

COVID-19 and its impact on arbitration

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Introduction

The most pressing issue in the worldwide legal community today is the impact of the spread of Corona ('COVID-19') Virus which was recently classified by the World Health Organization as a global pandemic (the 'Pandemic'). The matter has resulted in a partial or complete closure of many economies. International efforts have combined to contain this Pandemic which has had unprecedented implications on health, economic and legal activities. As we all hope that this Pandemic will soon subside, its consequences of this incident on various legal and contractual relations are likely to be felt for quite some time to come.

In this article, we discuss the effects of the Pandemic on contractual relations in general and, in particular, its impact on arbitration practice as well as its impact on the validity of [arbitration agreements](#) and the implications, if any, for arbitration proceedings. We also address precedents from the Dubai Court of Cassation and the Egyptian Court of Cassation regarding the validity and possibility of conducting arbitration in the event of special circumstances (such as the Pandemic) and whether such circumstances can be considered to fall within the meaning of force majeure.

Does the Pandemic qualify as a force majeure event?

Under UAE law, the concept of force majeure is regulated in Article 273.1 of the UAE Civil Transactions Law ('UAE Civil Code') which states that '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 terminated'.

In analysing whether the Pandemic qualifies as a force majeure event, the analysis must tick each of the

following boxes: (1) the Pandemic was unforeseeable to the relevant contracting party; and (2) the impact of the Pandemic was unavoidable and made the performance of certain obligation(s) impossible. In both cases, the analysis must be based on an objective test, i.e. on the conduct of a reasonable person, with regard to the existence of the conditions of the alleged force majeure.

The Dubai Court of Cassation confirmed the UAE Civil Code's definition of 'force majeure' when it determined 'A force majeure is an incident that: (1) is not foreseeable; and (2) is impossible to obviate [renders the obligation impossible to perform]. These two conditions have to be established for an incident to be classified as a force majeure incident. The analysis must be based on an objective test of a reasonable person in relation to the two conditions. The incident must be unforeseeable and impossible to avoid for any reasonable person in the same circumstances of the obligor'.^[1]

As for an event of force majeure that triggers partial or temporary impossibility of performance, Article 273(2) of UAE Civil Law provides that '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 rescind the contract provided that the obligor is made so aware'. That said, the obligation(s), in case of partial impossibility, shall be extinguished in the part corresponding to that impossibility. The same rule applies to temporary impossibility in continuous (i.e. running) contracts.

It is our view that the Pandemic is most likely to satisfy the first condition of a force majeure (i.e. is not foreseeable) as long as the parties have entered into the contract with sufficient time before the COVID-19 virus news broke and not only at the time of (or after) the declaration of the Pandemic by the WHO. However, in order to successfully cancel one's obligations under a contract by invoking 'force majeure' a party must also prove the obligations of a contract are 'impossible' to perform in this era of the Pandemic; to do so a party must satisfy the second condition i.e., that the impact of the Pandemic was unavoidable and has rendered the specific obligation or the contract's obligations impossible to perform). This, in our view, will essentially rely on the precautionary measures taken by the authorities in responding to the Pandemic and whether such measures would render the performance of the obligation(s) impossible; and to what extent.

Force majeure and arbitration agreements

Arbitration agreements, like any other agreement, are subject to the force majeure rule and may be terminated by the operation of law should a force majeure event make the performance of the arbitration agreement impossible.

In this regard, Article 8.1 of the UAE Federal Law no. 6 of 2018 on Arbitration ('UAE Arbitration Law') provides that:

'The court before which a dispute is brought that is subject to an arbitration agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits, unless the court is satisfied that the arbitration agreement is void or impossible to be performed'.

It appears from the wording of Article 8.1 of the [UAE Arbitration Law](#) that arbitration agreements will not only be terminated by operation of law in case of a force majeure event (which is unforeseeable and results in absolute impossibility) but also in case of any event which renders the performance of the arbitration agreement impossible whether such event is unforeseeable or not.

As such, we can knowingly say that arbitration agreements, unlike other agreements, can be terminated by operation of law (so parties are allowed to refer their disputes to the judiciary) in case of an event that makes its performance impossible irrespective of whether such an event qualifies as force majeure (i.e. unforeseeable) or not. The reason, in our view, for a differentiation can be attributed to the nature of the arbitration agreement which represents the parties' access to justice. So, the parties may not be prevented from having access to justice because the incidental event, which makes the performance of an arbitration agreement impossible, is not unforeseen.

