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Deadlock and termination Q&A: Turkey

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This Q&A provides country-specific commentary on Practice note, Deadlock and termination: Cross-border.

Deadlock and termination

1. In the absence of specific provisions in a company's bye-laws or a shareholders' agreement, are any remedies available at law in the event of an unresolved dispute between shareholders resulting in deadlock?

Two of the most common forms of corporate entity in Turkey are (privately held) joint stock companies (*anonim şirket*) and limited liability companies (*limited şirket*). The following analysis is based on the rules applicable to these two corporate types.

In the absence of specific provisions in a company's articles of association or shareholders' agreement, the available statutory remedies in the event of an unresolved dispute between shareholders resulting in a deadlock are limited to certain rights of action and statutory squeeze-out rights, depending on the nature and consequences of the event causing the deadlock.

The rights of action aim at the dissolution and liquidation of the company.

The statutory squeeze-out rights may apply where there is substantial majority control of the company and a minority shareholder is causing deadlock by abusing its veto rights.

Statutory rights of action

The available rights of action under the Turkish Commercial Code (TCC), depending on the nature and consequences of the deadlock event, are as follows.

Action for dissolution of the company due to impossibility of the company carrying out its business (*Article 529/1(b), TCC*)

This cause of action generally relates to extraneous events that render it impossible for the company to pursue its business or activities as set out in its articles of association. Typical examples include the inability of a company to obtain a required permit, or its business activities becoming illegal due to subsequent changes in law (for example, where a local distributor is no longer able to import relevant goods due to new regulatory prohibitions).

This cause of action may be available where a deadlock between shareholders occurs about whether and how to change the scope of company's activities once the current corporate subject becomes impossible.

To determine whether a company is suffering from the impossibility of it carrying out its business as determined in its articles of association, the Turkish courts would review the financial statements and trade registry records to assess whether the company is conducting any commercial activities and transactions with an aim to generate profits within the scope of its present corporate subject.

Action for dissolution of the company due to extended inability to form its mandatory corporate bodies (*Articles 530* and *636/2, TCC*)

Shareholders may initiate a lawsuit for the dissolution of a company where they are unable, for an extended period, to convene a general meeting, or to appoint the management body on expiry of the term of office of the previous management body.

This right of action would be available in cases of deadlock where one of the shareholders whose presence (or the presence of its representative) is necessary for validly convening the management body or a general meeting of shareholders fails to be present, or where shareholders are unable to agree at the general meeting to procure the appointment of a new management body following expiry of the term of office of the previous one.

In these cases, the court will grant a cure period in which the company may attempt to remedy the situation.

During this period, the court may appoint a provisional administrator (*kayyım*) to manage the company's affairs.

If the relevant corporate bodies cannot be reconstituted by the end of the allotted cure period, the court must order the dissolution of the company and appoint a liquidation officer. The court has no discretion over this.

Action for dissolution of the company for just cause (*Articles 531* and *636/3, TCC*)

The most versatile but unpredictable (in terms of its potential consequences) right of action available to the shareholders in the event of deadlock would be a suit for dissolution of the company for just cause.

Any single shareholder or group of shareholders holding at least 10% of the share capital in (private) joint stock companies, or any shareholder of a limited liability company, may request the court to dissolve the company if there is a just cause to do so.

Dissolution for just cause is a remedy of last resort. It will not be ordered unless there are serious grounds to do so and no alternative remedies. A finding of just cause will be highly dependant on the factual circumstances of each specific case. As a general rule, where the just cause argument is based on a deadlock, the subject matter and the effects of the deadlock must be so serious as to render the company unable to conduct its activities and operate towards achieving its corporate objectives. The onus of proving the existence of a just cause for dissolution will be on the plaintiff.

In an action for dissolution of the company for just cause, the court may order alternative remedies that it deems fit. These can include ordering the company (or other shareholders who are willing to do so) to buy-out the plaintiff's shares. Accordingly, a plaintiff party should be aware that it may be ordered to sell its shares at the end of the proceedings, at what the court deems to be true and fair value in light of the company's assets and liabilities. The law does not impose any particular valuation methodology.

The law is silent on whether the plaintiff can offer to buy-out the other shareholders.

In limited liability companies only, action for withdrawal (exit) from the company on just grounds (*Article 638/2, TCC*)

Any shareholder of a limited liability company may request the court to issue an order allowing it to exit the company, if there are just causes for doing so.

