

client alert

CONTRACT LAW | TURKEY |

APRIL 2014

HARDSHIP OR EXCESSIVE DIFFICULTY IN PERFORMANCE

The Turkish Code of Obligations (TCO) No. 6098, which entered into force in July 2012, introduced major changes and novelties to the Turkish legal system.

One such innovation is the adaptation or rescission of contracts due to excessive difficulty in performance (Hardship), which was given legal basis in the new Turkish Code of Obligations. While the concept of excessive difficulty in performance was mostly recognised as a legal doctrine by scholars, and some Appeal Court decisions indicate different views as to its scope, Article 138 of the TCO gives Hardship a legal basis in general contract law.

The article in question reads as follows:

“Excessive difficulty in performance

Article 138- When an unexpected event that is not foreseen and not expected to be foreseen by the parties during conclusion of the contract arises not resulting from negligence on the obligor’s part, and if the conditions present during the conclusion of the contract are modified to the detriment of the obligor to such an extent that demanding performance from the obligor would violate the principle of good faith, and if the obligor has not yet discharged his/her debt or has discharged his/her debt by reserving the right of hardship, the obligor shall be entitled to demand from the judge the adaptation of the contract to new circumstances, or to rescind the contract where such adaptation is not possible. In continuous contracts, as a rule, the obligor shall use the right to termination instead of the right to rescind.

This provision shall also apply to debts in foreign currencies.”

As described in the above article, the obligor may demand adaptation of the contract from the judge or rescind and/or terminate the contract when all four conditions below are met:

- An unexpected event, which was unforeseen and not expected to be foreseen by the obligor, must occur after the contract was entered into,
- There must be no negligence on the obligor’s side in the occurrence of such unexpected event,
- Performance must have become excessively burdensome for the obligor because of the unexpected event in light of the principle of good faith,
- The obligor must perform his obligation by reserving the right of hardship or the obligor must not yet perform the contract

If all of the above conditions are met, the obligor may demand from the judge that the contract be adapted in accordance with the changed circumstances. If this is not possible, the obligor may rescind the contract or terminate the contract in the event of a continuous contract.

The concept of adaptation of the contract introduced by Article 138 is an important exception to the basic principle of contract law, *Pacta sunt servanda* (Agreements must be kept) and is likely to have important consequences. The last paragraph stating that this provision shall also apply to debts denominated in foreign currencies is also of significance given the recent fluctuations of the Turkish lira.

However, as the wording of the Article consists of general expressions, its scope remains yet to be defined. Precedents set by the Turkish Court of Cassation shall therefore play a key role in laying out the guidelines and criteria for implementation of the Article's provisions.

In this context, in line with the precedents of the Court of Cassation, carefully drafted adaptation clauses inserted in contracts remain of paramount importance in determining the good faith of parties' obligations in the event of hardship.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters included in this client alert have been issued by Özdirekcan Bilgiç Dündar Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

CONTACTS

MATTHIEU ROY
roy@gide.com

ALI OSMAN AK
ak@obdavukatlik.com

You can also find this legal update on our website in the News & Insights section: gide.com

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department (privacy@gide.com).