

Power Plant EPC and O&M Contracts during Coronavirus Outbreak

Coronavirus (COVID-19) outbreak affects not only people's daily-life, but also disrupts economies and markets all around the world and electricity generation market is not immune to this effect. Due to the outbreak, construction projects related to power plants came to a standstill in some jurisdictions. Engineering, procurement and construction ("EPC") contractors and operation and maintenance ("O&M") service providers as well as project owners started to face difficulties.

With the spread of coronavirus worldwide, supply chain has been severally broken and equipment procurement for both construction projects and O&M works became almost impossible in certain jurisdictions. Even if the equipment is procured, due to the restrictions on movement, deploying key personnel also became a problem. As some governmental authorities are semi-functional as a result of the measures taken due to the outbreak, land acquisitions for the projects, connection lines, and in general, permitting are reported as impacted from the pandemic in some jurisdictions. Delays in commercial operation and drop in power generation have yet to be seen.

This article evaluates and discusses the necessary actions to be taken by EPC contractors, O&M service providers and project owners during the coronavirus outbreak.

1. Review Existing Contractual Provisions

a. Check the Force Majeure Provision¹

One of the prominent provisions which may apply during the coronavirus outbreak is force majeure clause in the contract. This legal concept is in essence a contractual concept; thus, it may be defined and regulated differently from contract to contract and may be construed differently from jurisdiction to jurisdiction. The most common elements in force majeure definitions are existence of a situation which (i) cannot be foreseen by the affected party, (ii) is beyond the reasonable control of the affected party, and (iii) could not be expected to be prevented or avoided by the affected party.

In common law, unless the contract includes force majeure provisions, parties to a contract cannot generally rely on force majeure and be excused from the performance. On the contrary, in certain jurisdictions (most of them being civil law countries), claiming force majeure may still be possible even if it is not regulated under a contract.

In case the contract provides a force majeure clause, it is essential first to define the circumstances creating the force majeure situation and their impacts on the performance. Force majeure provision in the contract may be linked with the impossibility or may only provide hardship in performance.

¹ You may also see our article "*Coronavirus: Supply Chains Are Broken, Now What? – A Legal Evaluation of Force Majeure Concept during an Epidemic*" available at <https://www.mondaq.com/turkey/CorporateCommercial-Law/901722/Coronavirus-Supply-Chains-Are-Broken-Now-What-A-Legal-Evaluation-Of-Force-Majeure-Concept-During-An-Epidemic>.

The force majeure events may also be defined in the contract with an exhaustive or inclusive list. In case of an inclusive list, events or circumstances similar to the ones listed in the contract may trigger the force majeure clause; therefore, even if governmental restrictions, epidemics or pandemics are not explicitly listed, the coronavirus or actions of governments taken in connection with the outbreak may still fall within the definition. The exhaustive list, however, will lead to a more limited application of the force majeure provision.

Not only what constitutes force majeure, but also the consequences of a force majeure event as regulated in the contract should be reviewed carefully. The contract may not relieve the parties experiencing force majeure from their obligations entirely or may lead to an immediate termination. As the consequences may differ from contract to contract, a thorough review based on the relevant contract provisions is advisable.

b. Check Other Provisions of the Contract

Coronavirus outbreak requires a thorough review of not only the force majeure provisions, but also the entire contract. Especially in cases where the coronavirus outbreak does not fall under the force majeure definition of a contract, provisions related to excusable delays and suspension require special attention. Delays due to the coronavirus outbreak may lead to payment of delay liquidated damages, if such delay is not excused. Additionally, if the conditions for suspension are satisfied by the current situation, suspending the works may be a worthy option. Aside from the abovementioned provisions, in case project owners consider engaging other EPC contractors or O&M service providers to complete the construction or provide the necessary services (if the situation allows in the relevant jurisdiction), termination and provisions related to warranty become especially important. It would also require a review of the provisions regulating intellectual property rights in the contract, as EPC contractors and O&M service providers, as well as their vendors and sub-contractors, may have intellectual property rights on the project equipment and documents, and working with a third party may lead to a violation of their intellectual property rights.

