

Freedom of Contract

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Contracts are legal transactions which create debt relationships between parties by the declaration of mutual agreement and consent. According to the Turkish Code of Obligations (Law no. 818) (“TCO”), in signing a contract parties are free to choose the contracting party and determine the subjects of the contract. This is called the principle of freedom of contract. This freedom, as will be explored below, is not unlimited.

A contract consists of enforceable obligations that have been voluntarily assumed. Thus, one of the essential elements of a contract is an agreement. There is an agreement when the parties lead one another to believe reasonably that they are of the same mind about a given transaction. This point is reached by an offer from one side, and evident acceptance of the offer on the part of the other. In addition, an offer expresses the willingness of the offeror to enter into a contractual agreement regarding a particular subject. It is a promise that is conditional upon an act or return promise and to make an offer, the offeror must appear to intend to create a binding obligation; whether this intent exists is determined by objective standards. Thus intention may be shown by conduct.

According to Article 19 of the TCO the contracting parties can choose the type, subject and terms and conditions of the contract freely. However, the Republic of Turkey has introduced planning into its economy and there is also state economic activity. These bring certain limitations to the freedom of contract. This article focuses on the limitations to freedom of contract, which can be found below as follows: (i) contracts violating the law and imperative provisions of the law, (ii) contracts contrary to morality and public order, (iii) contracts contrary to individual rights and (iv) impossible contracts, all of which shall not be valid.

Contracts Violating the Law and Imperative Provisions of the Law

There are some obligatory provisions in the TCO and the Turkish Commercial Code (Law no. 6762) (“TCC”) which a contract cannot violate. For instance, a party to the agreement cannot, in advance, waive the ef-

fect of the statute of limitations. In addition, parties sometimes enter into contracts which indirectly violate Turkish law. This is called fraud against the law and such contracts will be deemed a direct violation of the law. In addition, the subject of an agreement may be limited and/or entirely restricted by certain prohibitive provisions under relevant legislation. For instance, agreements for black-marketing and agreements aiming to arrange the purchase of narcotics are forbidden.

Contracts Against Morality and Public Order

A contract cannot be against morality and public order. For instance; contracts which aim to affect the bidding at auction sales, arrange bribery or organize false testimony in courts are forbidden.

Contracts Against Individual Rights

According to Article 23 of the Civil Code (Law no. 4721) (“CC”), no one can renounce his/her right to have rights and to enter into legal transactions entirely or partially. No one can alienate his/her own personal liberty, nor impose any restrictions contrary to the law or moral rules at his/her own discretion.

It should be noted, if the law prescribes a specific form for a certain type of a contract, observing the form is a condition for validity. If the law prescribes a specific form, the parties cannot agree not to comply with the specified form. For instance, written form is required where a statutory rule expressly prescribes it, or where the parties have agreed that a contract or part of it can only be executed in a written form; observance of this form is a condition for a validly existing contract.

In addition, relating to the public order concern, some areas of law and thus contracts made in such areas also have some specific restrictions. For example: (i) some contracts (such as those pertaining to incorporation of a company) are subject to state approval, (ii) some employment agreements must comply with applicable employment laws and collective bargaining agreements, (iii) some contracts have provisions subject to the Consumer Protection Law (Law no. 4077) (“CPL”) and (iv) contracts with impossible subjects are invalid.

In addition to all the substantive restraints on the freedom of contract principle as outlined above, when entering into a contractual relationship, the contracting parties shall always take good faith and fair dealing principles as a basis and act prudently and diligently.

Impossibility of Contracts

According to the TCO, if the subject of a contract is not possible, the contract is impossible. In this situation, a contract that is impossible for practical or legal reasons is subject to nullity and is invalid from the beginning. For nullity, the impossibility has to regard the subject of the contract and it has to affect everyone.

A contract which is invalid because of nullity does not create any profit or result from the beginning. But if, while making the contract, a party knows or has to know its impossibility that party has to make

up the other party’s reliance interest. According to the TCO, if the impossibility arises after making the contract and if the debtor is not at fault, the debtor is absolved of his/her debt. In this situation, the contract is not subject to nullity, but the debtor is excused from his/her debt. It is not important whether the impossibility which absolves the debtor of the debt is objective or subjective. If the impossibility is not the fault of the debtor, the debtor is absolved of his/her debt.

If the debtor is at fault regarding impossibility which arises after making the contract, the debtor is liable for that. Impossibility which arises after concluding the contract can be objective or subjective. It doesn’t affect the liability of the debtor. In other words, the debtor is always liable if he/she is at fault.

Conclusion

People entering into a contract relationship have to exercise their acts to each other. An act which is impossible has a very important impact on both sides’ situations and the contract’s validity. The Turkish Code of Obligations adopted the principle of freedom of contract, but on the other hand it constrains this principle. Impossible acts which are agreed to in contracts compose one of these bounds. Freedom of contract covers a large area and encompasses different conceptions. But, the fundamental understanding is that individuals are granted the right to arrange their private lives in a way that suits their interests and in accordance with their free will.