

Is COVID-19 considered as a Force Majeure in Oman?

- Muscat, Oman

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With the beginning of the new decade, the world witnessed a rapid spread of novel coronavirus disease ('COVID-19'). This pandemic, as so declared by the World Health Organization ('WHO'), has had, and continues at the time of writing to have, negative consequences on the economies of many countries and has led to a major disruption of global markets.

The Sultanate of Oman, like other Middle Eastern countries, has also been affected by this pandemic. As a result of the temporary suspension of operations in many vital sectors of the economy, in compliance with various directives issued by relevant authorities, Oman is facing a significant decline in commercial activities and services. This decline in economic activity will impact many contractual obligations between parties. Therefore, it is necessary at this juncture, to understand whether such circumstances are considered to be force majeure ('Force Majeure') from an Omani legal perspective, and analyse the legal impact on contractual obligations between parties.

What is Force Majeure in Oman?

Usually, when we read or review the clauses of a contract or an agreement, whether one of its parties is government, company or a natural person, we come across a specific clause with regard to Force Majeure. So what does that term mean?

Force Majeure has no official definition under Omani Law. In general, it is "a clause in a contract that excuses a party from not performing its contractual obligations that become impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled."

The Omani Civil Transactions Law, promulgated by Royal Decree 29/2013 ('Law') states in article 172 that:

1. *“in bilateral contracts, if force majeure occurs rendering the performance of the obligation impossible to complete, the corresponding obligation shall be extinguished, and the contract shall automatically be revoked.*
2. *In the case of partial impossibility, the corresponding obligation 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 rescind the contract provided that the obligor is made so aware.”*

To illustrate, Force Majeure theory is based on the fact that fulfilling a contractual obligation has become impossible due to the occurrence of a new circumstance beyond the control of the affected parties. The remedy for that, as per the Law, is the termination of the contract. However, it should be stressed that this will not be applicable unless it is proven by the party claiming Force Majeure that it is absolutely impossible to fulfil its obligation due to Force Majeure.

How to apply Force Majeure?

The party claiming Force Majeure must prove that the new circumstance has led to the impossibility of fulfilling its obligation, and that anyone else who is in the same position, would not be able to fulfil that obligation. Moreover, the new circumstance must be external and not caused by the party pleading Force Majeure, and one which could not have been anticipated, controlled or avoided. If a party to a contract has caused or contributed to the circumstance having occurred, such circumstance is not considered a Force Majeure event and the responsible party will not be exempted from liability for any failure to fulfil its obligations.

Is COVID-19 considered as a Force Majeure in Oman?

The Sultanate of Oman, with the beginning of the spread of COVID-19, has taken a number of precautionary measures to deal with the pandemic. Among those measures was the establishment of Oman’s Supreme Committee for Dealing with COVID-19, which is a government committee responsible for nationwide decisions in response to the current novel coronavirus outbreak. (‘Competent Authority’). The Competent Authority, in order to mitigate the spread of the pandemic in Oman, has implemented numerous directives, one of which is the temporary suspension of the education, commercial, transport, sport and tourism sectors from their normal operations.

COVID-19 could be considered as Force Majeure from an Omani legal perspective if certain conditions are met. The conditions to claim for Force Majeure in any COVID-19 case will be as follows:

- the contracting parties could not expect COVID-19 to take place before entering into a contract, nor control it when occurred;
- the contract should have been drafted well in advance of COVID-19 spreading (i.e. prior to WHO declaring COVID-19 as a pandemic); and
- the Competent Authority has taken certain measures that make the performance of the contract obligation impossible.

A real case example of the above conditions can be illustrated by the cancelling of events, such as weddings. What distinguishes these contracts is that its parties must perform their obligations within the specified time agreed upon. Time in these contracts, is an essential element, but in view of the new circumstance (COVID-19), and the directives issued by the Competent Authority to cancel all events and gatherings, implementation of the contractual commitment or obligation in this case is considered impossible. Accordingly, the contract will be entirely or partially rescinded by operation of Law pursuant to

the Article 172 (Force Majeure) or Article 339 of the Law which states that: “The Obligation shall be extinguished if the debtor proves that the fulfilment thereof becomes impossible due to a foreign reason beyond his will”.

However, is COVID-19 always considered a Force Majeure?

It is certainly not the case that COVID-19 may be considered as a Force Majeure in all circumstances. If for example, a defaulting party, in view of the new circumstances that have arisen, is finding it merely difficult to fulfil its obligation under a contract, such that the obligation may not be seen as impossible but rather as onerous or imposing a heavy loss on such party, this would not constitute Force Majeure. Force Majeure is only established if the implementation of the contract is impossible along with the other conditions mentioned above. Relief in this case may be obtainable via unforeseen events (‘Unforeseen Events’) under article 159 of the Law.

Unforeseen Events

Article 159 of the Law states that:

“If general exceptional accidents that were unforeseen at the time of contracting occur and result in that the execution of the contractual obligation, even if not impossible, becomes exhausting to the debtor and threaten him with serious loss, the court has the discretion to, according to the circumstances and after balancing the interests of both parties, reduce the exhausting obligation to a reasonable limit. Any other agreement to the contrary shall be deemed void.”

At first glance, it may appear that this article is similar to the Force Majeure doctrine, but in fact there is a difference. In essence, Force Majeure exists when the implementation of the obligation is impossible. However, Article 159 confirms that a contractual obligation becomes burdensome to the debtor or obligor as a result of the occurrence of unforeseen or unexpected event.

It is valid to construe the current COVID-19 situation in Oman as an unforeseeable circumstance which is beyond the parties’ will or control. It does not, however, render the performance of many obligations impossible, but makes it exhausting for obligors to fulfil them and/or threatens the obligor with a heavy loss. The reason for this is that the Competent Authority’s directives or decisions are, to date, temporary (i.e. specified for a certain time period) such as the suspension of work. Therefore, it is not impossible to perform the contractual obligation if one is talking about permanent contracts, rather there is only a burden or difficulty in doing so. As a result, the Unforeseen Event doctrine may be more appropriate in these circumstances and any judge or adjudicator will have wide discretion to amend, if it is required, the contractual obligations. That is, the judge will have to, after considering the circumstances and balancing the contractors’ interests, return the burdensome obligations to a reasonable extent on a case-by-case basis.

Differences between Force Majeure and Unforeseen Events

It should be noted when addressing Force Majeure provisions in contracts and agreements and their legal implications, that we must not confuse Force Majeure with Unforeseen Events. The occurrence of Force Majeure causes the impossibility of implementing the contractual obligation stated in the contract. A defaulting party who succeeds in establishing Force Majeure will be exempt from legal liability. In all other circumstances, such as Unforeseen Events, where events merely render the implementation of the contractual obligation exhausting or burdensome, rather than impossible, the occurrence of such events will not exempt the obligor or debtor from liability, rather, the court will have the discretion to balance between the contracting parties' interests and return the burdensome obligations to a reasonable extent.

Conclusion

To sum up, the decision as to whether COVID-19 qualifies as Force Majeure or an Unforeseen Event must be based on whether the performance of the contractual obligations is absolutely impossible or just burdensome to the obligor under the contract. This will depend entirely on the nature of the contract between the parties and the impact of the relevant directives or decisions issued by the Competent Authority, which cannot be anticipated in advance due to the continuous and rapid development of the pandemic. In the interim, we continue to assist contracting parties with detailed analyses of specific circumstances as new measures are put in place in Oman.

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