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ÇETİNEL

2023 CONSTRUCTION LAW WRAP UP

TURKISH CASE-LAW

2024

INTRODUCTION

Welcome to the third edition of CETINEL's annual Construction Law Wrap-up!
Reflecting on the events and legal developments shaping Türkiye's construction industry in the past year, we firstly need to acknowledge the significant and unfortunate seismic activity on February 6, 2023. The earthquake profoundly impacted several provinces, leaving a lasting mark on affected communities. Our thoughts are with all those who have experienced loss and hardship in the wake of this unfortunate event. In the aftermath of the earthquake, Türkiye has witnessed a collective effort to rebuild and strengthen its infrastructure. The legal community has also responded diligently, leading to the introduction of new legislation and noteworthy court rulings addressing the unique challenges posed by seismic events in the construction sector.

This year's wrap-up will delve into the legal implications arising from the earthquake, shedding light on the legislative changes implemented to enhance the resilience of construction projects in Türkiye. We will explore how Turkish authorities have adapted and refined their approach to construction law in the face of such unforeseen circumstances.

Furthermore, our comprehensive review will encompass the most significant decisions handed down by Turkish high courts in relation to construction and infrastructure practice. By highlighting both legal and technical aspects, we aim to contribute to a deeper understanding of construction law and its evolving landscape in Türkiye.

As we embark on this journey through the legal intricacies of the construction industry in Türkiye, we remain committed to providing valuable insights and updates contributing to the development of construction law understanding in our country.
We hope you find this edition informative and relevant to your professional endeavors.
Enjoy the read!

LEGISLATION NEWS

Earthquake – Lessons Learnt

In the aftermath of the earthquake in Turkey on February 6, 2023, significant legislative amendments were introduced, both permanent and temporary, aimed at safeguarding the regions affected by the earthquake.

Presidential Decree No. 127[1] ("Decree")
The Decree has introduced provisions that impact the Public Procurement Law. The changes, applicable exclusively to regions under a declared state of emergency, allow for the signing of direct contracts without adhering to the specified periods outlined in Articles 40, 41, and 42 of the Code. This exception applies particularly in cases requiring preliminary financial control, where there is no need to wait for the completion of this control before entering into contracts.
This decree aims to provide relief for contractors facing challenges due to the earthquakes. It allows for two main actions regarding ongoing contracts in affected areas: contract termination if performance becomes impossible or unnecessary due to the earthquakes, and contract transfer upon request and approval.

Furthermore, the following protective measure has been established for commercial enterprises whose main offices or branches conducting transactions are situated in the provinces under a state of emergency. Even if these enterprises are not physically located in the cities where the state of emergency is declared, they are granted protection in cases of force majeure affecting their operations:

"Provided that the commercial headquarters of the tenderer invited to sign the contract within the state of emergency period (if the tender is submitted by the branch, the branch) is located in the provinces where the state of emergency has been declared as of 6/2/2023, in the tenders held in provinces where the state of emergency has not been declared, if the tenderer requests an extension of the contract signing period due to the force majeure situation caused by the earthquake, an additional period of up to ten days is granted by the administration conducting the tender."

It is stated that, under Law No. 4735 on Public Procurement Contracts, natural disasters are considered force majeure events, hence, no additional application to the Public Procurement Authority is required for force majeure requests related to public procurement contracts conducted in the provinces affected by the earthquakes, namely Adana, Adıyaman, Diyarbakır, Gaziantep, Hatay, Kahramanmaraş, Kilis, Malatya, Osmaniye, and Şanlıurfa, or contracts affected by the earthquakes in other provinces where individuals or entities operating in these affected provinces carry out activities.

In case of force majeure application by contractors to the authorities, it is emphasized that the authorities may decide on granting an extension, terminating the contract, or rejecting the application based on the nature of the specific situation. Moreover, attention is drawn to the importance of providing necessary facilitation to contractors by the authorities, without imposing any penalty, regarding requests for the deployment of labor, machinery, equipment, and tools used in ongoing public procurement contracts to the affected region for meeting the needs arising from the earthquakes in the affected provinces. It should be noted that the reason for this coverage even for provinces outside the scope of the state of emergency is to minimize the potential supply shortages and damages that may occur within the framework of this presidential decree and to minimize their impact on the economy.

LEGISLATION NEWS

General Communiqué on the Implementation of the Rebar Monitoring System[2] (“Communiqué”)
The rebar quality (or the lack thereof) was one of the major contributors of the catastrophic result of the 2023 earthquake. With the Communiqué, the procedures, and principles regarding the monitoring of all stages from the import of iron to be used in construction until the delivery to the building contractor, including laboratory testing processes, are determined.

