

BULLETIN

December 18, 2023

When The Mutual Performance Balance in Contracts is Disrupted Due to Changes in Conditions (Adaptation Lawsuits)

THE PRINCIPLE OF FIDELITY

As a requirement of the constitutional right “freedom of contract”, everyone is free to make the contract he wants, with the person he wants, in the way he wants, within the limits stipulated by the law.

As a principle, parties of a contract adhere to concluded and fulfil their obligations, no matter how the circumstances change. The principle based on this acceptance is called the principle of Fidelity or “honoring the covenant”.

A strict interpretation of the principle of fidelity may lead to the occurrence of results contrary to justice and equity. For this reason, there is a need to limit the principle of fidelity, which is a fundamental principle of law, in some cases.

The Turkish Code of Obligations also regulates the excessive difficulty of performance with Article 138. In cases where performance is excessively difficult, there is provision for an "Adaptation (adjustment) of the contract" to restore the fairness of the contract.

As a result, it is aimed to ensure the fairness of the contract through "adaptation lawsuits" in the event of excessive difficulty of performance and the existence of certain conditions.

ADAPTATION OF THE CONTRACT DUE TO EXCESSIVE DIFFICULTY OF PERFORMANCE

We have mentioned that the change of conditions after the conclusion of the contract has no effect on the obligation in accordance with the principle of fidelity.

However, if the conditions existing after the conclusion of the contract change unexpectedly and this situation leads to excessive difficulty of performance and severe deterioration of the balance between the mutual obligations, the debtor cannot be expected to fulfil its obligation.

What circumstances could lead to an adaptation lawsuit?

Examples of unforeseen circumstances that disrupt the balance between the obligations are war, economic crisis, excessive increase in inflation, excessive decrease in the value of money.

Although adaptation is mostly available in lease relationships, it may also be applied to relationships other than the lease agreement.

For example, the supreme court has ruled in some of its decisions that adaptation should also be made in disputes arising from the property regime of the spouses and alimony.

In addition, within the scope of article \480\ of the Turkish Code of Obligations in terms of adaptation; if the price of the work contract is agreed as a lump sum, it may not be possible to complete the work for the same fee due to reasons that cannot be predicted in advance or that are possible to be predicted but are ignored by the parties. In this case, the contractor may request an increase in the price or termination of the contract.

The judge, who accepts that these unforeseen circumstances cause excessive difficulty of performance for the parties and that the basis of the transaction has collapsed, may adapt the contract to the changed conditions.

The adaptation of the contract to the changing conditions may be in the form of increasing the obligation of the debtor or reducing the obligations in favor of the debtor, or it may be by completely releasing the debtor from the performance obligation in the form of "adaptation to zero".

ADAPTATION LAWSUIT

The party harmed by the existence of an excessive difficulty of performance is entitled to "adaptation right". This right is an innovative right that is exercised through litigation. Therefore, the decision of the judge is not a constructive judgement. The judge makes a determinative decision as a result of the adaptation case.

To explain; with the exercise of this right, a new situation arises within the legal order. The decision rendered by the judge as a result of the adaptation case consists of the "determination" of this new situation and its nature by the courts.

1. Conditions of the Adaptation Lawsuit

a. Existence of a Valid Contract Between the Parties: In order for adaptation to be made, there must be a valid and ongoing contract between the parties.

b. There is no contrary provision in the Contract and the Law: Since the Turkish Code of Obligations provision \138\ is a complementary provision, special provisions are reserved. For example, the TCO 363 regulating the right of adaptation in the lease of an agricultural immovable is a special provision.

However, the parties should not have waived the right of adaptation.

c. Emergence of an Unforeseen and Unforeseeable Situation between the Parties: Unforeseeability is evaluated separately for each case. For example, supreme court has ruled that unforeseeability should be interpreted more narrowly since one of the parties is a merchant and is expected to act as a prudent merchant.

d) The Unforeseeable Circumstances Cause Difficulty of Performance to the Extent that Expecting the Debtor to Perform Would Be Contrary to the Rule of Honesty: Different criteria have been set forth for the difficulty of performance to be sufficient. In some court decisions; there are various criteria such as the performance of the debt should cause the economic ruin of the debtor or the performance should cause the exploitation of the debtor, as in the excessive utilization principle. The most accepted criterion is that "the expectation of performance from the debtor is contrary to the rule of honesty."

e. The Event Causing the Excessive Difficulty of Performance Is Not Caused by the Debtor.

f. The Debt Has Not Yet Been Performed or the Debt Has Been Performed by Withholding the Rights Arising from the Excessive Difficulty of Performance

g. The Existence of a Causal Link Between the Occurrence of Unforeseen Changes and Excessive Difficulty of Performance

Pursuant to the principle of fidelity; although the parties are required to be loyal to the obligations they have undertaken with the contract they have concluded, in some cases, there is a need to limit this principle.

In the event that the performance of the obligation becomes excessively difficult due to changing conditions, an adaptation lawsuit can be filed, and the judge is requested to adapt the contract to the new conditions. It should not be forgotten that the main basis of this institution is the "rule of honesty" regulated in the Turkish Civil Code .

For this reason, both the claim that the performance has become excessively difficult, and the adaptation of the contract are made in accordance with the rule of honesty.

REFERENCES

Mehmet Erdem AYBAY, SÖZLEŞMENİN DEĞİŞEN KOŞULLARA GÖRE UYARLANMASI (YARGITAY HUKUK GENEL KURULU KARARI İNCELEMESİ),

Zehra Betül KULP, AŞIRI İFA GÜÇLÜĞÜ (TBK 138), Yüksek Lisans Tezi, Ankara/2015

Prof. Dr. Haluk N. NOMER, BORÇLAR HUKUKU GENEL HÜKÜMLER, 12.Baskı, İstanbul/2012.