



Evaluation of Impacts of Covid-19 on Lease Agreements

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1. Introduction

The novel COVID-19 pandemic continues to have severe effects upon pace and quality of lives of many. Globally, businesses suspended or considerably decreased manufacturing; governments decided to close certain businesses during designated time periods, countries sealed their borders and millions of people are advised to stay in their houses. All these measures have led to unprecedented occupational repercussions and economical flux, along with serious sense of ambiguousness in terms of commercial relationships. In Turkey, the Ministry of the Interior decided to (“**Governmental Decision**”) close all public gathering places such as cafes, restaurants –except restaurants not offering music–, gyms, Internet cafés, SPA centres, funfairs and movie theatres (“**Closed Venues**”).¹ This measure inevitably brought forward the “*force majeure*” concept and lessors and lessees are looking for an answer to one particular question: Do I still have to perform my obligations under a lease contract concluded for leasing a Closed Venue?

Although *force majeure* is one of the enunciated legal concept during COVID-19 pandemic, especially due to the unpredictability element attached to this major epidemic and due to the existence of a governmental decision prohibiting the provision of certain services, each lease agreement should always be evaluated on a case-by-case basis considering the unique specialties of the business and provisions of each particular lease agreement.

2. COVID-19 and Lease Agreements

Analysing force majeure concept and impossibility of performance

¹ Information available at <<https://www.icisleri.gov.tr/81-il-valiligine-koronavirus-tedbirleri-konulu-ek-genelge-gonderildi>> accessed April 4, 2020.

The term "*force majeure*" is not explicitly defined under Turkish legislation. However, the concept of *force majeure* is recognized in Turkish legal doctrine, case law and legal provisions, mainly under Article 136 of the Turkish Code of Obligations ("TCO") titled "*impossibility of performance*". Indeed, *force majeure* events are considered as one of the instances that might trigger the issue of "*impossibility of performance*". The mentioned article sets forth that if it becomes impossible to perform the obligations due to reasons that are not attributable to the obligor, the obligor shall be released from performing the related obligations.

The High Court of Appeals has a very high threshold when considering an event as a *force majeure* event. The event must objectively make the performance of the obligation *impossible* for the party in order to be considered as a *force majeure* event. If alternative means of performance are available, although financially more burdensome, the obligor's failure to perform would not be evaluated within the scope of *force majeure*.

Turkish Courts would generally consider an incident as a *force majeure* event if the following requisites are met:

- (i) Performance of the contract must become impossible due to events outside the obligor's business/control.
- (ii) The event must occur after the conclusion of the contract.
- (iii) The event and/or its consequences must be unforeseeable at the time of entering into the contract
- (iv) The event and/or its consequences must be unavoidable despite exercising due diligence
- (v) There must be a causal link between the event and the obligor's impossibility of performance.
- (vi) If the contract entails an exclusive *force majeure* clause, the event must be listed therein; if the contract entails an inclusive (non-restrictive) *force majeure* clause, it must be possible to consider the event in the scope regulated therein.
- (vii) There must be no alternative means of performance.

If performance of contract becomes permanently impossible for the obligor, the obligor shall be released from its obligations. In synallagmatic contracts, both parties shall be released from their obligations. If one of the parties has performed its obligation, the counterparty shall return the acquisitions that it has obtained with this performance, on the grounds of unjustified enrichment (*condictio ob causam finitam*).²

If performance of contract becomes temporarily impossible for the obligor, i.e. *temporary impossibility*, the counterparty's right to require performance and compensation shall be suspended during the *force majeure* event. Although the consequences of a temporary impossibility is highly controversial in the legal doctrine, it is a fact that this issue varies depending on the characteristics of each agreement: whether there is an obligation of continuous performance, or instantaneous performance; whether the performance of the agreement has started or not; whether the agreement is a long-term or a short-term one, *et cetera*.³

Under particular circumstances, a temporary impossibility may turn into a permanent impossibility. In such a case, obligor's obligation shall be released. This may especially occur when delay in performance negates contractual purpose. Although temporary impossibility is not defined in Turkish legislation, this consequence is accepted by the legal doctrine through the application of Article 137 of the TCO titled "partial impossibility" by analogy. This article regulates that if it becomes clear that the parties would not have concluded such contract if they were to have foreseen the partial impossibility, they shall be fully released from their obligations.