As with an action for just cause for dissolution, a finding of a just cause for a suit for withdrawal will be highly dependant on the factual circumstances of the case, and the onus will be on the plaintiff seeking to withdraw.

The plaintiff must establish that there are circumstances rendering continuation of the existing shareholding relationship unbearable for the plaintiff and that the plaintiff cannot be expected, in good faith, to remain as a shareholder. As a general rule, the courts will deny requests for withdrawal if they find that the underlying circumstances causing problems to the plaintiff shareholder can be remedied through other statutory shareholder rights or remedies.

If a request for withdrawal is granted, the court will order payment of withdrawal compensation commensurate to the true value of the plaintiff's shareholding (*Article 641/1, TCC*).

A key consideration for the plaintiff would be the availability of disposable funds in the company for the payment of the withdrawal compensation. Where there are no sufficient funds, the unpaid amounts will be recorded as a claim of the withdrawing shareholder against the company, subordinated to other corporate debts (*Article 642/3, TCC*).

Squeeze-out rights

Under exceptional circumstances, a squeeze-out remedy may be available in the event of a deadlock, in particular where the deadlock is caused and maintained by a shareholder acting in bad faith and against the company's interests.

The squeeze out of minority shareholders in (private) joint stock companies is possible through either:

- A court decision rendered in a lawsuit for dissolution for just cause (as explained above).
- Application of Article 208 of the TCC, which is limited to the cases where there is a group of companies as defined under the TCC. A group of companies would be deemed to exist if there are at least two subsidiary business corporations and one controlling business corporation (one of which must be established in Turkey) or, where the controlling entity is not a business corporation, at least three subsidiary business corporations (*Article 195/4, TCC; and Article 105, Trade Registry Regulation*). In a group of companies, if a controlling company owns at least 90% of the shares or voting rights of a joint stock company affiliated to that group, the controlling company may buy out the shares of minority shareholders of the affiliated company, if the minority acts in a manner as to block the affiliated company's transactions and activities, acts in violation of the principles of honesty and good faith, creates a perceptible disruption in that affiliated company's operations or acts recklessly.

For limited liability companies, the company can, based on a shareholder resolution adopted by a qualified majority, apply to the court to order the expulsion of a shareholder on just grounds (*Articles 621/1(h)* and *640/3, TCC*).

2. Is it common practice expressly to provide for a dispute resolution process in a joint venture company for an unresolved dispute between shareholders resulting in deadlock? If so, are any procedures commonly adopted? In which document would the relevant provisions commonly be drafted?

It is common practice expressly to provide for a dispute resolution process in joint venture companies for unresolved disputes between shareholders resulting in deadlock. These mechanisms would generally provide some form of escalation procedure. The first steps would generally be direct negotiation and mutual consultation between members of the upper management of the shareholders.

Where the shareholders' representatives are unable to resolve the deadlock through negotiation, more formal deadlock resolution procedures would be engaged. These would include:

- Referring the matter to an independent technical expert, if it relates to a technical or financial matter that may be resolved by the informed decision of an expert.
- Attempting to resolve the matter through alternative dispute resolution proceedings, sometimes with institutional support.
- Buy/sell-out of the shares by one of the deadlocked parties.
- As an ultimate remedy, or in cases where the winding up of the business of the company and liquidation of its assets would be preferable, triggering the dissolution of the joint venture.

For joint stock companies, these provisions would commonly be included in the shareholders' agreement only, as certain generally applicable statutory principles would limit the possibility of effectively entrenching the provisions by incorporating them in the articles of association. Key considerations in this respect are that:

- The articles of association of a joint stock company may deviate from the statutory provisions only to the extent permitted under the *TCC* (*Article 340, TCC*).
- Although all provisions of the articles of association will be registered and published, only a limited number of them would have binding legal effect vis-à-vis third parties. These limited provisions do not include deadlock resolution mechanisms (*Articles 354/1* and *36/1, TCC*).
- With the exception of certain corporative obligations allowed under the TCC, shareholders of a joint stock company may not be required under the articles of association to fulfil any obligation other than payment of share capital contribution undertakings and share premiums (*Article 480/1, TCC*). Additional obligations set out under the articles of associations will either be null (where they relate to corporative matters and entail a breach of the statutory corporate law mechanisms prescribed under the TCC) or if upheld, will have limited effect as contractual provisions valid only between the shareholders of the company at the time the articles were adopted. Even where these provisions are upheld to be valid as contractual arrangements between the shareholders, no corporate law remedy will apply if they are breached.

