COVID-19: FORCE MAJEURE IN THE STATE OF QATAR

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

In this briefing we consider force majeure under the laws of Qatar and the specific issues and considerations that may arise for parties whose performance has been affected by COVID-19.

Force Majeure: Qatar Law

To qualify as force majeure under Qatari law, an event must be beyond the control of the parties, have been unforeseeable at the time the agreement was entered into, and render the performance of contractual obligations impossible. Depending on the nature of the event, the impossibility of performance may be temporary or permanent.

Where the impossibility is temporary, performance may be excused for the period in which the intervening event continues to have effect. Pursuant to Article 258 of the Qatari Civil Code No. (22) of 2004 ('Civil Code') a contractual party will be required to compensate the other party for any delay or failure to perform its obligations under a contract, unless it can show that the delay or failure to perform was due to an extraneous cause beyond its control. However, Article 258 of the Civil Code also provides that the parties may agree to make the obligor responsible for the consequences of any force majeure or unforeseen incident. Therefore, while a party may be excused from performing its obligations due to force majeure, it can still be liable for the consequences of that event.

Where the impossibility of performance is permanent, the law recognizes that the fundamental basis of the contract would have been frustrated such that it would be uncommercial for the agreement to remain in place. Article 188(1) of the Civil Code states that if the performance of a party's obligation becomes impossible due to a foreign cause beyond its control, that obligation and all the corresponding obligations may cease to exist and the contract will terminate automatically. Article 188(2) further confirms that 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.

If an event only makes the performance of a party's obligations more onerous and costly, recourse can be sought through the Qatari Courts for judicial intervention to reduce the burden. However, this intervention will not excuse performance of the original obligation. Article 171(2) of the Civil Code provides that in the event of general exceptional circumstances that cannot be reasonably foreseen and which result in the performance of the contractual obligation, although not impossible to perform, being exhausting to the obligor and threatening to cause serious loss, the court may decrease the exhausting obligation to a reasonable limit. Any agreement to the

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contrary will be invalid. Article 171(2) suggests that the Qatari legislator intended to decrease the obligation of the affected party to a reasonable limit and not to excuse the affected party from the performance of its obligations. The reasoning behind this is that the performance of the contract has not been made impossible, rather it has simply been made more onerous and/or expensive to perform.

Force Majeure: Contract

Under the Qatari civil law system, parties are generally free to agree on the contractual terms that will govern their relationship, so long as there is no conflict with mandatory provisions of Qatari law or any contravention of public order or morals. Accordingly, it is common to see force majeure clauses in bespoke and standard form contracts in the region. The concept of force majeure is recognized and well-understood in Qatar and other Arab civil law jurisdictions.

Force majeure clauses can be expressed in detail and in context of the specific nature of the transaction to which they relate. For example, clauses may be tailored for use in the LNG, the construction or information technology sectors.

Notably, Qatari law does not stipulate what constitutes force majeure. Parties are therefore able to specify in their contracts which events are to be considered force majeure (e.g. war, riots, etc.), together with an expression of the rights and entitlements each party would have under their agreement should such an event occur.

Claiming Force Majeure and Burden of Proof

A party seeking to rely on force majeure has the burden of proving that performance of its obligations was hindered, delayed or rendered impossible by a qualifying event. If it is simply that the obligation becomes more onerous, this will not be sufficient to excuse performance.

To receive the benefit of a force majeure clause, a party may be required to prove that the event occurred, that the event qualifies as force majeure, that the event impacted the performance of its obligations and that there was no reasonable or alternative steps that could have been taken to limit or avoid the force majeure event or its consequences.

It is also common for contractual notices to be issued on commencement of an event of force majeure and on cessation of its effects. These steps can be important and should be complied with.

Dispute Resolution

In light of the widespread effects and economic impact that COVID-19 has had both domestically and globally, it is almost inevitable that disputes will arise. As a result, businesses should be ready and aware of their legal and commercial positions. Neither party will want to accept responsibility for project delays or the additional costs that may arise.

