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TURKEY
FORCE MAJEURE IN CONSTRUCTION ARBITRATION

*This article aims to analyze the classification of Covid-19 as a **force majeure** event, particularly within the context of construction disputes. It will specifically focus on the application of **force majeure** under Turkish law, the International Federation of Consulting Engineers (**FIDIC**) Contracts, and the International Chamber of Commerce ("**ICC**") Force Majeure Clause 2020.*

H. Ercüment Erdem
Founder & Senior Partner
Erdem & Erdem

Melissa Balıkçı Sezen
Senior Associate
Erdem & Erdem

Mehveş Erdem Kamiloğlu
Senior Associate
Erdem & Erdem

Tilbe Birengel
Senior Associate
Erdem & Erdem

Definition of *Force Majeure*

Force majeure is an event that may excuse liability for non-performance when the event is unforeseeable, uncontrollable, and makes the performance of an obligation wholly or partially impossible.

Turkish Law

Force majeure is not defined under Turkish law and the parties are free to agree on the conditions and scope of *force majeure* as long as the cause is *(i)* external, *(ii)* unavoidable *(iii)* unforeseeable and *(iv)* makes the performance of the contract impossible *(Turkish Supreme Court General Assembly, 1978/11-773 E., 1980/2310 K., 17.10.1980).* This freedom is within some limits such as mandatory provisions of law and public order (*See*, Akıncı, Ziya, *International Construction Contracts,* İstanbul, February 2023, p.166).

In practice, parties of construction projects draft an illustrative list of events that might constitute *force majeure* in that contractual relationship. For the same purpose, they may use international standard contracts on *force majeure* such as the FIDIC Standard Contracts or ICC Force Majeure Clause 2020 which are covered below.

FIDIC Contracts

In FIDIC Silver Book 1999 ed. ("**Silver Book**"), *force majeure* is defined under Sub-Clause 19.1, which is non-exclusive. Sub-Clause 17.3 stipulates further provisions related to the Employer's risks.

According to Sub-Clause 19.1, the event must be *(i)* beyond the parties' control, *(ii)* which such Party could not reasonably have provided against before entering into the contract, *(iii)* which, having arisen, such Party could not reasonably have avoided overcome, and *(iv)* which is not substantially attributable to the other party.'

ICC *Force Majeure* Clause 2020

To minimize particularities of national laws on the concept of *force majeure,* ICC prepared its own *force majeure* clause with two alternatives: long and short form. The parties may include this clause in their contract to mitigate disputes on what constitutes *force majeure* by agreeing on a widely accepted language.

In order for an event to be considered *force majeure* under the ICC Force Majeure Clause 2020, all of the following conditions must exist concurrently: the impediment *(i)* should be beyond reasonable control; *(ii)* could not have been reasonably foreseen at the time of the conclusion of the contract; and *(iii)* the effects of the impediment could not have been reasonably avoided or overcome by the affected party.

The ICC Force Majeure Clause 2020 presumes some listed events as *force majeure* including war, currency restrictions, plague and epidemic meeting the requirements under (i) and (ii) above. For the listed events, the affected party has to prove only the condition (iii) above (*See*, Erdem, H. Ercüment, *An Update from the ICC: The ICC Force Majeure and Hardship Clause*, March 2020).

Potential Remedies of *Force Majeure*

In case of a *force majeure* event, the affected party may be eligible for various remedies if it can substantiate the existence of the *force majeure* event and its direct impact on the ability to perform. These usually include extension of time, extra costs and termination of the contract.

Extension of Time

The affected party might be entitled to an extension of time for performance of the contract due to the delays caused by the preventive effect of the *force majeure* event which are not attributable to itself.

As per Sub-Clause 20 of the Silver Book, the party seeking for extension of time due to *force majeure* is required to notify the other parties to the contract within 14 days.

In such circumstances, the parties may agree on a time extension for the completion of the works.

In case the parties have a dispute on the existence or impact of *force majeure*, a delay analysis of the works by a delay expert might be helpful.

Extra Costs

Force majeure can also trigger further costs on the parties. For this reason, parties may agree in advance on whom to leave such extra costs in case of a *force majeure* event. In the absence of an agreement on the matter, the contractor's right to seek compensation for extra costs depends on the provisions of the applicable law.

Turkish law is not clear as to who will bear the extra costs arising from a *force majeure* event. Depending on the circumstances of the case it is possible to argue that the contractor will bear the loss in accordance with Art. 483 of Turkish Code of Obligations ("**TCO**"). The contractor who has the right to ask the judge to adapt the contract to the new conditions pursuant to Art. 480/2 of TCO may also claim additional costs. Since there is no clarity on the subject, it is beneficial for the parties to agree on this in advance while drafting the contract.

As per Sub-Clause 20 of the Silver Book, the parties may seek extra costs due to *force majeure* (except for the causes triggered by nature) are required to notify the other parties of the contract.

Termination of Contracts

In the event of a prolonged *force majeure* event preventing the execution of the works, the parties may be entitled to terminate the contract.

Depending on the applicable law and contractual provisions, the parties may be entitled to terminate the contract via unilateral declaration, which would not require the consent of the other parties. According to the Turkish Supreme Court, the parties are bound by the contract in cases of temporary impossibility until expiration of "*contract tolerance period*" which shall be determined according to the circumstances of each case (*See*, Turkish Supreme Court General Assembly*, 2010/15-193 E., 2010/235 K.*, 28.04.2010).

After the termination of the contract, the parties may seek restitution of performance (if possible) and waive from their receivables. Depending on applicable law, the parties may seek compensation for damages due to non-performance of the contract.

