

How COVID-19 is characterised under Kuwait Law

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Introduction

The COVID-19 pandemic has had a significant impact on businesses around the world, and Kuwait is no exception. Many Kuwait based contracts have been negatively affected by the COVID-19 pandemic, as contractors were unable to fulfil their obligations as a result of suspensions in their related industries and commercial sectors. This negative impact on businesses was also a result of unprecedented restrictions and precautionary measures implemented by the various governments around the world in an attempt to contain and combat the spread of COVID-19.

Major governmental and state-owned projects were negatively affected by the spread of COVID-19. Main contractors, as well as sub-contractors, were forced to claim variation orders due to the losses they incurred as a result of the protective measures imposed by the relevant authorities to combat the spread of COVID-19. The basis for such claims was founded on the theory that such measures represented a “change of law” in the construction industry. This is especially relevant in relation to contracts inspired by the FIDIC’s model contracts, which entitles the main contractor and/or sub-contractor to claim damages from their employers where a change of law has been introduced, and which could not have been anticipated by any of the parties at the time of concluding the agreement.

Moreover, most of the contractual arrangements have been negatively impacted by the COVID-19, and in particular, contracts that depend heavily on time provisions as a major contractual element, such as lease contracts, supply contracts, and time or term performance deadlines.

How Kuwait has responded to the crisis

In Kuwait, the government took necessary and proactive measures to respond to the outbreak of the COVID-19 pandemic. Such measures were implemented on a gradual timetable to efficiently contain the pandemic, while at the same time, preserve the normal and smooth flow of the economy as best as possible. The measures contained the implementation of a lockdown, curfew, suspension of inbound and outbound commercial flights, and suspension of certain businesses and commercial activities during the period from March through to August of this year.

Now, while many aspects of life and economic activity are back to normal, some contractual relationships continue to suffer the consequences and aftermath of the pandemic and its related measures that were required to be implemented by the official authorities.

Force Majeure and exceptional incidents under Kuwait law

COVID-19 may be interpreted as a foreign element which makes the performance of contractual obligations impossible or, if not impossible, onerous on the part of one, or both, of the contractual parties. The Kuwaiti Civil Code No. (67) of 1980 ('Civil Code') provides certain mechanisms to resolve the situation where one of the contracting parties is unable to perform its obligations under the contract due to a foreign element in which it played no part, and which negatively affects the performance of its obligations under the contract.

The Civil Code establishes two principles that tackle the foreign element and its impact on contractual relationships. These principles are:

1. force majeure, and
2. exceptional

These principles are codified to regulate contractual obligations where certain unexpected events arise that may affect the performance of contractual obligations under a contract.

Force Majeure

Prior to addressing the definition of force majeure under Kuwait law, it is important to understand that pursuant to the Civil Code, the contract itself determines the rights and obligations of the parties, and the same will neither be amended nor revoked except by the agreement of the parties or by a provision of the law. Therefore, the parties must first look to the agreed provisions in their contract to determine how to address

exceptional event situations. In other words, the parties are required to first look to their contract to see if it regulates force majeure or related events. To the extent that the contract addresses the same, then the parties should apply these provisions accordingly. It is not uncommon for commercial contracts in Kuwait to contain a force majeure or hardship event clause, which, depending on the particulars of the agreement, could result in the termination of the contract, suspension of bilateral obligations temporarily, holding only the obligor liable for incurring the consequences of the unexpected event, or other agreed upon remedies.

Where a contract is silent in terms of force majeure, hardship, or other unexpected events, then assuming the contract is subject to Kuwait law, the relevant Civil Code provisions governing force majeure or exceptional incidents may apply.

Force majeure is defined under Article 215/1 of the Civil Code as "in bilateral contracts, where the performance of one of the parties' obligation becomes impossible due to an independent cause in which he played no part, the obligation becomes extinguished, and the corresponding obligation will be consequently extinguished and contract shall be, ipso facto, terminated."

Therefore, force majeure is an independent event where the cause cannot be attributed to the part or fault of any party to the contract and where such event makes the performance contract impossible.

Requirements to prove a case of Force Majeure

Unless there is an explicit agreement on the obligor's part to bear the consequences of a force majeure event, the Civil Code requires that a party prove certain conditions to be exempted from its obligation

under the contract due to a force majeure event. These conditions are as follows:

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1. the independent cause that represents the force majeure is unexpected. This means that none of the parties to the contract could have expected it when they initially concluded the agreement; or
2. the independent cause cannot be avoided and it makes the performance impossible.

As such, in addition to being unexpected, the party claiming the force majeure event must be able to show that it could not avoid the event and that its performance is impossible, and not merely inconvenient or burdensome. Conversely, if the situation can be avoided, or the relevant obligations are not impossible to perform, then the principle of force majeure should not be applied.

Consequences of claiming Force Majeure

As touched upon above, the Civil Code provides for the termination of the contract in the case of a force majeure event. Additionally, as a result of termination, the parties will be reinstated to the positions they were initially in prior to the conclusion of the contract. Moreover, unless there is an agreement to the contrary, the aggrieved party is not entitled to compensation if it is proven that the impossibility of performance is due to a foreign cause in which the obligor played no part. To this end, the Civil Code states that "where a person proves that damage has arisen by a cause beyond its control such as force majeure, unforeseen incident or the fault of the victim or a third party, such person shall not be liable for the damages, unless agreed to the contrary."

As the Civil Code suggests, it is permissible for the parties to agree in the contract that an obligor is responsible for the consequences of a force majeure event.

In light of the above, and given that COVID-19 is likely to be seen as an unexpected event, where a claimant is able to prove that COVID-19 has made the performance of his or her contractual obligation impossible, and where there is no provision in the agreement to the contrary, then the contract may be terminated in accordance with the Civil Code due to the occurrence of a force majeure event.

