

Invoking force majeure in Kuwait during the COVID-19 crisis

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Introduction

The ongoing COVID-19 pandemic continues to throw supply chains into turmoil on an unprecedented scale after its designation by the World Health Organisation ('WHO') as a Public Health Emergency of International Concern ('PHEIC'). Governments worldwide are increasingly imposing strict measures restricting the movement of people and goods in order to contain its rapid spread, whilst factory shutdowns, staff shortages and border restrictions cast a heavy shadow on supply chain operations. The knock-on effect on companies' ability to comply with their contractual obligations raises the question of force majeure: an oft-used clause found in many commercial contracts which may excuse the delay or non-performance of a party's obligation(s) following the occurrence of a specified event. Some major logistics companies are already invoking force majeure or the contractual emergency situation clauses to temporarily relieve them of their contractual obligations. In Kuwait, the government has also taken some progressive measures to reduce the outbreak of this pandemic via decrees issued by the Kuwait Port Authority (the 'KPA'), the Ministry of communications (the 'MOC') and the Ministry of Health (the 'MOH') (collectively the 'Government'), details of which are set out below.

Government's response

On 25 March 2020, due to the increase of COVID-19 cases in Iran, the KPA suspended all vessel movements to and from Iran with immediate effect until further notice.

Meanwhile, as a part of the efforts to prevent the spread of COVID-19, the MOC informed ship agents that Kuwaiti ports are prohibited from receiving foreign vessels arriving from or heading to some countries (i.e. The Republic of Korea, Italy, Thailand, Singapore and Japan as well as Republic of China and Hong Kong (the 'Prohibited Countries') in addition to closing all marine ports and banning all arrivals of any citizens

from the Prohibited Countries until further notice.

Furthermore, MOC has further advised that in order to maintain efficient trade, ships carrying goods from the Prohibited Countries will be allowed to berth but will be prohibited from having direct contact with the crew who will be barred from disembarking from the ship. These measures are due to remain in effect for two weeks of the vessels' departure from the affected ports.

With effect from 6 March 2020, the MOH imposed a ban on travellers arriving from, (or who have in the two weeks prior to their travel date) visited or passed through the following countries: Mainland People's Republic of China, South Korea, Italy, Iran, Iraq, Japan, Singapore, Hong Kong (SAR); and Thailand.

In addition to these measures, on 12 March 2020, it was advised that the Government impose a series of exceptional measures in a bid to prevent the spread of the coronavirus by halting commercial flights and requiring public sector employees to take a two-week public holiday until 26 March 2020.

However, the Government continued to permit marine navigation and usual operations at all Oil Terminals (Mina Al Ahmadi & Mina Abdulla) and Commercial ports (Shuwaikh and Shuaiba) in order to maintain the supply of food and oil.

Despite the above exception, the MOC, on 24 March 2020, advised that agents are required to provide, in addition to the usually required documentation before arrival, the following documents:

- a copy of the ships' logbook for the last 30 working days (in English); and
- a copy of port clearance for the last 10 ports where cargo operations were carried out.

In light of the above the Government is aware that such extreme measures may lead to disputes which may, in turn result in the delay and frustration of agreements in respect of the multimodal trading, especially in relation to vessels that were suspended from the prohibited countries. This article focuses on how the Kuwaiti legislator has addressed and continues to handle this crisis. We will also consider whether a debtor can invoke force majeure and/or emergency condition clauses in order to avoid losses.

Force majeure vs emergency incident

In general, jurists agree that the force majeure and the emergency condition clauses are considered similar however they are different in the way in which they impact an agreement. However, two conditions must be satisfied in order to rely on the said options: (i) the event in question must be considered to be beyond the control of a party; and (ii) independence of the human action.

Furthermore, the emergency incident and force majeure are common in that either of them may not be predicted and may not be avoided. However, they differ in the outcome, as force majeure concerns the performance of an obligation being impossible. As for an emergency incident, it concerns the performance of the obligation being only considered burdensome. This difference establishes a difference in the effect, as where the two step test of force majeure is satisfied the obligations under the contract are deemed impossible to perform and the contract is thereby terminated, and the debtor is not liable for the consequence of non-implementation. However with regard to emergency incident clauses, an agreement is not terminated but, where possible, any losses are distributed between the debtor and creditor and the debtor shoulders a part of the consequence of the emergency incident.

On the other hand, Kuwaiti legislators have described force majeure and emergency situation events as a cause external to the contract, which was not possible to forecast upon concluding the contract. This view is stipulated in Articles 214 and 215 of the Kuwaiti Civil Law number 67 of year 1980 (the 'Civil Law') where if the performance of the contractual obligation is impossible due to an external reason beyond the

control of the performing party, the contract shall be automatically revoked. But if the impossibility is partial, the creditor or party entitled to the relevant right, may insist that the performing party performs the obligation. It is noted that the Kuwaiti legislator's view has effectively combined two theories (force majeure and emergency conditions) in defining them as cause external to and arising after the conclusion of the contract. Further, it has ruled that in order to consider the incident as an external cause Article 437 of the Civil Law provides the event should not be predictable, and it must be impossible to avoid. If either of these two conditions does not exist, then the incident shall not qualify as an external cause and the conditions of force majeure have not been met. It is not required to consider whether the relevant event or incident is predictable if it occurs as a matter of custom or practice. Rather, it is enough, in this respect, that the conditions and circumstances indicate the possibility of its occurrence. Further, it is not required that the debtor has become informed of these conditions if they are not invisible to a very alert and insightful person because the non-predictability required for the existence of the external cause and force majeure should be absolute and not relative. The criterion in this case is objective.

Conclusion

In summary, the doctrine of force majeure is a legal concept that broadly refers to the occurrence of certain pre-specified events in a contract which are beyond the control of the contracting parties, and we believe that any of the contracting parties could rely on both force majeure and emergency condition clauses according to the aforesaid explanation as the two conditions may be acts of god in the context of COVID-19, which is independent of human action and its occurrence is likely beyond the control of the relevant performing party.

As such, international conventions such as the Hague Rules may also apply, depending on the jurisdiction and contractual clauses present, whereby courts take a narrow stance on the doctrine of force majeure. Consequently, it is important to ensure that once the contracts are sealed or concluded, companies should be prepared to provide appropriate documentation and evidence to demonstrate that such events and consequences were beyond their control, and that they took reasonable steps under these circumstances to mitigate the effects of those circumstances. Key is to make sure contractual documentation is robust and explicit with regard to the force majeure and emergency incident clauses with a comprehensive paper trail supporting contractual negotiations and conclusions. Clients are well advised to seek legal counsel to ensure they are protected.

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