

Recent UAE Judgments: Force Majeure and Covid-19 in the UAE

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INTRODUCTION

This article considers the extent to which contracting parties may invoke force majeure, and terminate their contractual arrangements as a result of the Covid-19 pandemic in light of recent UAE judgments (Abu Dhabi Court of Cassation judgment 835 of 2021, Abu Dhabi Court of Cassation judgment 512 of 2021, and Dubai Court of Cassation judgment 479 of 2021).

UAE LAW ON FORCE MAJEURE

In order for any given event to be considered a force majeure event, it must render an obligation impossible to perform (Article 273 of the UAE Civil Code (Federal Law No. 5 of 1985, as amended). Article 273 provides:

"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."

The UAE courts have interpreted this provision to mean that for an event to be considered a force majeure event it must satisfy the following cumulative conditions: (a) the event must be beyond the control of the obligor of the obligation; (b) the event could not have been reasonably foreseen at the time of the conclusion of the contract; (c) the effects of the event could not be avoided by appropriate measures; and (d) there must be a causal link between this event and the non-performance of the obligation by the obligor.

Article 273 distinguishes between three types of impossibility that could prevent the obligor from performing its obligation: (i) total impossibility, (ii) partial impossibility and (iii) temporary impossibility. Where a force majeure event results in impossibility of performance, it will extinguish the obligation(s) of an obligor. This will, by operation of law, extinguish the corresponding obligation(s) of the obligee and result in the "automatic cancellation" of the contract unless it is proven that the contract can still operate without the extinguished obligation(s) (Article 273).

Force majeure is to be distinguished from the doctrine of exceptional circumstances (under Article 249 of the UAE Civil Code). The doctrine of exceptional circumstances does not render performance impossible, but renders it onerous and excessive, without reaching the level of impossibility. As a result, it only reduces the obligation to a reasonable level, and the consequences are thus borne by the obligee and the obligor. Force majeure, however, results in the termination of the obligation, and the obligee does not bear the consequence of the termination. Mere hardship or economic imbalance between the parties with respect to a contractual obligation will not qualify as force majeure pursuant (Article 273).

Termination

Article 272 of the UAE Civil Code regulates the judicial termination of contracts subject, of course, to the discretionary power of the UAE courts. Article 272 (1) of the UAE Civil Code provides that:

“In contracts binding on both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, claim that the contract be performed or terminated”.

Comparing the wording of Article 272(1) and Article 273(2) of the UAE Civil Code demonstrates that the termination exercised by the obligee under Article 273(2), in case of temporary/partial impossibility, is not of the same nature as termination effected under Article 272(1). Whilst Article 272(1) entitles the contracting party to “claim” that the contract be terminated, Article 273(2) provides 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.”

Conditions developed by the UAE jurisprudence

In a number of recent judgments, the Abu Dhabi Court of Cassation and the Dubai Court of Cassation considered the definition of force majeure in the context of the Covid-19 pandemic.

Unforeseeability

In Abu Dhabi Court of Cassation judgment 835 of 2021, the court held that force majeure not only makes the performance of the contract onerous for the judgment debtor and a mere burden (see Article 249 of the UAE Civil Code, above), but actually renders contractual performance impossible, and it must be unforeseeable at the time the contract is made, i.e., an event that the parties could not have expected at the time of conclusion of the contract.

The contractor in that case asserted force majeure on the basis of the lockdown and the suspension of trade activity resulting at the relevant time from the Covid-19 pandemic, especially in China where the contractor alleged it sourced the building materials and equipment used to carry out its work on the project in question. However, the court rejected this argument on the basis that the contractor did not prove that the equipment and building materials were imported from China.

Moreover, prior to its removal from the project the contractor completed a portion of the construction works in question which was not impossible for it to perform. This disproved its assertion that the cause of delay in execution of the works, up to the date of their removal from the project, was the pandemic, as a force majeure. The court held that the pandemic should not only make the performance of the agreement onerous for the contractor, it should also render performance impossible by reason of such event. This could not be reconciled with the contractor having carried out a portion of the construction works up to the date of their removal from the project.

Force majeure must be sole reason that renders performance impossible

In its judgment 512 of 2021, the Abu Dhabi Court of Cassation considered an application to dissolve a contract on the basis of force majeure and to recover payments made towards an investment that was impacted by the pandemic. It was decided (with reference to Article 273 of the Civil Code) that if a force majeure arises that makes performance of an obligation (of an obligee) impossible, the corresponding

obligation will be extinguished and the contract rescinded. The Court also decided that in order to be exempted from liability due to force majeure, force majeure must be the sole reason for the damage to occur. The Court reaffirmed that the determination of those issues is subject to the scope of the discretionary authority of the trial court.

Impossibility

In its judgment 479 of 2021, the Dubai Court of Cassation held that force majeure supervenes to make the performance of obligations set out under binding provisions of contract impossible. In this case, the Defendant did not invoke impossibility (neither total, partial nor temporary). The Defendant had, prior to the Covid-19 pandemic, sent a letter regarding a postponement and a further extension of the handover date, which meant that the Covid-19 pandemic did not cause the project to stall.

Conclusion

The disruption caused by the Covid-19 pandemic will not necessarily amount to a force majeure event that would justify the cancellation of a contract. In order for a Covid-19-related event to amount to force majeure, the judgments reviewed above, clarify that:

1. The alleged force majeure event must be the sole reason that renders performance impossible;
2. The effects of the pandemic could not be avoided;
3. the party asserting a Covid-19-related force majeure event must explain how the pandemic has rendered performance of the contract impossible (rather than making a general allegation in this regard); and
4. Impossibility to perform may either be total, partial or temporary.

Al Tamimi & Company's litigation and arbitration teams regularly advise on the termination of contracts. For further information please contact [John Gaffney](#).