Finally, the effectiveness and mechanism for a termination of a Kuwait law governed contract also depends on the language of the termination clause provided in the agreement. Again, the parties should look to the language of their termination provisions to determine the appropriate course of action, and where the agreement is silent as to termination rights, or where force majeure cannot be linked to a termination provision, then the terminating party may be required to seek a court order for purposes of effecting the termination.

Exceptional Incidents

As mentioned above, the exceptional incidents principle is provided for under the Civil Code to also address the occurrence of unexpected events during the life of a contractual relationship.

This principle allows a contracting party to suspend the performance of a contract or request the resetting of the economics of the contract (i.e. economic rights and obligations) where an exceptional incident exists that could not have been foreseen by the parties at the outset of the agreement. In order to suspend the

performance of the contract under the exceptional incidents principle, and unlike force majeure, the obligor is not required to prove impossibility of performance, rather, it is sufficient for the obligor to show that the exceptional incident creates hardship and makes the performance onerous.

Article 198 of the Civil Code states that where, after the conclusion of the contract and before completing its performance, exceptional circumstances that could not have been expected at the outset of the contract arise, which make the fulfilment of the contractual obligation excessively onerous (although not impossible) in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the obligation to a reasonable level by limiting its application or increasing its consideration. Furthermore, Article 198 states that any agreement to the contrary in the contract shall be considered void. Therefore, the key distinction between exceptional incidents and force majeure rests upon whether the unexpected event creates a hardship on one or more of the parties or whether the event renders the agreement or obligations therein impossible to perform. Moreover, the remedies offered under each principle differ significantly, from termination of the contract under force majeure, to reduction or alteration of the obligation to alleviate the hardship under exceptional incidents.

Requirements for proving Exceptional Incidents

In order for a contracting party to avail itself of the exceptional incidents principle, the party must prove the following:

1. there must be a period of future performance between the execution of the contract and the exceptional incident;
2. the exceptional incident must arise after the execution of the contract;
3. the exceptional incident must be unforeseeable and not predictable or expected; and the exceptional incident must create a hardship in the performance of the obligation, and not render the performance impossible.

Again, the distinguishing factors between proving a case for force majeure and exceptional incidents are that under force majeure the execution of the obligation becomes impossible, and under an exceptional incident the obligation becomes onerous (or a hardship is created).

Relief available under Exceptional Incidents

Unlike force majeure, an incident which qualifies as an exceptional incident is, ipso facto, temporary in nature, which means that it does not make the performance of a contractual obligation perpetually impossible, but rather, it makes it onerous for a limited period of time. Therefore, under exceptional incidents termination of the contract is not an available remedy. However, the following relief may be applied by the judge:

1. temporarily suspend the performance of the contract until the incident ends, allowing the parties to resume performance thereafter;
2. increase the obligations of the non-claiming party to reasonably achieve an economic equilibrium between them; or
3. reasonably reduce the onerous obligation of the obligor.

As such, under the exceptional incidents principle, the court is granted the discretion to put the parties in a position that they would have been in had the exceptional incident not occurred or otherwise provide relief to achieve an equitable balance between the obligations of the parties.

Assessing Exceptional Incidents

A Kuwait judge, is the competent authority to adjudicate claims and determine the existence, applicability, and relief available in relation to force majeure or exceptional incidents in Kuwait. The Kuwait courts will

look to the Civil Code to address situations where an unexpected event has occurred, and which negatively affects the performance of the contract. The court will further rely on the principles embedded within the Civil Code to determine whether the unexpected event is a force majeure event that makes the performance of the contract or obligation impossible, or whether it is an exceptional incident, which renders the performance onerous on one party but does not entail termination of the whole contractual relationship.

Commercial responses to COVID-19 by the Kuwait legislature

As mentioned above, due to the COVID-19 pandemic, the majority of businesses and commercial activities were suspended upon the imposition of an official lockdown by the Kuwait government. From a legal perspective, parties to periodical contracts such as lease agreements were among those most affected by the lockdown.

The Kuwait legislature, in order not to lessen the negative impact on such affected individuals and companies, introduced certain amendments to various laws. For example, amendments were made to the Kuwait lease law in order to reset the equilibrium between the lessor's right to receive the rent and to protect the tenant from eviction due to non-payment of rent. In its rationale, the legislature did not consider the lockdown as a force majeure event, as it did not completely release the tenant from paying rent, but rather delayed the payment of the same.

Moreover, with respect to the rights of litigants before the Kuwait courts, the legislature introduced certain amendments to the Civil and Commercial Procedures Law whereby all hearings falling within the period from March 2020 through June 2020 were postponed and rescheduled to ensure that litigants were not harmed by the protective measures imposed by the government to contain the spread of COVID-19.

The above are just a few examples of how the Kuwait government implemented commercial responses to the crisis in order to lessen the burden placed on individuals and companies during the lockdown period due to the COVID-19 pandemic.

Conclusion

The characterisation of COVID-19 as a force majeure or an exceptional incident is a debatable topic under Kuwait law and will depend upon the specific circumstances surrounding each contractual arrangement and the effect that the event has on the rights and obligations of the parties thereto. The Kuwait courts reserve a well established discretionary power to assess the circumstances of each case in determining whether claims are force majeure or exceptional incidents as a result of COVID-19 and its effect on businesses and contractual relationships.

Although the end to this COVID-19 pandemic may still be far off, and business will certainly continue to be affected by it and the precautions put in place by the Kuwait government to halt its spread as best possible remain in place, the Kuwait Civil Code is well equipped to deal with the repercussions from a contractual perspective by providing parties with the potential relief offered through the principles of force majeure and/or exceptional incidents.

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