However, it is not uncommon for the parties to a joint venture to reflect the provisions of the shareholders' agreement that relate to deadlock and deadlock resolution mechanisms in the articles of association in some form. Aside from the limitations on the enforceability and binding effect of these provisions, the shareholders should be wary of potential legal uncertainties that may follow. Notable uncertainties include those that may arise due to inconsistencies between the articles of association and the provisions of the shareholders' agreement and to the risk of having parallel proceedings initiated under the shareholders' agreement and the articles of association.

For limited liability companies, provisions on deadlock resolution would also be reflected in the shareholders' agreement. However, as the statutory regime governing what may or may not be included in the articles of association of a limited liability company is more flexible, certain deadlock resolution provisions may also be reflected in the articles of association, if there are no countervailing confidentiality concerns. As with joint stock companies, the articles of association of a limited liability company may deviate from the statutory provisions only to the extent permitted under the law (*Article 579, TCC*). However, provisions relating to the following matters may be validly included in the articles of association with binding effect:

- Transfer restrictions deviating from the statutory regime.
- Option rights, pre-emption rights, repurchase and purchase rights over shares.
- Veto rights or rights for a casting vote at general meetings.

- Contractual penalties for non-performance or delayed performance of obligations set out under the articles of associations.
- Rights of withdrawal that may be granted to shareholders, the conditions for the exercise of these rights and terms governing the type and payment of the withdrawal compensation.
- Just causes that would result in the expulsion of shareholders.
- Grounds for dissolution other than those set out under the statute.

(*Articles 577* and *587, TCC.*)

If Standard document, Joint venture shareholders' agreement: majority and minority shareholder: Cross-border were governed by the laws of the Republic of Turkey:

- We would remove the provision of clause 13.1(c), as equality in votes in corporate bodies would have certain statutory consequences, both in joint stock companies (*Articles 390/3, 418/2* and *421, TCC*) and in limited liability companies (*Articles 620, 621* and *624/3, TCC*).
- We would generally revise clauses 13 and 14 to ensure that time periods are consistent with Turkish law requirements for holding corporate meetings.
- We would generally retain the remainder of clauses 13 and 14 but would caution the parties that:
  - the prevailing position under Turkish law is that no corporate remedies (that is, remedies available under various rights of action for shareholders or directors under the *TCC*) may be sought where there is only a breach of an agreement between shareholders. Breach of an agreement between shareholders is likely to be rejected if advanced as a standalone ground for challenging the validity of corporate resolutions; and
  - these provisions would only offer contractual protection. In case of breach, the only available remedy would be a claim for compensation by the non-breaching party for its provable damages.
- Bearing in mind the difficulties under Turkish law of obtaining an order for specific performance and proving the quantum of damages, we would recommend negotiating a contractual penalty provision.
- If the joint venture vehicle is a limited liability company, we would recommend that parties consider entrenching certain provisions in the articles of association of the joint venture company, as and to the extent appropriate.

3. Is it common to provide for the compulsory transfer of shares in a joint venture company in any of the following circumstances? In which document are the relevant provisions likely to be drafted and are they likely to be enforceable?

- (a) Insolvency of shareholder.
- (b) Change of control of shareholder.
- (c) Material breach of the shareholders' agreement or bye-laws.
- Would such compulsory transfer be potentially subject to "claw-back" in case of insolvency of the transferor, if the latter were incorporated in your jurisdiction and local insolvency law applied?

It is fairly common to provide for compulsory transfer of shares in a joint venture company in case of insolvency of a shareholder, change of control of a shareholder or material breach of the shareholders' agreement or the articles of association.

With respect to joint stock companies, these provisions would customarily be regulated under the shareholders' agreement, for reasons outlined in Question 2. However, similar to deadlock provisions, there is a widespread practice of reflecting the provisions of shareholders' agreement relating to compulsory share transfer mechanisms, in some form, in the articles of association.

With respect to limited liability companies, the practice would essentially follow the practices relating to deadlock provisions (see Question 2).