It is possible that a contractual counterparty may not accept that a force majeure event has occurred or that the event made contractual obligations impossible to perform. The counterparty may contend that non-performance of contractual obligations constitutes a breach, for which it is entitled to seek damages or potentially, terminate the contract. Accordingly, a party seeking to rely on force majeure should ensure that it has taken and documented all steps relating to its claim. The consequences of force majeure can be very serious.

The method selected by the parties for resolution of their disputes is relevant. COVID-19 has interfered with the usual operation of the Qatari courts and affected access to local counsel. It is therefore difficult for a party to seek

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or obtain interim measures or relief, if it was required. However, where arbitration has been selected, parties may be able to take advantage of emergency arbitration procedures.

Where dispute resolution procedures are ongoing, parties might want to make provision for, or include claims arising from, the effects of COVID-19.

Given the potential for disputes, parties may want to consider some form of amicable suspension of the works, possible renegotiations of contractual terms, or a moratorium on claims.

COVID-19 - EFFECT ON DIFFERENT SECTORS

Construction

Qatar has not announced a shutdown of all construction works (similar to the Boston stoppage last week), but the government has imposed a number of other measures which are impacting the local construction market. Clearly, both the employers and the contractors may now face delays on their projects resulting from shortage in manpower and, to a lesser extent, interruption in supply chains.

As there is no universal form of a construction contract in the Qatari market, any advice as to which clauses the industry players should now turn to must be done on a contract to contract basis. Apart from the force majeure clause, it would be advisable to see if under the given contract (a) there is any potential relief available (as to the time or costs) and what the relevant notification requirements and mitigation measures to be undertaken by any party are, (b) what are the termination provisions allowing any of the parties to argue that the contract should come to an end in the current circumstances, (c) if there are any specific obligations owed by the employer or contractor for the health and safety of their staff, and (d) insurance obligations. In terms of practicalities, both employers and contractors should now be more diligent than ever in relation to the record keeping as to the precise impact of COVID-19 on their projects. This will need organized and careful recording.

With respect to the new construction contracts which are under negotiation, it would be advisable to include specific wording that clearly allocates the risks related to COVID-19. These may include redrafting of the force majeure clause, introducing rights to suspend works and remobilize and changing the usual communication protocols.

Banking and Finance

While the documentation for most financing transactions (in particular those based on Loan Market Association standards) do not explicitly provide for force majeure, the equivalent provision would be the material adverse change or MAC event of default. These clauses are typically drafted to allow lenders to call an event of default and exercise their remedies (including accelerating outstanding loans or drawstopping any unutilized amounts of available facilities) in the case that an event or circumstance occurs which the lenders (acting as a majority in the case of syndicated facilities) believe has or is reasonably likely to have a material adverse effect. The parameters on which material adverse effect is assessed is usually based on a material adverse effect on:

- The business, operations, property, (financial or other) condition or prospects of the borrower;
- The ability of the borrower to comply with payment obligations under the finance documents; or
- In the case of secured financings, the validity or enforceability of security.

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While lenders have been historically reluctant to rely solely on MAC clauses, in light of the unprecedented economic disruptions caused by COVID-19, lenders and borrowers alike will be giving these clauses serious consideration, particularly lenders who may want to look at recovery/enforcement options before such rights are constrained by the onset of any formal insolvency or creditors' processes that may affect their borrowers. That is not to say that calling a MAC event of default is not without its difficulties, chief amongst them are that such clauses are predicated on the banks' belief that an event or circumstance has or is reasonably likely to have a material adverse effect which involves a degree of judgment as to future performance of a borrower. While it is early days in terms of how central banks and governments will react in terms of supporting borrowers and the economy, the Qatar Central Bank ('QCB') has already issued Circular No. (5) of 2020 which requires banks to defer, for a period of six months from 16 March 2020, payments of principal and interest due from borrowers operating in industry sectors that have been adversely affected by COVID-19. Such deferral shall be without additional costs or penalties, whether in the form of interest or fees. It is therefore arguable that such government intervention will neutralize any adverse effect on borrowers performing payment obligations and may also serve to stablilize other factors to consider in a MAC clause such as financial condition and prospects.

