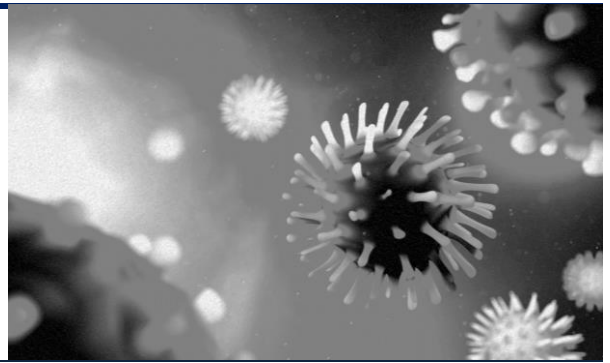


inBrief



COVID-19: Is it an event of force majeure under UAE law?

By Chatura Randeniya | 19 April 2020

The continuing COVID-19 pandemic has caused an unprecedented disruption of business worldwide, and many businesses and organisations will be scouring their current contracts to identify avenues of relief. In many cases, the pages containing the force majeure clause will be the first to be turned. Are these clauses enforceable? What if a contract does not include a force majeure clause? Would COVID-19 qualify as force majeure under UAE law? Answers to these questions will be discussed in this inBrief.

What is force majeure?

Force majeure originates from French civil law and literally translates as '*superior force*'. Although there is no specific definition of force majeure under UAE law, Federal Law No. 8 of 1985 (the **UAE Civil Code**) recognises the concept of force majeure and contains several articles of law that are applicable to excuse non-performance of contractual obligations when events of force majeure and other exceptional events occur.

Force majeure clauses in contracts

Under UAE law, parties are free to agree contractual terms, provided that such terms are not contrary to mandatory provisions of UAE law or public policy. Force majeure clauses are frequently incorporated in commercial contracts (very often as boilerplate clauses) and are interpreted in the same way as any other clause: the plain language will apply and, in the event of any ambiguity, the court will attempt to give effect to the intention of the parties at the time the contract was entered into.

Whether or not COVID-19 can qualify as an event of force majeure will depend largely on the language used in the contract. For example, does the contract define epidemics or pandemics as an event of force majeure? A further consideration should be given to whether governmental action is included within the definition of force majeure, as the proximate cause of business disruption is

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arguably not the pandemic itself, but the measures taken by governments worldwide to curb the spread of the virus.

If the contract has a force majeure clause, and defines force majeure to include epidemics, pandemics or governmental actions, the party seeking to rely on the force majeure event to have its non-performance excused will have a stronger footing. If there is a force majeure clause, but the definition does not capture the above events, the party seeking to rely on force majeure as an excuse will be required to demonstrate that the events in question do in fact qualify as force majeure. This task may be rendered more difficult if force majeure is defined as being certain specific events to the exclusion of other events (*i.e.* a closed list).

Parties will need to ensure that force majeure is correctly invoked under the contract. For example, many contracts require parties to give notice of the occurrence of an event of force majeure, usually as soon as the event has occurred.

No force majeure clause in contract: statutory provisions of the UAE Civil Code

Even where a contract does not contain a force majeure clause, it is still possible to rely on force majeure as an excuse for non-performance pursuant to the UAE Civil Code. Article 273 of the UAE Civil Code provides as follows:

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.*

The key element for a force majeure claim under Article 273 is impossibility. Although there is no system of binding precedent in the UAE, several cases have held that the requirement of impossibility is to be interpreted literally. Consequently, invoking force majeure on the basis of mere hardship or uneconomic balance between parties is unlikely to succeed. Although Article 273 does not expressly require it, the UAE courts in practice also require force majeure events to have been unforeseeable at the time the contract was entered into.

Where a party believes that it will be unable to establish impossibility, it may seek relief under the provisions of Article 249 of the UAE Civil Code, which provides as follows:

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.

A party seeking relief under Article 249 will be required to establish that an exceptional event of a general nature has occurred, that the event was unforeseen, and as a result of that event, the performance of its obligations is rendered onerous to such an extent as to threaten that party with grave loss if the obligation is performed. Article 249 was used with greater success (compared to Article 273) by parties seeking relief during the financial crisis of 2008/2009.

While Articles 273 and 249 are the principal provisions of UAE law which are relevant to the circumstances which the COVID-19 pandemic has given rise to, there are a number of other provisions which are relevant.

Article 287 of the UAE Civil Code, for example, makes provision for relying on an event of force majeure as a defence to liability:

Article 287

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.

An important element of Article 287 is that the defendant played no part in the extraneous event (which in the case of a contract caused the defendant to become incapable of completing the contract). A successful claim under Article 287 can result in the release of contractual obligations.

Articles 893 and 894 of the UAE Civil Code are of particular interest in the UAE, as they are applicable with regard to *muqawala* contracts (*i.e.* contracts to make a thing or perform a task) and therefore construction disputes:

Article 893

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.

While Article 893 can be invoked by both parties (*i.e.* the employer and contractor) to cancel or terminate the contract on the basis that performance (or completion of performance) is *prevented*, Article 894 makes provision for a contractor to claim payment for works performed up to the point it became incapable of performance. For a claim based on Article 894 to be successful, it is necessary to establish that the contractor had no involvement in the reason which resulted in the inability to complete the contract.

Conclusion

COVID-19 has brought force majeure clauses and UAE law on force majeure back in to the spotlight. Whether COVID-19 would qualify as a force majeure event will need to be considered carefully in light of the relevant contractual clauses and the facts. While the UAE courts have traditionally been strict in applying the principles related to force majeure, it is yet to be seen whether this approach will continue given today's circumstances. ■

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