



Validity of Term-Related Penalty Clauses Stipulated In Definite-Termed Contract That Are By Law Deemed To Be Indefinite-Termed

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I. Introduction

Freedom of contract can be restricted due to mandatory provisions and such restrictions are common for employment contracts since the majority of employment law provisions aims to protect the employee and thus are deemed mandatory and cannot be altered through a contract between employer and employee.

Under this Article two main restrictions implemented in the Turkish employment law, being the duration of the employment contracts and penal clauses under the employment contracts, and the ambiguity around on the validity of the penal clauses on the contracts that are deemed to be indefinite-termed will be clarified.

As it will be explained in detail below, one of these restrictions is the penal clause stipulated in indefinite-term employment agreements. Although the High Court of Appeals' approach on invalidity of termination-related penalty clauses in indefinite-term employment agreements is clear, validity of those terms, which are set forth under definite-term employment contract that are deemed to be indefinite-term employment contract, remained disputed for a quite long time. Contradictorily, certain Civil Chambers of the High Court of Appeals insistently deemed such clauses as invalid since it is forbidden to stipulate a penal clause in indefinite-term employment contracts, while other Chambers valued the will of the parties regarding the penal clause and deemed such penal clauses as valid, limited with the definite term stipulated in the agreement that is actually deemed to be indefinite-termed by law.

The binding decision of the Civil General Assembly of the High Court of Appeals ("General Assembly"), has resolved such inconsistency and the General Assembly ruled that penalty clauses attached to unjustified termination before the expiration of the definite-term of the employment contract is valid.

II. Definite And Indefinite-Term Agreements Under Turkish Employment Law

As per Article 9 of the Labor Law No. 4857 (“**Labor Law**”), “*the parties are free to draw up the employment contract in a manner corresponding to their needs, without prejudice to the limitations regulated by the legislation. Employment contracts shall be made for a definite or indefinite period*”.

According to Article 11 of the Labor Law “*an employment contract for a definite period is one that is concluded between the employer and the employee in written form, which has a specified term or which is based on the emergence of objective conditions like the completion of a certain work or the materialization of a certain event*”.

Considering the provisions of the Labor Law, fixed-term employment contracts are employment contracts where the employment relationship is limited with a certain period of time. On the contrary in indefinite-termed employment contracts, the term of the employment is either defined as indefinite or has not been determined.

As stated above, under Turkish labor law, employment contracts are considered to be indefinite-termed if there is no stipulation about the term of the agreement. As per Article 18 of the Labor Law, employers must depend on a valid reason for terminating the indefinite-termed employment contract. Also, according to Article 17 of the Labor Law, in case of indefinite-termed employment, employers must give notice for termination. Lastly employees, who are employed under a definite-termed agreement, will not be entitled to severance payment upon expiration of the definite term as the agreement will be terminated automatically.

Therefore, as per Article 11 of the Labor Law, which is a mandatory provision and therefore cannot be altered with agreement of the parties, a definite-term employment contract is admissible only if the employment is for (i) completion of a certain work/project (*i.e. there is such a work that will no longer continue once finished – for example, the building of a machine, installment of a computer software etc.*), (ii) materialization of a certain event (*i.e.*

cases where employment might be needed due to exceptional circumstances - for example, an employee taking maternity leave, sick leave or any other reason) or (iii) the work itself is definite-termed (i.e. cases where the required work emanates from a particular matter - for example, an organization, conference or sports event).

Definite-term employment contracts that do not meet these conditions or no longer meets those despite had been fulfilling them in the past are considered invalid and deemed as an indefinite-term employment contract.

III. Validity of Penalty Clauses Under Turkish Employment Law

1. Validity of Penalty Clauses On The Employment Contracts In General

Although there is no provision in the Labor Law regarding the penalty clauses in employment contracts, Article 420 of the Turkish Code of Obligations No.6098 (“TCO”) regulates that penalty clauses that are solely determined against the employee are invalid. In accordance with the principle of "*interpretation in favor of the employee*" in labor law, it is accepted that a penalty clause is valid when it is agreed to be applied to both Parties.

Although there is no other provision restricting the validity of the penalty clauses on the employment contracts apart from Article 420 of the TCO, the High Court of Appeals consistently deems penalty clauses in the indefinite-termed employment contracts as null and void. The precedents¹ rely on the fact that since there is no term for the employment relationship regulated under an indefinite-termed employment agreement, it would be unbearable to be bound with a penalty clause requiring payment of penalty in case of unilateral termination of employment. In other words, the High Court of Appeals deems such clauses void, as such clauses may force employees to choose not to terminate contract and bear with the employment relationship for an infinite term.