Impossibility in terms of lease agreements

In order to apply the provision regulating "impossibility", the first step is to determine whether the performance of lease agreement concluded for a Closed Venues has become impossible for either party. First of all, the lessee's main obligation arising from a lease

² M. Kemal Oğuzman, M. Turgut Öz, "Borçlar Hukuku Genel Hükümler", Vol. 1 (12th edn, Vedat Kitapçılık, İstanbul 2014), p. 572.

³ H. Kübra Ercoşkun Şenol, "Borçlar Hukukunda Kısmi İmkânsızlık" (On İki Levha Yayıncılık İstanbul, 2016), p. 96-100.



agreement is payment of the rent, thus the lessee's obligations is a pecuniary debt. Since impossibility of performance for pecuniary debts are not acceptable, under no circumstances the lessee's performance could become impossible. Therefore, it is of great importance to determine the lessor's exact obligation and whether or not its performance of that obligation has become impossible due to the Governmental Decision.

As per Article 301 of the TCO, the lessor's main obligation arising from a lease agreement is delivering the leased property on the agreed date and in a condition convenient for the use of the property in accordance with the contractual purpose, and to keep it as such throughout the duration of the agreement. In this regard, in assessment of whether it is possible for the lessor to perform its obligation, it must be evaluated whether the Governmental Decision makes it impossible for the lessor to duly deliver the leased property and keep it available for the contractual purpose. The crucial point here is that ensuring the lessee's use of the leased property is *not* the lessor's obligation. The lessor's obligation pertains to the leased property itself. In that sense, it might be argued that the lessor is no longer in a position to fulfil its obligations due to the fact that the Governmental Decision does not hinder the lessor's capacity to deliver the leased property or ensure that the leased property is convenient for the contractual purpose. In other words, the Governmental Decision does not aim at the leased property itself, but pertains to certain activities and services; thus the issue regarding the Closed Venues does not actually have a link with availability of the leased property, it rather concerns the specific activity-area of the lessee.

It might also be argued that there is a fine line in determination of the lessor's exact obligation. The following instance might be helpful to demonstrate that as long as the leased property is in a convenient condition for contractual purpose, the lessor does not have an obligation to ensure that the lessee is able to use the leased property. For instance, the Ministry of Interior announced a curfew for those who are over the age 65 or have a chronic illness, effective from March 22, 2020. If a 66-year-old person is the lessee of a property wherein he/she runs a restaurant that does not offer music, that person would not be able to, continue operating the restaurant during this restriction. Nonetheless, it is possible to argue

that the lessor is still keeping the leased property available for the contractual purpose and the existing situation has nothing to do with the unavailability of the leased property.

Another instance might be based on a cafe in a mall. Currently, Turkish government has not made an announcement as to the closure of the malls. But if the government later on decides to issue a decision to close the malls, in terms of the café within the mall the restriction then will be linked to the characteristic of the leased property itself. In such case, it might be argued that the lessor is no longer in a position to keep the leased property available for the contractual purpose, thus performance of its obligations is temporarily, i.e. for the duration when the malls are closed, impossible.

Analysing the event of change in circumstances surrounding an agreement and adaption of contracts

In light of the above, the Governmental Decision does not make the lessor's performance of the agreement impossible *per se*. However, this does mean that the parties of a lease agreement remain without any legal remedy against the consequences of this Governmental Decision. It is a fact that under Turkish law, the parties are obliged to fulfil their contractual obligations ("*pacta sunt servanda*"), but if circumstances surrounding a contract changes significantly and this substantially alters the equilibrium of the contract in a way that renders the performance of the contract excessively burdensome for one party, such change of circumstances might be considered as a ground for adaption or revocation or termination of the contract⁴ ("*clausula rebus sic stantibus*" principle). This principle is based on the general principles of fairness and good faith under Turkish law and explained with the "*collapse of the foundation of the transaction theory*".⁵ Moreover, it is regulated under Article 138 of the TCO.

Pursuant to Article 138 of the TCO titled "hardship", an obligor has the right to request adaptation of the contract to the new conditions from the court; and if adaptation of the

⁴ The applicability of right to revocation and right to termination depends on the nature of contract. The right to termination is applicable for the contracts of continuous performance, while the right to revocation comes into play for the contracts of instantaneous performance.

⁵ Oğuzman, Öz (n 2), p. 580, 581.



contract is not possible, it has the right to revoke the contract, without being liable for compensation. At this point it must be emphasised that unless the parties mutually agree on revocation, adaption of contract overrides revocation, i.e. a contract may be revoked only if adaption of the contract is not possible.

