COVID-19: FORCE MAJEURE IN THE UNITED ARAB EMIRATES

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As COVID-19 continues to cause widespread disruption to commercial activity around the world, there is increased focus on the effectiveness of contractual force majeure provisions and the availability of relief for force majeure events under applicable local laws.

Under the UAE civil law system, parties are generally free to agree the contractual terms that will govern their relationship, so long as there is no conflict with a mandatory provision of UAE law or any contravention of public order or morals. The concept of force majeure is recognised and judicially well-understood in the UAE and other Arab civil law jurisdictions, and force majeure provisions are commonly included in commercial contracts in the region. In general terms, parties should expect that express contractual force majeure provisions, which may include exhaustive or non-exhaustive definitions of the scope of a force majeure event (that could potentially encompass epidemic or pandemic scenarios), will be enforceable in contracts governed by UAE law. Similarly, contractual notice requirements that must be satisfied before force majeure can be relied on will usually be upheld.

In the absence of (or supplementing) express contractual force majeure provisions, the UAE Civil Code ("Civil Code") contains several articles that provide for relief in the case of force majeure and other exceptional circumstances. Unlike in the common law context, where force majeure may result in the suspension of contractual obligations, the default consequence of establishing force majeure in the UAE is termination.

Article 273(1) of the Civil Code provides that if a force majeure event supervenes that renders performance of a contract impossible, all contractual obligations will cease and the contract will be automatically cancelled. Under Article 273(2), in cases where the force majeure event renders only part of the obligations impossible to perform, only that part of the contract will be extinguished and the remainder will continue in effect. Article 273(2) permits the obligor, in respect of the partially impossible obligation, to cancel the entire contract on giving notice to the obligee. If a contract is cancelled under either Article 273(1) or 273(2), the parties are to be restored to the position they were in before they entered into the contract; if that is not possible, damages may be awarded by way of compensation to a party that has suffered a loss as a result of the inability to unwind the contract.

In the context of *muqawala* contracts (contracts to make a thing or perform a task, including construction contracts), Article 893 of the Civil Code provides that if any cause arises that prevents performance or completion of a contract, any of the parties may require that the contract be cancelled or terminated. Under Article 894, if a contractor becomes incapable of completing a *muqawala* contract for a cause in which it played no part, it will be entitled to the value of the work it has completed and the expenses it has incurred, up to the amount of value that its counterparty has derived from the incomplete performance.

Even though Articles 273(1) and 273(2) of the Civil Code do not require notice to be given to effect cancellation of a contract (and Article 893 is silent on notice), a party seeking to rely on the Civil Code in force majeure

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circumstances would be well advised to provide notice of cancellation to its counterparty, to avoid any allegation of breach of the general obligation under Article 246 of the Civil Code to perform the contract consistent with the requirements of good faith.

Article 287 of the Civil Code provides that if a person can prove that a loss arose out of an *extraneous cause* in which it played no part, such as a natural disaster, unavoidable accident, force majeure, the act of a third party or the act of the person that has suffered the loss, it will not be obliged to make good the loss.

Article 249 of the Civil Code provides that if exceptional circumstances of a public nature that could not have been foreseen occur, as a result of which performance of a contract becomes oppressive for a party, but not necessarily impossible, the judge (or arbitral tribunal in an arbitration) has discretion, after weighing the interests of each party, to reduce the obligation to a reasonable level if justice requires it. It is necessary for a party to commence court or arbitral proceedings if it seeks to obtain relief under Article 249. Unlike the Civil Code provisions that concern force majeure, the operation of Article 249, which is equivalent to the hardship doctrine available in other jurisdictions, does not result in the termination of the contract.

Although the Civil Code refers to force majeure and exceptional circumstances as the basis for relief from performance of contractual obligations, it does not provide any definition of what constitutes force majeure or exceptional circumstances. The starting point for any analysis of whether COVID-19 may constitute a force majeure event or exceptional circumstances is the contract in question and, in particular, whether there are any definitions that could encompass an epidemic or pandemic scenario. If the contract is silent or unclear, then it will be for the court or arbitral tribunal to determine whether the existence and effects of an epidemic or pandemic constitute force majeure or exceptional circumstances in the context of the Civil Code.

In a 2011 case, the Dubai Court of Cassation held that it was a settled principle that the determination of whether an "*extraneous cause*" (i.e. an event that was not caused by the parties) could permit a party to a contract to avoid liability was within the sole discretion of the court (or an arbitral tribunal). The Court of Cassation analysed the effect and not just the nature of the extraneous cause in making its determination. To the extent that the effect of an epidemic or pandemic could be said to be a normal commercial risk that could be caused by other, less serious circumstances, this might be said to tend against a finding of force majeure. Conversely, consequences of a more distinct or unusual or particularly severe nature may more readily form the basis of force majeure.

At this stage, it is difficult to predict how the courts in the UAE (or arbitrators considering contracts governed by UAE law) will deal with force majeure and exceptional issues raised by COVID-19. Much may depend on the severity of the outbreak and whether the disruption suffered as a result goes beyond that experienced in other recent situations. The courts will have to consider the effect on existing contracts of actions taken by the UAE government and foreign authorities. It does seem likely that these legal issues will be brought into the spotlight over the coming months and that parties will be looking carefully at the relevant provisions of the Civil Code.

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