Even if it can be successfully argued that the MAC event of default is not triggered, this does not necessarily mean that a borrower is home and dry, the effects of COVID-19 will warrant serious consideration of a number of other provisions in a typical financing facility agreement including consideration relating to:

Representations - can all the representations be made at the times that they are required to be made; if not what are the processes for notifying banks of a potential event of default for misrepresentation? Do grace periods apply to remedy the circumstance giving rise to the misrepresentation?

Undertakings - will the effects of COVID-19 result in non-compliance with any undertakings, in particular those relating to performance of the borrower? Can information that is required to be delivered to the banks be delivered on time or at all e.g. can surveyors gain access to properties to prepare valuations; can professional advisors gain the access they require to books, records and officers of the borrower (either due to themselves or the officers of the borrower being required to work from home) to prepare relevant reports and financial statements? What are the grace periods before non-compliance triggers an event of default?

Financial covenants - what effect will the economic impact have on the ability of the borrower to comply with its financial covenants, are there any means to cure non-compliance e.g. shareholder injections? In margin facilities, where has the recent volatility in stock prices left security coverage ratios and where these are local facilities, what might be the mitigating effect of the initiative of the Supreme Committee for Crisis Management of the State to inject up to QAR10 billion into the Qatar Stock Exchange?

Technology, Media and Telecommunications (TMT)

In respect of matters and transactions within the technology, telecommunications and related sectors, the advent of COVID-19 is unlikely to have any impact on (or easily constitute grounds for claiming force majeure in respect of) the supply and delivery of hardware, software, equipment and/or network systems, all of which would reasonably be expected to be capable of being arranged, albeit it at an additional cost, via a different route and/or in another manner. This is because despite numerous travel restrictions, cargo flights are generally still operating, inventory is generally still available (despite potential manufacturing difficulties) and alternative delivery methods can be arranged.

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Where COVID-19 could have an impact in these sectors is in the area of services and service delivery. In certain instances, specific services in respect of technology and network systems (whether for the implementation, maintenance and/or ongoing support thereof) require specialized technicians with expert knowledge of such systems, which cannot be outsourced or resolved remotely or by way of a workaround solution. In such instances, the inability of the services to be provided on site may result in a viable claim for non-performance due to force majeure arising from COVID-19, whether temporary (e.g. due to travel restrictions, which may later be lifted) or permanent (e.g. in cases where the service provider goes into liquidation or is no longer able to provide such services).

In respect of such transactions and in order to avoid scenarios where technology system and services providers attempt to justify non-performance of contractual obligations due to COVID-19-related force majeure, customers and entities procuring such systems should try to proactively protect themselves by, inter alia, including contractual provisions specifying force majeure provisions, any related indemnities and/or alternative/emergency arrangements as well as obtaining appropriate insurance cover in respect of potential damages which may be suffered.

Key Steps and Considerations

The nature and extent of the effects of COVID-19 means that many if not all industries and sectors will be impacted in some manner. We recommend that businesses consider taking the following steps:

1. Understand the contractual provisions concerning force majeure, possible suspension and termination. Determine whether your contract has a force majeure clause to cover COVID-19.
2. Consider the effect of the governing law of the contract on the force majeure clause.
3. Review related insurance policies to see if they cover COVID-19. If they do, ensure that notifications are issued in a timely manner.
4. Document matters relating to the force majeure event, including all attempts to perform obligations or to mitigate the effect of non-performance.
5. To the extent necessary, consider seeking agreement concerning the suspension of obligations with the counterparty, or the renegotiation of terms of the contract.
6. Review and understand the dispute resolution provisions contained in the contract.

Conclusion

If the provisions of a contract cannot truly be performed due to the COVID-19 outbreak, irrespective of ancillary measures or cost, then the affected party may be excused from performance. If those obligations are made impossible, the contract could potentially be terminated. However, if it is simply that carrying out those obligations would be more expensive or onerous, then the affected party may not have a valid legal basis to refuse to perform the contract and could be exposed to substantial claims for damages or potential termination.

The extent of the impact of COVID-19 is as yet unknown. However, businesses should ensure they are aware of, and are able to protect, their rights and interests.

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