A compulsory transfer provision would be subject to general limitations on enforceability and claw-back rules under the Execution and Bankruptcy Code (EBC) rules governing the impact of insolvency proceedings and lawsuits for cancellation of disposals made before insolvency.

As a general rule, where a transferor subject to Turkish bankruptcy rules becomes bankrupt before the completion of the transfer of shares under a compulsory transfer provision, these shares would go to the bankruptcy estate of the transferor and the claim of the other shareholder would be substituted by a claim for cash compensation against the bankruptcy administration of the transferor (*Article 198, EBC*).

Where such a transferor becomes insolvent or bankrupt after the completion of the transfer of shares under a compulsory transfer provision, the disposal of shares may be challenged under a cancellation of disposal (*tasarrufun iptali*) suit. A challenge can be made by the bankruptcy administration of the transferor or by certain qualified creditors of the transferor where the transfer in question was demonstrably carried out at an undervalue or with fraudulent purpose (*Articles 277-284, EBC*).

If Standard document, Joint venture shareholders' agreement: majority and minority shareholder: Cross-border were governed by the laws of the Republic of Turkey, we would amend clause 16 (Compulsory Transfers) and its referenced clauses to provide:

- A clear definition of "material breach" triggering a compulsory transfer.
- A clearly defined timeline and procedural steps for valuation, together with explicit obligations for the parties to provide necessary assistance and cooperation to the valuer for a prompt and successful completion of the valuation.

Note that the constitutional documentation of Turkish companies is limited to:

- The articles of association, the form and content of which are circumscribed by statute and instruments and practices allowed by the Central Electronic Registry System (*MERSIS*) and local trade registry directorates.
- The internal directive for general assembly meetings, the form and content of which is circumscribed by statute and regulation. The internal directive sets out the procedural rules for holding general meetings.
- The internal directive for the board of directors. This is an instrument adopted by the management body to determine the principles relating to delegation of management duties and the scope and limits to the signing powers of authorised signatories of a company.

Turkish companies have no constitutional document corresponding to bye-laws operating in parallel to the company's articles of association, as may be the case for business organisations incorporated in other jurisdictions. Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border is, therefore, not compatible with Turkish corporate law and practice and cannot be used by Turkish companies. Provisions that are found in the bye-laws in other jurisdictions would be distributed between:

- The articles of association.
- The internal directive for general assembly meetings.
- The internal directive for the board of directors.

Some of the provisions covered by bye-laws are subject to mandatory statutory provisions, and as such, shareholders familiar with the Turkish jurisdiction may simply omit them if their inclusion is not required under statute or a template form under a regulation. Where foreign shareholders are involved, parties may still want to include these provisions in the appropriate corporate documents for ease of reference.

4. Is it common in a joint venture company to impose restrictions on the transfer of shares? If so, what sort of restrictions are commonly imposed and in which document are they likely to be drafted?

It is common in a joint venture company to impose restrictions on the transfer of shares. The specifics of the transfer restrictions would vary depending on the underlying commercial deal leading to creation of the joint venture. These restrictions would typically include:

- Lock-up periods.
- Suitability conditions relating to third party transferees, which would allow transfers only to third party transferees meeting certain pre-determined eligibility criteria (relating, for example, to good commercial standing and reputation, financial strength, compliance with local and international sanction rules and so on).
- Rights of first refusal/offer for the benefit of the remaining shareholders.
- Generally in the context of minority/majority joint ventures, tag along rights granted for the benefit of the minority shareholders.

With respect to joint stock companies, these provisions would customarily be set out under the shareholders' agreement, for reasons outlined under *Question 2*. However, similar to deadlock provisions, there is some practice of reflecting the provisions of shareholders' agreement relating to transfer restrictions, in some form, into the articles of association.

Parties negotiating a Turkish law governed joint venture shareholders' agreement for a joint stock company should be wary of the statutory regime relating to transfer restrictions and should ensure that the provisions of the shareholders' agreement and articles of association do not conflict with each other.

Key points to consider relating to the statutory transfer restriction regime are:

- Certificated bearer shares are freely transferable.
- Articles of association may provide that the company's consent (acting through its board) must be obtained for a valid transfer of registered shares. This consent requirement would fall away as and when the company enters into liquidation (*Article 492, TCC*).