The Rebar Monitoring System (IDIS), which uses security labels or signs on rebar to monitor production operations and transfer data to a central system, is being implemented by the General Directorate of Mint and Security Printing. Additionally, this system will manage delivery transactions and provide several ministries with pertinent data. The General Directorate built the IDIS, which will monitor critical production data and communicate it to the central system by attaching security labels or signs to rebar.

It will also track delivery transactions and record information on manufacturers, distributors, importers, wholesalers, dealers, and traders. The Ministry of Environment, Urbanization and Climate Change, the Ministry of Trade, and the Revenue Administration will get this data. In this regard, the Communiqué requires all taxpayers operating in the construction industry to use IDIS and requires taxpayers producing or importing rebar to mark or apply security labels to their rebar.

Law No. 7471 on the Amendment of the Law on the Transformation of Areas Under Disaster Risk and Certain Laws and Decree Law No. 375[3] (“*Amendment*”)

The Amendment introduces significant changes to Law No. 6306 concerning the transformation of areas at risk of disaster. Key changes include empowering the General Directorate of Urban Transformation to oversee processes such as building inspection and evacuation. The concept of "reserve building areas" is expanded to include existing settlements, enabling transformation practices like demolition and reconstruction. The threshold for decision-making by property owners regarding transformation actions is lowered to require a simple majority vote. Owners of risky buildings now have a maximum of 90 days to demolish them, with government assistance available if necessary. Provincial Directorates will handle zoning plan announcements and objections in reserve building areas. The law also introduces contractual obligations for beneficiaries receiving new properties in exchange for demolished ones, based on property values. Overall, Law No. 7471 aims to streamline urban transformation efforts and ensure smoother processes for all stakeholders involved.

[1] Published in the Official Gazette No. 32121 and dated March 3, 2023.
[2] Published in the Official Gazette No. 32134 and dated March 16, 2023.
[3] Published in the Official Gazette No. 32364 and dated November 9, 2023.

LEGISLATION NEWS

Other Developments

We note that the Regulation Amending the Regulation on Social Insurance Transactions[4] was published in the Official Gazette. The sixth paragraph of Article 111 of the Regulation on Social Insurance Transactions has been amended as follows:

“In the calculation of the construction cost completed in the year in which it started, the unit cost in force on the date the construction was completed; In the calculation of the construction cost completed in the years following the year in which it started, the last unit cost published for the year preceding the year in which the construction was completed is taken as basis.”

This is an interesting regulation as it encompasses the social security regulations and the public procurement technical regulations, i.e. composition of unit rates.

Indeed, for specialized construction projects carried out by individuals, legal entities, or institutions lacking legal personality, the Social Security Institution (SGK) conducts investigations to ascertain the adequacy of labour declarations, applying a 25% shortfall to the minimum labour rate specified in institution-published regulations.
Building costs are determined by multiplying the unit cost amount by the area designated in construction permits issued by municipalities, governorates, or other authorized entities; if permits are absent, the SGK determines the area. Unit cost amounts, categorized by construction class and type, are annually established by the Ministry of Environment, Urbanization, and Climate Change.

Recent amendments dictate that for constructions completed within the same year, costs are calculated using the unit cost amount effective at completion, while for those completed in subsequent years, costs are determined using the unit cost amount published for the year preceding completion. The unit cost amount applicable at completion serves as the basis for calculation.

[4] Published in the Official Gazette No. 32133 and dated March 15, 2023.

SUPREME COURT DECISIONS

IDENTIFYING THE CONTRACTORS IN LABOUR LAWSUITS

9.HD 2023/15985 E., 2023/15248 K. DATED OCTOBER 18, 2023

The dispute at its core relates to labour receivables but it also extends to the discussion on the identification of subcontractor and main contractor level responsibility, which is a very common point of dispute in construction projects.

In this case, the plaintiff is an employee and claimed that his service contract was terminated unfairly. Within this context, he requested the collection of severance and notice pay, overtime work, annual leave pay and unpaid wage receivables from the defendants, identified as subcontractor and principal employer/main contractor.

The attorney representing the defendant company, identified as the main contractor, asserted that they had entered into an agreement for the construction of a natural gas pipeline with the other defendant company possessing a certificate issued by the Energy Market and Supervision Authority. This agreement was structured as a turnkey contract, and the attorney argued that it constitutes a contract for work rather than a service contract. Consequently, the attorney contended that as there is no service contract between the defendants, and hence they do not hold the status of the main contractor.

