

COVID-19, contracts and employment law

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AS A RESULT of the precautionary measures applied by many countries in connection with the coronavirus pandemic, it may become difficult or impossible for parties to fully perform their obligations under contracts in a timely fashion. This is where the force majeure context steps in.

While Turkish law does not explicitly define a force majeure, doctrine states it is an event which is objectively impossible to avoid or eliminate and prevents parties from fulfilling their contractual obligations. In light of this definition, the Cassation Court examines a force majeure event on a case by case basis instead of providing for an explicit definition.

Although there is no explicit definition under Turkish law, a force majeure is evaluated under the “impossibility of performance” category. Article 136 of the Turkish Code of Obligations provides that if the performance of an obligation becomes objectively impossible for any reason that is not attributable to the debtor, the debtor’s obligation ceases to exist. However, the debtor must notify his or her counterparty without delay and take necessary measures to minimize damage.

In some cases, where the performance of the debt is possible but has become very difficult, the concept of “hardship” regulated under Article 138 of the Turkish Code of Obligations may be applicable. Accordingly, if an unforeseen extraordinary event that is not attributable to the debtor occurs and adversely changes circumstances from those existing at the time of the contract’s execution such that the debtor can no longer be reasonably expected to perform his or her obligations, the debtor can request from the court an adjustment of the contract to the new circumstanc-

es or its termination, if adjustment is not possible or adequate.

Now the main question is whether the pandemic is a force majeure or not. It would not be accurate to generalize. All contractual obligations are not automatically eliminated because of the pandemic. Instead, each case should be evaluated separately for force majeure and hardship in line with the provisions of the contract and the nature of the relevant obligation. However, the parties should, to the extent possible, document and inform each other of any circumstances which may make it difficult or impossible for them to fully perform their obligations in a timely fashion, without delay, to avoid any damages.

EMPLOYERS’ OPTIONS DURING THE PANDEMIC

Currently, many employers, either at their own discretion or based on government guidance, have temporarily shut down their businesses for an undetermined period. However, their obligation to pay wages to employees continues. The following actions may be considered by employers to alleviate their obligations towards employees:

In principle, employees submit their annual leave requests to the employer and the employer is entitled to evaluate this request based on operational grounds. On the other hand, there is no clarity under Turkish law on whether an employer can force employees use their annual paid leaves on its own initiative. The Regulation on Annual Paid Leave allows employers to assign their employees to collectively use their annual leave days within a period between the beginning of April and end of October.

In principle, the use of unpaid leave is dependent on a request coming from the

employee; however, if employers wish to have their employees use unpaid leave, written consent from the employees is required. As another option, the employer has the right to request overtime work in the form of “make-up work” if operations of the business are suspended due to force majeure circumstances. Pursuant to the omnibus bill published on March 26, 2020, the term for make-up work has been extended to four months and the President can further extend this term up to twofold.

Employers may also assign their employees to a “short term working” arrangement for up to three months, if the working hours are temporarily reduced by at least one-third or the operation is completely or partly halted for at least four weeks as a result of a force majeure event. If the employer’s short term working application is approved by the Turkish Labor Agency, employees can receive a short-term working allowance which is calculated based on 60 percent of the employee’s daily income, not exceeding 150 percent of the minimum wage.

Finally, the Cassation Court’s precedents indicates that, to the extent the Covid-19 pandemic or related practices prevent the continuation of work, the employer may 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, both the employer and employees are entitled to terminate employment with just cause. That said, considering the sensitive period and social uncertainty that surrounds the legal aspects of the ongoing pandemic, it is essential that termination be considered as a last resort. ●

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