

## CLIENT ALERT

CONTRACT LAW | TURKEY

MARCH 2022

### CONFLICT IN UKRAINE: FORCE MAJEURE AND HARDSHIP UNDER TURKISH LAW

This Client Alert is issued in the scope of the Ukraine Taskforce of Gide. For further legal analysis, please visit our dedicated page: [here](#).

The military operation launched by the Russian Federation against the east of Ukraine on 24 February 2022 turned into an all-out war between Ukraine and Russia in the blink of an eye. The decision of the United Nations Security Council regarding the termination of the offensive and the withdrawal of all Russian troops could not be taken because the Russian Federation exercised its veto power. At the time of writing of this article, armed conflicts between the Russian Federation and Ukraine continue.

Currently, EU-27 countries, USA, Canada, Japan, Australia and many international organizations have decided to impose sanctions against the Russian Federation. The sanctions are wide-ranging, targeting individuals, banks, businesses, monetary exchanges, bank transfers, exports, and imports. In turn, the Russian Federation has implemented a number of counter-sanctions and has imposed restrictions on the export of many raw materials and commodities abroad.

Both Ukraine and Russia are essential suppliers of raw materials and energy for many crucial supply chains. As the crisis still escalates in Ukraine, its impacts are severely felt by the Turkish economy. Although the Republic of Turkey has put a lot of effort into intensifying the peace talks between the parties, as the war continues the effects on the Turkish economy are continuing to increase. For instance:

- **Food:** Turkey is particularly dependent on grain from Russia and Ukraine, relying on them for almost 80% of their wheat imports. Russia and Ukraine are also key sources for sunflower oil, accounting for 70% of Turkey's imports.
- **Turkish FDI in Ukraine:** There are more than 700 Turkish companies in Ukraine, accounting for more than USD 4.5 billion worth of investment. One of them is a Turkish beverage company which has three facilities in Ukraine. All of them have temporarily shut down. Additionally, 75% of overseas income for the largest Turkish mobile operator is generated from Ukrainian operations.
- **Tourism and aviation:** 30% of foreign tourists in Turkey are visitors from Ukraine and Russia. Additionally, Russian and Ukrainian passengers generate around 3% of passenger revenue for the largest Turkish airlines.

Multi-national companies, cross-border traders, as well as courts and arbitral tribunals have extensive experience on the effects of war, international embargo and sanctions on commercial contracts. It is also customary for these situations to be regulated in various clauses, especially in international commercial contracts. In this Client Alert, we would like to briefly summarize the general application conditions of Article 136 (*Impossibility to perform*) and Article 138 (*Hardship*) of the Turkish Code of Obligations.

Furthermore, we would like to draw attention to the benefits to the commercial parties of the use of force majeure and hardship clauses as a mitigating factor in the event of situations like war, international embargoes and sanctions affecting a commercial relationship.

## FORCE MAJEURE AND HARDSHIP UNDER THE TURKISH CODE OF OBLIGATIONS

According to the principle of contractual freedom, parties to a contract may agree on provisions relating to force majeure events and hardship situations. To the extent that contractual provisions have been set forth in relation to war, international embargoes and sanctions, the assessment should be first conducted within the framework of the contract. In the absence of any such provision, the relevant articles of the Turkish Code of Obligations shall apply:

### - **Impossibility to perform**

If the performance of a contractual obligation becomes impossible due to reasons that are not attributable to the obligor/debtor, an impossibility to perform, which also includes force majeure events, shall be deemed to have occurred as set out under Article 136 of the Turkish Code of Obligations. If the performance of an obligation is not possible through compulsory execution (for example, if the contractual obligation that needs to be performed is an obligation to act) and the debtor cannot perform its obligation -with no fault that may be attributable to the debtor- or performs it partially due to the war or an international embargo or sanction, the debtor cannot be held liable in relation to such obligation.

### - **Hardship / Excessive difficulty in performance**

There may be extraordinary circumstances which, although not rendering the performance impossible, were not or could not be foreseen by the parties at the time of the conclusion of contract. In this case, hardship as set out under Article 138 of the Turkish Code of Obligations may be deemed to have occurred, provided that specific performance of the debtor cannot be expected due to disruption of the balance of the contractual obligations between the parties and such expectation would violate the principle of good faith. For instance, as impossible performance cannot be considered for substitutable obligations (such as payment obligations), an assessment of hardship could be made.

As per the Article 138 of the Turkish Code of Obligations, hardship and its consequences shall apply provided that the debtor has not yet performed its obligations or has performed its obligations but reserved its rights arising from the hardship. In such situations, the parties may choose to adapt the contract based on their mutual agreements. In case no agreement can be reached and a dispute occurs, the parties may request an adaptation of the contractual terms from the court. The judge will try to restore the balance of the rights and interests of the parties in light of their respective contractual obligations and in accordance with the principle of good faith. If such adaptation is not possible, rescission of the contracts with instantaneous obligations and termination of the contracts with continuing performance obligations may be considered.

## USE OF FORCE MAJEURE AND HARDSHIP CLAUSES AS CONTRACTUAL PROTECTIONS

Risk mitigation is primarily achieved through the contracting process, allocating risks among parties in contractual form. Force majeure clauses are more commonly used in international commercial contracts, whereas hardship clauses are less often seen in practice.

### FORCE MAJEURE CLAUSES

Force majeure clauses are used in international commercial contracts in order to free one party from liability when an extraordinary event prevents it from fulfilling its obligations. "Force majeure" refers to an event beyond the control of the parties and generally includes events such as wars or armed conflicts. Therefore, force majeure provisions can assuage the consequences of a political crisis on a commercial relationship.