Both the courts of first instance and the courts of appeal acknowledged the existence of a subcontractor-main contractor relationship between the defendants and partially upheld the lawsuit.

Following an appeal by the defendant company, the Court of Cassation, citing a previous decision of the Court of Cassation General Assembly of Civil Chambers, declared the following: "*The inclusion of certain provisions in the work contract aimed at ensuring the quality of the work and workplace discipline does not confer the status of principal employer beyond construction ownership. It does not negate the independent employer identity of the recipient of the work.*"

The Court of Cassation emphasized that, considering the turnkey contract between the defendants is essentially a work contract, it is crucial for the entire work to be executed by the contractor. The provisions pertaining to the employer's procurement of materials, according to the court, do not alter the nature of the contract. Therefore, the Court of Cassation concluded that the defendant does not hold the title of the main contractor, leading to the rejection of the plaintiff's claims.

SUPREME COURT DECISIONS

UNPACKING RELIANCE DAMAGES AND CONTRACT RESCISSION

6.HD, 2022/1061 E., 2023/593 K. DATED FEBRUARY 15,2023

The dispute under consideration in the Supreme Court Decision originated from a construction contract involving land share. The plaintiff, a landowner, terminated the contract with the defendant contractor due to the latter's failure to meet the flats’ delivery deadline. The plaintiff sought reliance damages and additional damages, contending that the termination resulted in missing a more favorable contract and an inability to generate income from the flats due to engagement in jewelry making.

The Court of Appeal dismissed the claim, citing the claimant's failure to substantiate reliance damages and asserting that damages based on conjecture (somut varsayıma dayalı zarar) are not permissible.
On the other hand, the Court of Cassation turned to Article 125 of Turkish Code of Obligations No. 6098, providing clarification. According to this article, when a debt remains unfulfilled due to the debtor's default, the creditor has three options:

1. Demand performance and delay compensation at any time.
2. Demand positive damage compensation by waiving performance.
3. Demand reliance damages compensation by renouncing performance and rescinding the contract.

Negative damage, defined in doctrine as "damage suffered due to the non-fulfillment of a contract believed to be fulfilled, which would not have been suffered if the contract had not been made."

In this context, the Court of Cassation upheld the decision, reasoning that the plaintiff's claims constituted positive damages, and such damages couldn't be pursued since the plaintiff had rescinded the contract. Furthermore, the court noted that reliance damages claims could not be substantiated.

SUPREME COURT DECISIONS

IF ONE CAN ANTICIPATE IT, THEN IT CAN'T BE ADAPTED

11.HD, 2021/7877 E., 2023/2131 K. DATED APRIL 06, 2023

The dispute concerns a large-scale real estate development project, wherein the plaintiff alleges that post-contractual regulatory and administrative changes have impeded the project's completion within the anticipated timeframe and hindered the realization of expected revenues. Consequently, the plaintiff, alongside other stakeholders, seeks to amend the existing contract terms. Specifically, they propose adjustments to the remaining revenue commitment, suggesting a shift from a fixed $63 million amount to an 11% share based on actual revenue generated. Additionally, they request provisions for postponing payment corresponding to the delay in obtaining necessary construction permits, the conversion of payment obligations into Turkish Lira, and the return of the security bond related to the project. Supreme Court Decision revolves around whether the conditions for adaptation of the contract have arisen in accordance with the claimant's request. In legal doctrine, the existence of adaptation conditions requires a significant and unforeseeable deterioration, within the framework of good faith, in the balance between the mutual performances outlined in the contract.
The Court of Cassation, in its decision on this matter, assessed the fulfilment of adaptation conditions based on three key points:

1. Protected Area Declaration Impact: A protected area declaration for some land in the project area resulted in substantial changes, costs, and disruptions in the project initiated in 2011.
The construction license was only obtained at the end of 2018 due to these factors. Recognizing that the limited-time land allocation significantly reduced the period for commercial use and would devalue the units to be built in the protected area, the Court deemed the decision to declare the area protected, made 20 years after the land allocation, unpredictable and unforeseeable. This situation required the restoration of balance in a costly investment endeavor, thus qualifying as a valid reason for adaptation.

2. Currency Prohibition Amendment: The amendment to Code No. 32 on the Protection of the Value of Turkish Currency by Presidential Decree No. 85, published on 13.09.2018, prohibited the sale and lease contracts of immovables and work contracts in foreign currency or indexed to foreign currency. The Court concluded that this prohibition significantly increased the plaintiff's investment cost and exacerbated the performance obligation. Despite the initial feasibility of sales in foreign currency, the guarantee of revenue sharing in foreign currency was found to complicate sales and marketing activities, leading to a substantial decrease in the plaintiff's anticipated income from the investment. This circumstance was acknowledged as a valid reason for adaptation.