¹ Please see 22th Chamber of High Court of Appeals’ decision dated 7.10.2019, numbered 2016/19833 E., 2019/18334 K. or 7th Chambers of decision High Court of Appeals’ decision dated 15.12.2015, numbered 2015/40814 E., 2015/25406 K.

2. Validity of Penalty Clauses Stipulated In Definite-Termed Contract That Are By Law Deemed To Be Indefinite-Termed

Definite-term employment contracts usually include a penalty clause against both parties, stipulating payment of a penalty in case of termination of the contract (i.e. employment) by one party without any just cause before the expiry of the definite term. In principle, a penalty clause is qualified as a side-obligation, validity of which depends on the validity of the contract it is stipulated in. In that sense, definite-term employment contract turns into an indefinite term employment contract due to not meeting the conditions required for definite-term employment, which makes the penalty clause connected to the definite term will also be invalid.

There was, however, a divergence of opinions in the Turkish court practice in cases where a definite-term employment contract was accepted and treated as an employment contract with an indefinite term, due to failure to satisfy the required conditions for a definite-term contract, and a dispute has arisen that concerns the issue of whether the penalty clause (related to early terminations without just cause) stipulated in a definite-term employment contract would still be valid and enforceable. Certain Civil Chambers of the High Court of Appeals have held the view that the term-related penalty clause must be given effect in such cases², while some others have concluded that the penalty clause cannot be deemed valid³. To elaborate;

The 9th Civil Chamber deemed such clauses as invalid on the grounds that in case of a definite term contract being deemed by law as indefinite termed, the penalty attached to termination of employment before the definite term that is actually seen as indefinite in the eyes of the law can no longer be considered to inure effect and thus must be deemed invalid.

The 22th Civil Chamber deemed the penalty clauses attached to termination of employment before expiry of the definite-term as valid, even if the definite term is actually seen as indefinite in the eyes of the law. The Civil Chamber's reasoning behind this ruling is that the

² Please see 22th Chambers of the High Court of Appeals' decision dated 29.11.2016, numbered 2015/18939 E., 2016/26066 K. or dated 17.2.2015, numbered 2013/31698 E., 2015/5108 K.

³ Please see 9th Chambers of the High Court of Appeals' decision dated 4.4.2017, numbered 2017/3977 E., 2017/5968K. or dated 25.12.2014, numbered 2014/36059 E., 2014/40181 K.

parties' will to maintain the employment relationship for a certain period of time must still be regarded.

In face of that, for resolution of the ambiguity in case law regarding the validity of the penalty clauses, the Civil General Assembly of the High Court of Appeals has taken the case in question to bring much-needed clarity to this issue and granted its final decision settling the divergence between the Chambers.

The binding decision of the General Assembly, numbered 2017/10 E., 2019/1 K. and dated March 8, 2019, unified the case-law of the Turkish courts and determined that the penalty clause attached to unjustified termination before the expiration of the definite term of the employment contract is valid, regardless of the definite-term employment contract turning into an indefinite-term employment contract due to failure to satisfy the conditions required for a definite-term contract. In effect, the General Assembly upheld the principles of freedom of contract, as opposed to the restrictions brought by the mandatory provisions of labor law. Evidently the General Assembly did not see a term-related penalty to be violating the purpose behind the legal rule that turns definite-term employment contract into an indefinite-term employment.

IV. Conclusion

All in all, although there is no ambiguity on the invalidity of the penalty clauses attached to unjustified termination of the indefinite-term employment contracts, there were two main ideas on the enforceability of the penalty clauses on the employment contracts that are deemed to be indefinite-term employment contract. In certain High Court of Appeals decisions, penalty clauses in the employment contracts that are deemed to be indefinite-term is considered to be invalid. On the other hand, in certain High Court of Appeals decisions, the will of the parties on a penalty clause are regarded and accordingly deemed to be valid.

Consequently, with the General Assembly's decision, the divergence among the precedent on this very topic has ended and now it must be accepted that the principle of freedom of contract must be observed in terms of validity of the penalty clause, even if the definite-term contract



itself might be deemed as an indefinite-term contract due to failure to satisfy the required conditions for a definite-term contract.

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