In order to implement the hardship provision, as specified by Article 138 of the TCO and established in case law⁶, the following conditions must be met:

- (i) An extraordinary event, which is neither foreseen nor expected to be foreseen by the parties at the time of entering into the contract, must occur.
- (ii) This event must not be attributed to the obligor.
- (iii) This event must change the circumstances to the detriment of the obligor in such a way that renders requesting the obligor to perform its obligations contrary to good faith.
- (iv) The obligor must have not be fulfilled its obligations arising from the contract or it must have fulfilled its obligations by reserving its rights arising from the hardship.

The High Court of Appeals applies *clausula rebus sic stantibus* principle in a rather restrictive manner. This is mainly because it has a very high threshold of “unpredictability”. For instance, it has well-established precedents concluding that the change in economic conditions, increases in exchange rate, high devaluation, and monetary depreciation are the realities of Turkey, therefore they do not entail amendment or termination of the agreement.⁷ Indeed, in one of its decision the High Court of Appeal states that “*devaluation is not an event that cannot be predicted as far as our country is concerned, therefore it is a fact that exchange rate policies can always change. Persons agreeing to be loaned with foreign currency, instead of Turkish Lira that keeps devaluated before foreign currency are supposed to foresee, in face of previous high inflation and economic crisis in the country, that such*

⁶ 13th Civil Chamber of the High Court of Appeals, decision dated 13.06.2014 and numbered 2013/16898 E., 2014/18895 K.; 6th Civil Chamber of the High Court of Appeals, decision dated 22.10.2015 and numbered 2014/11928 E., 2015/8860 K.; 6th Civil Chamber of the High Court of Appeals, decision dated 18.11.2015 and numbered 2014/12999 E., 2015/10017 K.

⁷ 13th Civil Chamber of the High Court of Appeals, decision dated 16.12.2015 and numbered 2015/33476 E., 2015/36982 K.; 13th Civil Chamber of the High Court of Appeals, decision dated 16.04.2015 and 2015/3758 E., 2015/12548 K.;



increases may occur in loan with foreign currency. For that reason the lawsuit must be rejected.”⁸

Adaption in terms of lease agreements

A case-by-case analysis is required for due assessment of the necessity and availability of adaptation of an agreement. Then again it is likely that the High Court of Appeals will regard the situation created by the Governmental Decision –which is adapted as a measure against COVID-19 outbreak– as a change of the circumstances to the detriment of the obligor, which would make it contrary to good faith and unreasonable to request the obligor to perform its obligations under these circumstances. This would give the obligor the right to request adaptation of the lease agreement in accordance with the change of circumstances (Article 138 of TCO). Accordingly it might be argued that it would be unreasonable to expect from the lessee to pay the lease in full while it is not possible to utilise the leased property at all. In such a case, the judge might be inclined to modify the terms of the agreement, considering the specifics of each case, such as the duration of the contract, lease amount, and contractual purpose

In this regard, adaption of the contract might not always be possible or feasible, or it might be unfair to settle for adapting the contract instead of freeing the parties from their contractual bind if this temporary unavailability for using the leased property in fact negates the contractual purpose. For instance, if a lessee has concluded a lease agreement for a property in Sapanca, effective between March and June, in order to operate a SPA centre therein; the Governmental Decision will severely impact the contractual purpose. In such a case, the reasonable solution might be mutual release of the parties from their obligations and terminating the contract as per Article 138 of TCO, since it might not be possible to adapt contract in a way that does not unreasonably burden either parties. There are views in the legal doctrine suggesting that in such case, performance of obligation would be pointless; therefore, Article 137 of TCO shall be applied by analogy and the obligations of the parties

⁸ The High Court of Appeals Assembly of Civil Chambers dated 12.11.2014 and numbered 2014/1614 E., 2014/900 K.



shall end, together with the commercial relationship between them, without being required to resort to a judge and request for adaption before being able to terminate the agreement.

3. Conclusion

In a considerably short time, COVID-19 pandemic has turned into a global crisis and affected millions of people in different ways. In this fight against this virus, Turkey has taken various precautions and one of them is closure of certain venues. This inevitably paved the way for questions regarding the performance of the lease agreements concerning the temporarily prohibited services.

This work has sought to evaluate the legal remedies that exist in Turkish law in the event of the occurrence of an unpredictable incident. In any case each contract must be examined in line with its own terms and conditions, also in consideration of the specific circumstances surrounding that contract, but adaptation of lease agreement on the account of change of circumstances seems to be the primary solution, and revocation or termination of contract might be of question only in certain specific circumstances.

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