Other provisions to bear in mind include change in law and change in price provisions. Some of the precautions and decisions that are taken by governmental authorities may be seen as a change in law, depending on the definition of “change in law” and “law” in the contract. Change in price provisions, depending on the wording of the provision, may also be applicable when performance is not impossible but possible only with higher price, cost and expenses.

2. Check the Applicable Law

In cases where the force majeure clause in the contract is not operative or other provisions fall short to cover the situation, applicability of other the legal concepts in the applicable law may be sought for².

Under Turkish law, force majeure provision of a contract, if linked with impossibility, may overlap

² For the determination of applicable law in cases where it is not determined by the contract, please see our article “*Coronavirus: Supply Chains Are Broken, Now What? – A Legal Evaluation of Force Majeure Concept during an Epidemic*” available at <https://www.mondaq.com/turkey/CorporateCommercial-Law/901722/Coronavirus-Supply-Chains-Are-Broken-Now-What-A-Legal-Evaluation-Of-Force-Majeure-Concept-During-An-Epidemic>.

with the “impossibility of performance” principle, which is regulated in Articles 136 and 137 of the Turkish Code of Obligations No. 6098 (“TCO”). If the force majeure provision of the contract is not linked with the impossibility, Articles 136 and 137 of the TCO may still be applicable alongside with the contract provisions. Under the impossibility concept, the obligor may be deemed to be released from performance wholly or partially, if the performance of contractual obligation becomes wholly or partially impossible due to a reason which is not attributable to the obligor. Nevertheless, the obligor should duly and timely notify the creditor of the impossibility and take necessary precautions to prevent the increase of loss; otherwise, the obligor may be held liable for the compensation of the related losses.

In common law, unless otherwise provided, the frustration doctrine may be seen as an option which may provide the parties a right to terminate the contract. On the other hand, adjustment of the contract due to hardship may be evaluated under Turkish law and in other civil law jurisdictions. As for the Turkish law, adjustment due to hardship is a legal concept regulated in Article 138 of the TCO that can be applied in case of occurrence of an extraordinary situation which (i) is not foreseen or cannot be expected to be foreseen by the parties at the time the contract is concluded, (ii) is not arising due to a reason attributable to the debtor and (iii) makes the fulfillment of the debt or performance extremely difficult that expecting such performance from the debtor would be against the rule of honesty³. In order for this provision to be applicable, relevant obligations should not been performed or should be performed with a reservation of the rights arising out of Article 138. In case of a provision in the contract regulating the hardship (or a similar provision requiring adjustment), Article 138 may not be applicable to the contract, or may be applicable only if the contract provision falls short to cover the current situation. It is also advisable to engage in negotiations before revoking Article 138, as it is commonly seen as a requirement arising out of the rule of honesty in the legal literature.

One should bear in mind that Article 138 does not automatically grant parties a right to terminate the contract; the parties should apply to the competent judicial authority and demand adjustment from the judge. In that case, judge will try to adjust the contract as per the rule of honesty.

Upon receiving adjustment request, the judge may decide (i) on the adjustment of the contract, (ii) that the adjustment is not possible although the conditions are met or (iii) on the rejection of the case due to the fact that the conditions provided in the law could not been met. For cases which the judge decides that the adjustment is not possible even if the conditions are met, the relevant provision provides two options to the obligor. The obligor can either continue performing the contract as it is or terminate it.

Whether Article 138 can be applicable to a contract should be analyzed carefully on a case by case basis, as there is a vast case law on this legal concept, and the Court of Appeal’s approach to this concept varies.

³ The term “rule of honesty” used in this article refers the civil law principle that includes “prohibition of abuse of rights” and that envisaged in Article 2 of both the Swiss Civil Code and the Turkish Civil Code. The legal concept is also referred to as “acting in good faith” in the official translation of Article 2 of the Swiss Civil Code (which is available at <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html#a2>). However, as the term “acting in good faith” does not properly differentiate this legal concept from the good faith principle envisaged in Article 3 of both the Swiss Civil Code and the Turkish Civil Code, the term “rule of honesty” is preferred herein.