3. Exchange Rate Increase: Anticipating increases in exchange rates is deemed possible in countries like Turkey, where inflation is frequent and severe. Consequently, on its own, the anticipation of exchange rate increases was not considered a valid reason for adaptation.

In summary, the Court of Cassation's decision provides a nuanced evaluation of the circumstances, acknowledging certain factors as valid reasons for adaptation while rejecting others based on their foreseeability and impact on the contractual balance.

SUPREME COURT DECISIONS

COMPLYING WITH A REGULATION THAT WILL EXIST IN 15 YEARS: IS IT POSSIBLE?

6.HD, 2022/1704 E., 2023/2773 K. DATED SEPTEMBER 14, 2023

In this decision, the focal point of the dispute was whether the expenses for reinforcement, incurred after the building—whose construction license was granted in 1987 and habitation permit in 1992—suffered damage in the Konya earthquake in 2009, could be assigned to the contractor.

The defendant contractor contended that Block A, the section it constructed, remained undamaged, asserting that no reinforcement was necessary. They maintained that the building was constructed in accordance with the project, adhering to technical specifications, and compliant with the rules stipulated in the 1975 Earthquake Regulation, applicable during the building's construction.

The Court of Cassation determined that the evaluation of the building, for which the occupancy license was obtained in 1992, should align with the regulations in force at that specific time for the contractor. However, in the expert assessment conducted by the court of first instance, it was established that the earthquake regulation of 2007 served as the basis, and no damage was identified in the block constructed by the contractor. Considering these findings, the Court of Cassation concluded that no liability could be attributed to the contractor, thereby dismissing the plaintiffs' appeal objections.

SUPREME COURT DECISIONS

DISPUTE OVER CONTRACT TERMINATION: GENERAL ASSEMBLY'S SCRUTINY ON LOST PROFIT CLAIMS

HGK., E. 2021/874 K. 2023/118 T. DATED FEBRUARY 22, 2023

The detailed discussion by the General Assembly of the Court of Cassation revolves around the plaintiff contractor's claim for compensation due to lost profits and damages resulting from the termination of a construction contract in exchange for a land share by the defendant landowners. Notably, the defendant landowners also sought the termination of the contract with the plaintiff through a counterclaim.

The Court of Appeal initially ruled that the mutual agreement of the parties to terminate, as reflected in both the lawsuit and counterclaim, precluded the plaintiff from claiming positive damages in the form of lost profits. The contract termination was deemed retroactive in the event of unified wills. Following the reversal decision by the Court of Cassation, the Court of Appeal persisted in its ruling, leading to the escalation of the dispute to the General Assembly of the Court of Cassation.

The General Assembly of the Court of Cassation, in its conclusion, found fault with the retroactive termination of the contract. It highlighted the oversight of the final decision on the wrongful termination of the contract and emphasized the need to evaluate the plaintiff contractor's claim for positive damages based on lost profit.

The Board argued that the decision of the Court of First Instance, determining the wrongful termination in the main case, should not be considered null and void. Additionally, it contended that the Regional Court of Appeal's decision on retroactive termination in the counterclaim, based on the parties' unified will for termination, was erroneous, particularly with the acceptance of the appeal application by the defendant counterclaimants.

STATE COUNCIL DECISIONS

CAN’T BYPASS THE RATIO LEGIS

6.HD., E. 2022/2923 K. 2023/264 DATED JANUARY 18, 2023

This legal case revolves around the contestation of an administrative fine imposed for the absence of an Environmental Impact Assessment Report (EIA Report).Despite obtaining an "EIA Out of Scope" certificate for Block A of the site, it was discovered during an audit that construction of Block B had commenced without an "EIA Not Required" certificate. Despite having a building license from the Municipality, an administrative fine of 2% of the project cost was levied on the construction of Block B for not having an "EIA Not Required" certificate, in accordance with the relevant article of the Environmental Law. Block A, comprising 154 houses and 3 shops, received an "EIA Out Of Scope" certificate following an audit on December 22, 2020, based on an application made to the administration on December 09, 2020. Subsequently, a second audit was conducted for both Block A and Block B upon an e-ÇED system application, encompassing 154 houses in Block A and 132 houses, 10 shops, and 9 offices in Block B.

