discretion, Turkish law also provides alternatives for force majeure events. The Cassation Court's jurisprudence indicates that, in the context of employment law, epidemics/pandemics constitute an event of force majeure to the extent they prevent continuation of work (*e.g.*, regional quarantines or imposition of curfew). In this respect, to the extent the Coronavirus pandemic or related practices prevent continuation of work, the employer is obliged to pay only half of each employee's salary for the first week following the occurrence of the event. If the force majeure event lasts longer than a week and it is not possible for employees to come to work, both the employer and employee are deemed entitled to terminate employment with just cause (by making their severance payments). That said, considering the sensitive state of mind and social uncertainty that surrounds the legal aspects of the ongoing outbreak, we recommend employers to consider termination as a last resort, even in the event of a force majeure and to try to proceed with the aforementioned alternatives as much as possible.

2. Personal Data Protection

In order to avoid the Coronavirus pandemic and adopt necessary precautions, many employers request information from their employees on their travel and health status. Under the Turkish Personal Data Protection Law, travel data requested from employees are classified as personal data while data on health status are classified as sensitive personal data.

Within the scope of the occupational health and safety legislation, it is critical for the employer to know whether employees have travelled to any risky country, in order to take the necessary measures. The employer, within the scope of its legal obligations, can process such personal data without the employee's consent. However, personal data processed in this way must be processed in accordance with the general principles of the Turkish Personal Data Protection Law, kept confidential and stored exclusively in connection with the stated purpose under the Law.

The data related to the health status of the employees (such as disease symptoms, health report or test results) are classified as sensitive personal data and can only be processed by authorized individuals, institutions and organizations to protect public health, without obtaining the data subject's explicit consent. Accordingly, it would be appropriate for the occupational physician to process the employees' health data and inform the employer about the measures and precautions that can be taken. In the absence of an occupational physician, the employees' express consent must be obtained.

III. CONCLUSION

If the difficulties, incurred by the parties of a commercial relationship due to the Coronavirus precautions, cause parties to become unable to fully and/or timely perform their obligations, the focal point of the legal assessment would be whether there is a legal justification for the non-performance. In this regard, whether the difficulties in question constitute force majeure or

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hardship, can only be evaluated by considering the nature of the debt forming the subject matter of the commercial relationship and the special provisions of the relevant contract. This is only possible by conducting a rigorous examination of each incident. Accordingly, it would not be right to say that the Coronavirus precautions eliminate the obligations of the parties, in terms of all commercial relations related to the countries affected by the pandemic, by making an overall general assessment.

It is significant for parties to inform each other in writing and in a timely manner to prevent any possibility of forfeiture in terms of business relations, where Coronavirus practices are likely to cause impossibility of performance.

As for employment related matters, for continuation of business we recommend that employers consider termination as a last resort even in the event of a force majeure and to try to proceed with the other alternatives detailed above. In addition, during the conduct of business, it is important for employers to track travel and health status of their employees, provided that they stay within the boundaries of the Turkish Personal Data Protection Law.

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