3. Be Aware of the Domino Effect and Plan Ahead

A delay in a project agreement may create a domino effect in other project agreements. For instance, in O&M agreements, initiation of the commercial operation is generally provided as a condition for effectiveness, and in some cases a condition for the issuance of a notice to proceed (“NTP”). In case of a NTP, mostly a latest date for the NTP to be dispatched, which is commonly referred as a *sunset date* or *long-stop date*, is provided too, along with the results of the non-issuance of NTP until such date. An extensive delay occurred in initiating the commercial operation due to the coronavirus outbreak under an EPC contract may result in exceeding such term. In order to assess the risk arising out of such a delay, not only results provided under the EPC contract, but also the results of not dispatching the NTP as provided in the O&M contract due to such delay should be evaluated carefully considering the circumstances, applicable law and the relevant contract provisions.

The works related to connection line are also not immune to the coronavirus outbreak. A delay in the construction of the connection line may delay the initiation of commercial operation as well. Any delay in such works may result in the project owner’s liability against the EPC contractor or O&M service provider, or liability of the EPC contractor against the project owner depending on the contract provisions. Who is responsible from the connection line related works under the contract and whether any excuse is provided should be reviewed.

Noting all the possible domino effects, the market actors should plan ahead and determine the actions to be taken, such as re-negotiating the agreements and making new financial projection, and consulting with their attorneys regarding the other possible effects under the project documents and contracts as well as the applicable legislation.

4. Check the Special Force Majeure Situations in the Energy Legislation

Project owners are generally subject to certain obligations under the legislation applicable to their facilities and the project related agreements, such as obtaining license, fulfilling license obligations, completing the construction work within a certain time period. Therefore, a review of the relevant legislation is required to check whether the legislation provides any suspension or time extension for project owners with regards to their obligations arising out of the energy legislation.

The Turkish Electricity Market License Regulation (“**License Regulation**”) foresees a force majeure provision according to which the project owners’ obligations under the License Regulation may be suspended or term thereof may be extended. Such force majeure provision lists epidemics as a force majeure event. In order to make a force majeure claim, an application should be made to the Energy Market Regulatory Authority (“**EMRA**”) in accordance with the License Regulation.

The License Regulation also provides that the term of pre-licenses and licenses may be extended for licensed projects, if affected from a force majeure event. In such case, the term provided for provisional acceptance of unlicensed projects may also be extended. In order to extent such terms, an application for time extension in the form of license revision should be made to the EMRA (for licenses related to

renewable energy resource areas, however, the General Directorate of Energy Affairs is also involved in the process).

For the connection and system usage agreements under Turkish law, both the force majeure provisions of the License Regulation and those of the Connection and System Usage Regulation (“CSUR”) should be reviewed in addition to the contract provisions. The CSUR refers to the License Regulation’s force majeure definition, and regulates that a notification should be made to the relevant network operator for the obligations under connection and system usage agreements to be postponed or suspended. It also requires the project owners affected from the force majeure event to submit reports to the network operators regularly regarding the measures taken for eliminating the effects of force majeure.

The EMRA, without the need for the project owners to apply, already decided on 2 April 2020 on extension of the terms of pre-licenses, licenses and connection agreements for three months due to the outbreak of coronavirus. The time extension is applicable to any project, the term of pre-license, license or connection agreement of which is ending on or following 10 March 2020.

In Turkey, renewable energy subsidies (feed-in tariffs and local component bonus payments) are conditional upon the commercial operation of facilities before 31 December 2020: if operational before such date, the relevant facility can benefit from the feed-in tariffs for ten years and from local component bonus payments for five years. Accordingly, project owners have been expressing their concerns that completions cannot be made until 31 December 2020 due to the outbreak and demanding for extension of such deadline.

In addition, the latest dates for the application to benefit from the feed-in tariff and local component bonus payment for 2021 are 31 October 2020 and 1 August 2020, respectively. Also, in order to benefit from local component bonus payment, the installation of the concerned facilities should be completed until 30 September 2020, or even if the installation cannot be completed until such date, a site visit certificate issued by a certified accountant confirming that the local equipment claimed to be used in the facility (through invoices and other related documents) should be submitted to the relevant governmental authorities until 31 October 2020. The market actors are also concerned about reaching these deadlines and possible consequences of any failure.

To sum up, we strongly advise the market actors to make a thorough review of the applicable legislation and the contracts related to their power plants and projects in order to determine all the effects of coronavirus outbreak. It should also be noted that in any case parties should act in good faith and diligent manner while taking any action.