- Articles of association of a privately held joint stock company may not provide more stringent transferability conditions for transfer of registered shares than those allowed under the statutory transferability and restrictions regime (*Article 493/7, TCC*).
- Where the articles of association require consent for a transfer, the company may refuse to grant its consent to a proposed share transfer by acquiring the transfer shares in its own name, or on behalf of its other shareholders or of third parties (*Article 493/1, TCC*).
- Articles of association may set out the just causes based on which the company may deny its consent to a proposed share transfer. To be valid, these just causes for refusing consent must pertain to requirements relating to shareholders' composition, the company's field of activity or maintaining the company's economic independence (*Article 493/2, TCC*).

Parties negotiating a Turkish law joint venture in the form of joint stock company should also be aware that the Turkish courts' decisions regarding the validity and effect of articles of association provisions incorporating rights of first offer or pre-emption rights are not settled, and that any assessment would be highly context-dependant. However, reflecting the transfer restrictions under the shareholders' agreement in the articles of association in the form of a transfer restriction prohibition that would comply with the statutory regime would be helpful in reinforcing the benefit of these provisions.

With respect to limited liability companies, the practice would follow the practices relating to deadlock provisions. Given that the law allows shareholders to validly include provisions relating to transfer restrictions, rights of first offer, pre-emption rights and so on in the articles of association of a limited liability company (see Question 2), reflecting contractual provisions in the articles of association of a limited liability company is generally possible and would be advisable.

As noted in Question 3, the form of bye-laws available under Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border is not practicable for Turkish companies. Accordingly, if this document were governed by the laws of the Republic of Turkey, we would remove all references under clause 15 (Transfer of Shares) made to bye-laws and merge the relevant provisions of the Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border into the joint venture shareholders' agreement (with necessary revisions).

5. In case of a transfer of shares following exercise of pre-emption rights, what are the warranties that the transferor usually gives to the transferee (apart from full title guarantee)?

In case of a transfer of shares following the exercise of pre-emption rights, the additional warranties that the transferor would usually give to the transferee (other than title guarantee) include:

- Due organisation and corporate standing, and absence of conflict with the transferor's corporate constitutional documentation (if the transferor is a legal entity).
- Absence of any encumbrances and so on, to the extent not covered by the full title guarantee.
- Absence of third party claims, litigation, interim orders, attachments and so on that may prevent consummation of the transfer.
- The transferor's compliance with applicable laws.

Any representations or warranties would customarily be set out only under the shareholders' agreement.

6. If shares are transferred to a third party in breach of restrictions on transfer (in a shareholders' agreement or bye-laws) what remedies are available to the remaining party?

If the shares are transferred to a third party in breach of restrictions on transfer in a shareholders' agreement, to the extent that these restrictions are not validly reflected in the articles of association of the relevant company the only available remedy for the remaining party would be a claim against the transferor for damages due to breach of contract (see Question 2).

In this respect, contractual transfer restrictions would not, by themselves, vitiate the acquisition of ownership of shares by a third party. Rights arising from the shareholding (for example, economic and participatory rights granted to each shareholder) as circumscribed by statute may not be suspended, frozen or denied by the company, its management bodies or shareholders, by virtue of a contract or a stipulation in the company's constitutive documents. Accordingly, any conduct or decisions preventing the transferee from exercising its statutory rights, or rights generally granted to other shareholders under the articles of association, after a transfer, regardless of whether that transfer occurred in breach of a shareholders' agreement, would not be protected by law. In addition, any decisions by the company's corporate bodies that contradict the basic structural principles of a corporate type or that infringe on inalienable rights of the shareholders would be null (*Articles 391, 447, 622* and *644/1(c), TCC*).

Where transfer restrictions are validly reflected in the articles of association and the procedures under the articles are not followed, the purported transfer may not be validly completed and all rights that attach to shareholding would remain with the transferor (*Article 494/1* and *595/2, TCC*).

7. In case of a compulsory transfer of shares, if the parties fail to agree on a valuer, which (professional) body is usually requested to nominate a valuer? Is it usual for such body to agree the valuer's terms of appointment? Is there any statutory provision that applies? In which document are the relevant provisions likely to be drafted and are they likely to be enforceable?