However, such provision must be cautiously negotiated. Force majeure clauses must appear consistently in all inter-connected contracts, even when negotiated by separate teams of negotiators and lawyers. The failure to perform an

obligation, although excused under one contract, may otherwise be cause for termination of another related contract such as a subcontract. While drafting the relevant provision, the following matters should be also taken into account:

- **Compatibility with the choice of applicable law:** The force majeure clause will gain value to the extent that it differs from the force majeure definition existing in the chosen applicable law. Additionally, the clause should not conflict with the mandatory provisions of the chosen applicable law regarding public order.
- **Definition of force majeure:** The provision may either give a broad definition of force majeure by referring to unpredictability, inevitability or irresistibility, externality and non-performance/impossibility as the result of force majeure; or it may give a non-exhaustive (or maybe exhaustive depending on the choice of the contracting parties) list of events including natural disasters; wars, civil unrest and terrorist incidents; disputes related to working life such as strikes and lockdowns; government intervention and legislative change; disruptions in the supply of raw materials and the transportation of goods; accidents in machinery or other equipment or in the production process.
- **Reference to sub-contractors or upstream suppliers:** It may be decided that the party to the main commercial agreement will be relieved of their obligations, provided that the force majeure faced by the sub-contractors or upstream suppliers also affects the party of the main commercial agreement and both of them meet the force majeure conditions in the clause.
- **Notification and evidencing:** The form of the notification, information about the event, its estimated duration, the affected obligations and why they should be suspended, the documents proving the event and the period for which the notification should be made may also be drafted in detail.
- **Effect of force majeure:** Even though the applicable law may only provide that the agreement be terminated in the event that a contractual obligation becomes impossible to fulfil within the agreed timeframe, the contracting parties may foresee other options:

**(i) Suspension:** It may be agreed that force majeure has a suspensive effect in long-term and continuous-acting international commercial contracts. In the process when force majeure creates a temporary impossibility, the performance of obligations is suspended and postponed until the end of force majeure circumstances. The contracting parties may decide to suspend the contract by extending the contract period, or suspend it without extension.

**(ii) Renegotiation:** The ability to renegotiate the conditions of the agreement is similar to the structure of hardship clauses. In addition to suspension, the parties may agree that after the force majeure event occurs, their obligations will be mutually suspended and they will meet to re-examine their contract. The obligation to renegotiate obliges the contracting parties to examine the changed conditions together and submit their proposals to restore the deteriorated economic balance of the contract. However, this obligation does not necessarily impose an obligation on the parties to reach a conclusion. The parties will carry out these negotiations according to the principle of honesty and will do their utmost to adapt the contract.

**(iii) Termination:** If the parties do not wish to include the option to renegotiate in the contract, they give one of the parties the right to terminate the contract either directly at the time of force majeure, or at the end of the suspension period.

## HARDSHIP CLAUSES

Hardship clauses are meant to address situations in which unforeseen circumstances occur that fundamentally change the balance of the contract, resulting in an unreasonable burden being imposed on one of the contracting parties concerned. Where ongoing performance has become unduly burdensome as a result of an event outside of a party's reasonable control that it could not reasonably have anticipated, the clause can compel the parties to negotiate new contractual terms to accommodate the event's implications.

The hardship clause is sometimes used in conjunction with the force majeure clause, owing to their similar properties and the fact that they both address situations involving altered circumstances. The contrast between the two concepts is that hardship refers to the disadvantaged party's performance becoming significantly more difficult, but still feasible. The term "force majeure" refers to a situation in which a party's contractual obligations have become impossible, at least temporarily.

The main objective of hardship clauses is to open up room for negotiation in the event of a hardship situation that would render the contract more onerous for one of the parties. For instance, war or international embargoes may lead to export bans of some products from a particular country, in this case the Russian Federation. For traders who make long-term supply agreements for particular commodities from specific Russian sources, the fulfilment of obligations from other commodity suppliers may become so onerous that it would completely disrupt the commercial balance established at the beginning of the contractual relationship. Such traders may thus benefit from the possibility to renegotiate contained in such clauses.

Additionally, hardship clauses usually allow the parties to apply to an independent third party (such as an arbitrator, mediator or technical expert) to adapt the contractual provisions. Such possibility could become critical in long-term relations, especially if the law applicable to the agreement applies strictly the *pacta sunt servanda* rule, and does not provide for any rule allowing the parties to request courts to adapt the contractual terms.

## CONCLUSION

As mentioned above, the Turkish Code of Obligations provides for certain legal mechanisms in terms of both force majeure and hardship situations. In practice however, the contracting parties often secure themselves with special force majeure or hardship clauses. If the contract does not contain any provision relating to war or armed conflicts, the first assessment to be made relates to whether or not the performance of the contractual obligation is possible. The sole fact that war or armed conflicts qualify in principle as force majeure events is not sufficient alone; an assessment must therefore be conducted to confirm the impact of such events on the performance of the contract.

Accordingly, the effects of the war between Ukraine and the Russian Federation on contracts should be specifically assessed on a case-by-case basis, regardless of the fact that the war or armed conflicts qualify as a force majeure event.

As noted above, the force majeure and hardship clauses should be drafted in accordance with the choice of applicable law and jurisdiction clause of the relevant agreement. It should be borne in mind that different legal systems can create havoc on well-planned, matched force majeure provisions. The choice of applicable law and the jurisdiction of disputes shall be therefore seen as a critical element in ensuring that the force majeure structure is respected and enforced.



## CONTACTS

ARPAT ŞENOCAK  
senocak@odsavukatlik.com

MEHMET KÖSOĞLU  
kosoglu@odsavukatlik.com

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

You can also find this legal update on our website in the News & Insights section: [gide.com](https://www.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. You may request access to, rectification of, or deletion of your personal data processed by our Communications department ([privacy@gide.com](mailto:privacy@gide.com)).