For example, as per Sub-Clause 19 of the Silver Book, if the execution of the works is substantially prevented for a continuous period of 84 days or for multiple periods, which total more than 140 days, then either party may terminate the contract. In this case, the termination shall take effect seven days after the notice is given.

Covid-19 as a *Force Majeure* Event

The Covid-19 pandemic has emerged as a prevalent factor in construction works. Although Covid-19 represents an exceptional circumstance, its acceptance as a *force majeure* event depends on meeting certain criteria *(i)* it must fall within the contract's definition of *force majeure*, *(ii)* be recognized under the applicable law, and *(iii)* directly impact the performance of the party claiming *force majeure*.

According to a recent FIDIC Contracts guidance note, the fact that performing obligations may be more difficult, onerous or that there is delay caused by post Covid-19 difficulties does not necessarily amount to the contractor being prevented as required by the relevant clause.

Recent case law, including arbitral awards and rulings from the Turkish Supreme Court, highlights a consistent stance: Covid-19 alone cannot serve as a sufficient justification for a party's non-performance. To establish Covid-19 as a valid *force majeure* event, it is necessary to demonstrate a direct causal link between the non-compliance or failure to perform and the impact of Covid-19. In essence, the effect of Covid-19 must be the underlying cause for the contract's non-performance or breach.

In Ace Group International LLC and Ace Group Bowery LLC v. 225 Bowery LLC, which was brought before the ICC, a dispute emerged from a hotel management contract. The hotel in question was temporarily closed during the Covid-19 pandemic and, without the consent of the Claimant, was repurposed as a homeless shelter by the Respondent.

The respondent, among other arguments, claimed that it did not breach or repudiate the contract because its decision to use the property as a homeless shelter was "caused" by the Covid-19 pandemic, and this was permitted under the contract's force majeure clause. The discussion revolved around whether Covid-19 or the economic downturn caused the respondent to enter into the homeless services agreement. Under the relevant contract a party's failure to perform its obligations is excused if that failure is "caused in whole or in part" by an extraordinary event. Extraordinary event is defined to include disease, epidemic, and government action, but to exclude causes due to economic downturn or insufficient funds. According to the arbitral tribunal a party seeking to avail itself of a force majeure defense must show that it took "virtually every action within its power" to perform its duties. The arbitral tribunal found that the respondent failed to establish that its non-performance was excused by Covid-19.

In an Istanbul Arbitration Center arbitration, a respondent claimed its non-performance was a result of Covid-19 as a force majeure event. The arbitral tribunal decided that Covid-19 has not prevented the respondent from fulfilling its obligations therefore, Covid-19 could not be considered as a force majeure event. The Court of Appeal did not evaluate the decision due to the prohibition of revision au fond and rejected the request for annulment, this decision was upheld by the Supreme Court (See, Turkish Supreme Court 11th Chamber, 2022/138 E., 2022/3708 K., 10.5.2022).

In another decision, the Turkish Supreme Court stated that the existence of Covid-19 does not automatically constitute a force majeure event. In order for it to be accepted as force majeure, there must be a causal relationship between the consequences of Covid-19 and non- performance of the contract (See, Turkish Supreme Court General Assembly, 2022/537 E., 2022/537 K., 29.9.2022).

In conclusion, the question of whether the Covid-19 pandemic qualifies as a force majeure event hinges on whether the party invoking force majeure has been directly impacted by it. Merely considering Covid-19 as an extraordinary event beyond the parties' control is not enough to trigger the effects of force majeure. The party invoking force majeure must demonstrate that their contractual obligations have been directly hindered or prevented by the Covid-19 pandemic.

ABOUT THE AUTHORS

Prof. Dr. H. Ercüment Erdem, *the Founder and Senior Partner of* Erdem & Erdem*, possesses over 35 years of experience in arbitration. His extensive experience, leadership, and involvement in arbitration firmly establish him as a highly regarded authority in the realms of international arbitration and commercial law.*

He serves a diverse clientele in industries such as energy, construction, finance, retail, real estate, aviation, healthcare, and insurance, providing invaluable legal services.

Throughout his career, he has amassed a remarkable track record of success, by handling numerous arbitration proceedings and enforcement claims for clients engaged in arbitral awards beyond the borders of Turkey.

Melissa Balıkçı Sezen, *a Senior Associate at Erdem & Erdem with particular expertise in arbitration. She provides legal advice mainly on matters relating to international arbitration, corporate law, contract law and business law.*

As counsel, Melissa represents diverse parties in arbitration proceedings under institutional rules such as the ICC, LCIA, ISTAC, ITOTAM, and UNCITRAL, and acts as tribunal-secretary. Her understanding of the arbitration process, combined with her dedication and skill, strengthens her reputation as a trusted advocate in this field.

Mehveş Erdem Kamiloğlu *is a Senior Associate at Erdem & Erdem. Her practice includes arbitration, litigation, regulatory assessments, corporate matters, and legal consultancy. Mehveş represents diverse clients as counsel in arbitration proceedings and local courts, while also serving as an arbitrator and arbitral secretary before various arbitral institutions.*

She coordinates cross-border lawsuits and provides guidance to local and international clients.

Tilbe Birengel *is a Senior Associate at Erdem & Erdem's Dispute Resolution Department, specializing in investment treaty arbitration, international commercial arbitration, and litigation. She represents clients in arbitration proceedings and acts as arbitral tribunal secretary under various institutional arbitration rules such as the ICC, ISTAC, ITOTAM, UNCITRAL and Malta Arbitration Centre. Tilbe handles the recognition and enforcement of arbitral awards and foreign judgments, represents clients before local courts and coordinates overseas litigation. She advices on technology, cybersecurity, data protection and corporate law.*