The appointment of a valuer is generally determined through agreement by the parties. There is no customarily selected professional body. Contractual provisions relating to appointment of valuers may refer to:

- Named accounting firms or a pool of possible candidates.
- An independent international institution (for example, the ICC International Centre for ADR).
- The chamber of commerce of a relevant city.
- A court of competent jurisdiction.

The relevant provisions would be drafted solely in the shareholders' agreement. Provisions relating to the appointment of a valuer, if properly drafted, are likely to be held valid by Turkish courts and upheld as an agreement for expert appointment (*hakem-bilirkişilik sözleşmesi*), a subset of evidentiary agreements (*delil sözleşmesi*) recognized under Article 193 of the Civil Procedure Code.

If Standard document, Joint venture shareholders' agreement: majority and minority shareholder: Cross-border were governed by the laws of the Republic of Turkey, we would merge under clause 17 (Valuation) relevant provisions of Standard document, Bye-laws: majority and minority shareholder (joint ventures): Cross-border, with the following revisions:

- We would provide a clearly defined timeline and procedural steps for valuation.
- We would provide explicit obligations for the parties to assist and cooperate with the valuer for the prompt and successful completion of the valuation.

8. Is it possible to provide that in the event of a joint venture company being wound up, certain assets (such as intellectual property rights) will be transferred to a specific shareholder? Will such a provision be enforceable in the winding-up of the company?

Parties can agree that in the event of a joint venture company being wound up, certain assets will be transferred to a specific shareholder.

These provisions may be enforceable only to a very limited extent in cases of solvent liquidation of the company. The following conditions must be met:

- The assets in question are retained by the company until the end of the liquidation proceedings (that is, the liquidation officers do not have to liquidate those assets to satisfy the company's creditors, who will have priority over all shareholder rights and claims).
- There is either:
  - a specific provision in the articles of association of the company for the transfer of the relevant assets to the intended recipient shareholder as an in-kind distribution of final liquidation proceeds; or
  - a specific general meeting resolution adopted to that effect (*Articles 543/3* and *643, TCC*).

9. On an insolvency of the joint venture, can a liquidator set aside transactions carried out by the joint venture within a particular time frame (so called "suspect period")? Which features do such transactions need to present in order to be set aside (for example, being below market value)?

Setting aside of transactions carried out by a company would be possible through a cancellation of disposal (*tasarrufun iptali*) suit, or under the general provisions relating to invalidity of contracts on the ground of unfair advantage (*gabin*).

Cancellation of disposal suits

Cancellation of disposal suits may be initiated by the bankruptcy administration or certain qualified creditors of the joint venture company, where the challenged disposal is demonstrably carried out at an undervalue or with fraudulent purpose (see Question 3).

The limitation period for bringing a cancellation suit will vary depending on the grounds for challenge. However, all claims in this respect will be subject to a general statute of limitations of five years starting from the date of disposal (*Article 284, EBC*).

Invalidation due to unfair advantage

Transactions may also be invalidated, in very exceptional circumstances, by a declaration of invalidity on the grounds of unfair advantage (*gabin*).

An aggrieved party's right to invalidate will lapse within one year following the date on which the reason for invalidity becomes known, and in any event, within five years after the conclusion of the contract (*Article 28, Turkish Code of Obligations*).

There are two constitutive elements of unfair advantage:

- **An objective element.** There must be an excessive disproportion between the rights and obligations of the parties. The objective element will be deemed to be met where the financial value of the aggrieved party's performance is substantially greater than the value of the party accused of unfair advantage. Turkish courts will generally find that this condition is met where the value differential is equal to, or in excess of, 50%.
- **The subjective element.** The disproportion between the rights and obligations of the parties must be due to one party's exploitation in bad faith of the other party's straitened circumstances, inexperience or imprudence.

Companies are subject to a statutory obligation to act with diligence and foresight, to the standard of a diligent merchant, in all their business dealings (*Article 18/2, TCC*). This over-arching obligation to act as a diligent merchant severely restricts the possibility of a company making arguments based on unfair advantage to invalidate its contractual commitments. The generally prevailing view in Turkish law is that merchants cannot plead gross disproportionality on the grounds of inexperience or imprudence. A claim of unfair advantage pleaded by a merchant will be admissible only in the rarest of the circumstances, where the other party to the contract has intentionally exploited the company's severe financial distress.

The party pleading unfair advantage bears the burden of proving the presence of both the objective and subjective element.

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