

Force majeure clauses in contracts governed under UAE law

Presented by:
Chatura Randeniya
Partner
Afridi & Angell

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The highlights

- What is force majeure and what relief does it provide?
- What is the law on force majeure in the UAE?
- How is the law applied?
- The interplay between contractual provisions and statute in the UAE
- Coronavirus COVID-19 and whether it can give rise to force majeure in the UAE
- Questions

What is force majeure?

- Literally a ‘superior force’
- Black’s Law Dictionary - An event or effect that can be neither anticipated nor controlled
- English Law: A creature of contract which has no specific meaning in common law. It has to be clearly defined in a contractual clause.
- UAE Law: A creature of statute with no statutory definition. An event that makes performance impossible.

What is the effect of force majeure?

- Depends to a large extent on the law governing the contract
 - Under English law, force majeure typically suspends, defers or releases the performance of obligations without liability in the event a defined event of force majeure occurs. The contract may also provide for termination if force majeure continues. Not necessarily unforeseen.

English law doctrine of frustration - allows a contract to be discharged when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil a fundamental obligation, or transforms a fundamental obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract. Must be unforeseen and fundamental obligation.

- Under UAE law, results in cancellation of the contract, or the option to cancel the contract for the party to whom performance is owed. Excuses or discharges a party's non performance

Force majeure under UAE law – the Statutory Provisions

- The relevant statutory provisions are found in Federal Law No. 5 of 1985 – the UAE Civil Code

Article 273:

- (1) *In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.*
- (2) *In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligee to cancel the contract provided that the obligor is made aware*

Force majeure under UAE law – the Statutory Provisions (*cont'd*)

- Events falling short of Force Majeure
- A lower bar than impossibility

Article 249:

If exceptional events of a general nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes onerous for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the onerous obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.

Force majeure under UAE law – the Statutory Provisions (*cont'd*)

Article 287 (Acts Causing Harm):

If a person proves that the harm arose out of an extraneous cause in which he played no part such as a natural disaster, sudden incident, force majeure, act of a third party, or act of the person suffering harm, he shall not be bound to make it good in the absence of a provision of the law or an agreement to the contrary.

Article 893 (Muqqawala Contracts):

*If any cause arises **preventing the performance** of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be cancelled or terminated as the case may be*

Article 894:

*If the contractor commences performance and then becomes incapable of completing it **for a cause in which he played no part**, he shall be entitled to the value of the work he has completed and to the expenses he has incurred in the performance up to the amount of the benefit the employer has derived therefrom*

Force majeure under UAE law – Application by the Courts

- The last occasion on which these statutory provisions were frequently used was during the market correction of 2008/09
- The majority of cases held that the market ‘crash’ did not constitute an event of force majeure. Occasionally relief was granted under Article 249.
- Strict application is the norm.
- Trial courts are recognized as having discretion to determine, on the facts, whether an event constitutes force majeure or an exceptional event under Article 249.
- No system of binding precedent.

Force majeure under UAE law – Application by the Courts (*cont'd*)

- Dubai Court of Cassation 268/290 of 2009
*That Force Majeure...is caused by an incident that is **incapable of being foreseen upon concluding the agreement** and it is **impossible to prevent the same**; i.e. such incident and its consequences cannot be prevented, thus **rendering performance of the obligation impossible** and that performance thereof is not only a source of hardship or trouble for the Obligor. Further, the **unforeseen incident** is such one that is unpredictable by the contracting parties... the criterion governing the same is an **objective one based on the ordinary person**, and falls within the discretionary power of the Trial Court*
- Abu Dhabi Court of Cassation 73/15 of 2007
Court ruled that the financial crisis is not an unforeseen event for traders, and therefore not an event of Force Majeure
- Federal Supreme Court- 45/4 of 2007
Court accepted appeal to reduce the rent payable holding that that the financial crisis qualifies as an exceptional general event for the purposes of Article 249

Obtaining relief under UAE law - what must you establish?

- Supervening event which makes performance impossible for Article 273 (in application, the foreseeability test is also applied by the UAE courts)
- Literally impossible
- Exceptional event, unforeseen, threatens grave loss for Article 249
- Article 287, 849 - the applying party played no part
- Good faith (Article 246)

Obtaining relief under UAE law – what is the relief you can obtain?

- Cancellation of contract (Article 273)
- Reduction of obligations (Article 249)
- Release of contractual obligations (Article 287)
- Payment for work done without completing the contract (Article 894)

Force majeure clauses in contracts governed by UAE law

- No force majeure clause - statutory provisions will apply
- What happens if your contract has a force majeure clause?
 - Articles 2(1) and 6 of Federal Law 18 of 1993 (the UAE Commercial Code)
 - Traders and commercial activities shall be governed under the terms of the agreement between the parties
 - Where no agreement - commercial custom, in the absence custom, the law regarding civil matters applies
 - Commercial activities - agency, supply, land/real estate, transport, natural resources, tourism, import/export, publishing, representation etc.
 - Scope - open ended v closed lists
 - FIDIC Red Book Clause 19 - force majeure events must occur 'in country' in order for an entitlement to time and cost to arise
 - Notice requirements

Coronavirus (COVID-19) outbreak

Countries/regions affected: 117

	Global Snapshot	UAE Snapshot
Total confirmed	116,694	74
Total deaths	4,090	0
Total recovered	64,391	12

Source: John Hopkins University CSSE, as at 9:30pm on 10 March 2020

Coronavirus (COVID-19) outbreak (*cont'd*)

- Immediately visible consequences so far: travel restrictions, quarantines, shortages of medicines, medical and safety equipment, cancellation of events
- Not immediately visible: supplies under contracts, the ability to pay, provisions of good and services as agreed, increased overheads and costs
- Impacted industries
 - Aviation and travel
 - Construction
 - Insurance
 - Education
 - Supply contracts
- Impact in the UAE (schools, events, EXPO)

Can COVID-19 give rise to force majeure in the UAE?

- It depends
- The Coronavirus vs. government/regulatory action to contain and mitigate
- Is an act of government a force majeure event?
 - Chinese authorities issuing force majeure certificates - whether they will be upheld remains to be seen. Hubei Provincial High Court has recognized government measures to contain COVID-19 as a force majeure event
 - Kyocera Case (US) - price fluctuations because of the US-China trade war. The contract included acts of government as qualifying as FM. However, the contract does not specify the acts of which government is at issue and that if the parties wanted to cover the situation that a government's manipulation would cause the contract to be unprofitable, then they could have specifically included such a provision. Mere financial disadvantage not FM.
 - Change in law as a force majeure event in contracts
 - Substantially different outcome possible under UAE law

Can COVID-19 give rise to force majeure in the UAE?

(cont'd)

- The key tests
 - External supervening event - Yes
 - Irresistible/Unavoidable - Yes
 - Impossibility/Onerous burden - Maybe
 - Unforeseeable - Maybe not?
- Currently designated as a Public Health Emergency of International Concern by the WHO which is defined as “an ***extraordinary event*** which is determined...: (i) to constitute a public health risk to other States through the international spread of disease; and (ii) to potentially require a coordinated international response”.

The WHO has commented this definition “*implies a situation that: is serious, **unusual or unexpected**; carries implications for public health beyond the affected State’s national border; and may require immediate international action.*”

Questions?