In this audit, it was revealed that Block A had previously obtained an "EIA Out of Scope" certificate, and Block B had a building license from the Municipality for 132 houses and 16 offices. Despite these findings, it was noted that excavation and concrete pouring works were conducted for both blocks without obtaining an "EIA Not Required" certificate for Block B. An administrative fine equivalent to 2% of the project cost was subsequently imposed.

Interestingly, one day after the imposition of the administrative fine, a decision of "EIA Not Required" was issued for the Project, stating that the environmental impact measures outlined in the project presentation file were deemed sufficient.

The Council of State annulled the administrative fine on two grounds:

Firstly, it emphasized that the plaintiff contractor could not be considered at fault for commencing construction based on the building license obtained from the municipality with the "EIA Not Necessary" decision. The Court of Cassation held that the subsequent issuance of the "EIA not required" decision one day after the fine did not contradict the purpose of environmental protection under Environmental Law No. 2872.

Secondly, the Court of Cassation ruled that the administrative fine, determined as 2% of the project cost under Article 20 of Law No. 2872, could not be imposed for the construction of Block A, which had an "EIA is Out of Scope" certificate. It found it erroneous to calculate the administrative fine based on the total project cost, incorporating both blocks.

STATE COUNCIL DECISIONS

JURISDICTIONAL BOUNDARIES IN CONTRACT DISPUTES: COUNCIL OF STATE'S RULING ON ADMINISTRATIVE VS. JUDICIAL AUTHORITY?

13. HD, 2021/3988 E., 2023/1685 K. DATED APRİL 05,2023

Another decision from the Council of State pertains to the dismissal of an application made by plaintiff companies against the defendant ministry for the liquidation of a contract related to a tender. In the dispute brought before the Council of State by the ministry, the examination did not delve into the merits of the case but focused on crucial procedural determinations. During the procedural review, the Council of State, in accordance with Provisional Article 4 of Public Procurement Contracts Law No. 4735, scrutinized the jurisdiction in cases filed for contract liquidation and transaction annulment. Citing a decision from the Court of Dispute, the Council of State emphasized that actions taken from the tendering stage until the conclusion and finalization of the tender are considered administrative in nature. It is generally accepted that dispute resolution during this stage falls under administrative jurisdiction.

On the other hand, disputes arising from contract implementation post-tender, after finalizing the tender and concluding the contract, are under judicial jurisdiction following private law provisions. In the specific case and contract under consideration, the Council of State determined that if an agreement is reached within the framework of the contract rules, the plaintiff would fulfill its obligations.

Alternatively, if deemed inappropriate, the request could be rejected. Since this transaction was decided within the context of the contract, the administration did not employ superior public power. Parties would decide based on freedom of contract and equality, characterizing it as transactions related to the execution and implementation of the contract in question established by the administration within the realm of private law.

The Council of State asserted that the administration and the plaintiff entered into a contract as equal parties when the application was made for the liquidation of the business. Consequently, it concluded that the implementation, execution, liquidation, and the ensuing consequences of this contract fall under the jurisdiction of the judicial authorities.

PUBLIC PROCUREMENT AUTHORITY DECISIONS

PREVENTION OF ABUSE BASED ON FORCE MAJEURE

PUBLIC PROCUREMENT AUTHORİTY DATED MAY 24,.2023, 2023/UY.II-784

In this case, the company lodged a complaint with the administration on May 2, 2023, concerning the tender conducted on December 28, 2022, through an open tender procedure by the Housing Development Administration of the Republic of Turkey Ministry of Environment, Urbanization, and Climate Change. Following the rejection of the complaint, the company submitted an appeal complaint to the Public Procurement Authority.

It is noteworthy that Presidential Decree No. 127, issued after the earthquake in Turkey on February 6, 2023, includes the following provision: "*In the tenders held throughout the country to meet the needs arising in the provinces where a state of emergency has been declared, if the tenderers are unable to sign the contract due to force majeure caused by the earthquake, the sanctions of prohibition, and recording the collateral as revenue shall not be applied.*"

Based on this regulation, the applicant requested the administration to cancel the invitation to contract and return the tender guarantees to the parties; the administration rejected the request by stating that their request was outside the scope of this regulation.

Upon the objection to the Public Procurement Authority, the institution made a three-stage evaluation. The tendered company was located in Ankara and the work was carried out in Muğla, which was not among the provinces stated in the Presidential Decree. In its third evaluation, the Authority additionally assessed the nature of the work. It concluded that the applicant's claim was not justified on the grounds that the nature of the work did not serve the "*purpose of meeting the needs arising in the provinces where the State of Emergency was declared*" within the scope of Presidential Decree No. 127.