On 8 April 2018, the Dubai Court of Cassation issued a judgment in Cassation no. 1042 of 2017 Commercial where it ruled that 'arbitration agreement is deemed as never made and borne invalid if it was impossible to be performed in the event that the agreed applicable rules and arbitration centre mentioned therein did not exist at the time when the arbitration agreement was executed'. The same ruling was also affirmed in an earlier judgment handed down by the Dubai Court of Cassation in Cassation 59 of 1990 Rights where it ruled that 'as long as the Claimant is not able to effect the arbitration agreement due to an out of control reason, he will be entitled to file his claim to the judiciary'.

However, it shall be impossible to perform the arbitration agreement in order to be terminated by operation of law. In case that an event temporarily renders the arbitration agreement impossible, the arbitration agreement is not likely to be terminated by operation of law. Instead, the only impact is that the statutory and/or agreed time limit (e.g. time bar or agreed filing deadline) for initiating the arbitration claim shall be stayed.

In a similar case, the Egyptian Ministry of Supply signed a contract, which contained a London-seated arbitration clause, with a private company in the 1960's. During such time, the political ties between Egypt and the UK had been cut. Consequently, the Egyptian Ministry of Supply filed its claim before the Egyptian Courts and argued that the cut of political ties between Egypt and the UK qualified as a force majeure incident which rendered the arbitration agreement impossible to be performed (especially in light of the lack of any online or internet communication at that time). The Egyptian Court of Cassation however, ruled on 17 June 1965 in Cassation 406 in 30 J that 'the force majeure in such case should not render the arbitration clause extinguished but will only stay the agreed deadline, if any, for filing such arbitration claim'.

Arbitration practice and COVID-19 implications

In our view, it is difficult to argue, or even envisage, that conducting arbitration might be impossible, whether permanently or temporarily, in light of the implications of the current Pandemic. Instead, we believe that arbitration is currently an advantage for those who have agreed to it as their dispute resolution method.

While we can very obviously note that court proceedings have been disrupted and sometimes totally stayed in light of the precautionary measures taken in most of the world's countries in responding to the current Pandemic, arbitration proceedings, instead, could be continued in an accessible, smooth and flexible manner that could fully adapt to the health precautions and other implications recommended by the experts in light of the Pandemic.

As a great example, we refer to the UAE Arbitration law which offered the arbitration community in the region a very accessible and flexible set of rules that would perfectly fit with a difficult and unprecedented time like what we are experiencing today. In this respect, we refer to the following Articles of the UAE Arbitration Law:

Article 28 provides that:

1. The Parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the Parties.
2. The Arbitral Tribunal may, unless otherwise agreed by the Parties:
 1. hold arbitration hearings at any place it considers appropriate to conduct any of the arbitral proceedings, while providing the Parties sufficient advance notice of the hearing.
 2. hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the Parties.

Article 24.1.a provides that:

Any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at its place of business, habitual residence or mailing address known to the Parties or designated in the Arbitration Agreement or the document governing the relationship addressed by the Arbitration; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter, courier, or any other means which provides a written record of the attempt to deliver it. The expression "mailing address" shall include any facsimile number or email address previously used by the Parties in their dealings or previously advised by either Party to the other in its communications.

Article 41.6 provides that:

Unless otherwise agreed by the Parties, the arbitral award shall be deemed issued at the place of arbitration as determined in accordance with Article 28 of this Law, notwithstanding that it may have been signed by the members of the Arbitral Tribunal outside the place of arbitration, and irrespective of how the award was signed, whether by all the members of the Arbitral Tribunal at one sitting or separately by each member to whom the award was forwarded for signature, or by electronic means.

In our view, the above Articles, among other provisions in the UAE Arbitration Law, provide for arbitration tools that would continue to be effective despite the current challenging times. Under Article 28, arbitration hearings and the tribunal deliberation could be held by any means of electronic communications. Further any communication could be effected, under Article 24.1.a, via any facsimile number, email address, registered letter, courier, or any other means which provides a written record of the attempt of delivery. Article 41.6 also permits signing any award by electronic means and acknowledges the possibility of signing an award outside the place of arbitration unless otherwise agreed by the parties.

Conclusion

We believe that:

- the implication of the current Pandemic on contractual arrangements and whether it falls under force majeure depends on: (1) the nature and circumstances of the contract in question; and (2) the precautionary measures taken by the authorities in responding to the Pandemic;

- arbitration agreements could be rendered terminated by operation of law in the event that it is impossible at all to be performed; and
- arbitration practice provides a very effective means of dispute resolution that could avoid the current implications of the Pandemic and provide the community with uninterrupted access to justice.

For legal assistance with your arbitrary needs, get in touch with our [arbitration lawyers in UAE](#).

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[1] Court of Cassation Judgment 101/2014 Civil issued on 26/2/2015