Qualifying Events For Force Majeure

Suzanne Abdallah - Senior Associate - Litigation
- Dubai International Financial Centre

Principle

When the performance of an obligation under a binding contract becomes impossible, the contract will be terminated, thereby extinguishing the subject obligation and returning the parties to their pre-contractual positions,. This means that each party will be required to return that which he had received under the contract. If that is not possible, the court will award damages. An extraneous cause such as an unforeseen occurrence, force majeure, fault of the aggrieved party or the act of a third party may be pleaded as a defence to liability in both tort and in contract.

Claim

A commercial action was filed by a company ("the Claimant") against the first and second defendants, being the Dubai International Airport and a Contractor (together "the Defendants"). In his action The Claimant sought an order from the court:

– that the Defendants pay, jointly and severally, the amount AED 3,406,323.27; alternatively

– an order of specific performance, plus the payment of damages for the period of non-performance

Facts

The Claimant's case was that it had concluded a contract with the Defendants to supply 35 airlock units and accessories for installation at the Dubai Flower Centre, which was part of the Dubai International Airport Expansion Project. In compliance with its obligations, the Claimant instructed its UK factory to purchase the raw materials and engineering materials required to manufacture the airlock units. The Claimant asserted that the Defendants had both refrained from performing their obligations under the contract and then arbitrarily terminated it without notice, thus causing loss and damage to the Claimant.

The Court of First Instance

An expert was appointed by the Court of First Instance. Upon receipt and review of the expert's report, the Court ordered as follows:

- That the contract in question be terminated; and
- That the Second Defendant take delivery of the 5 airlock units that the Claimant had supplied under the terminated contract, and to pay their value (AED 21,614.28) to the Claimant.

Subsequently, the Claimant and the second Defendant appealed.

The Court Of Appeal

The Court of Appeal dismissed the Claimant's appeal. However, with respect to the Second Defendant's appeal, the court decided to overturn the decision of the Court of First Instance and dismissed the case. Consequently, the Claimant appealed to the Court of Cassation.

The Court of Cassation

Before the Court of Cassation, the Claimant argued that the Court of Appeal had erred in its decision to dismiss its case. The basis of the Claimant's argument was that an event of force majeure had occurred.

The Claimant submitted that the Department of Civil Aviation had struck the Claimant off its list of accredited suppliers, and had refused to accept any of the Claimant's work or use its equipment in the Dubai Flower City project. The Claimant submitted that this was an event of force majeure which had rendered the performance of its obligations under the contract impossible. On the Claimant's assessment, this impossibility equated to the contract being terminated. The above interpretation by the court means that the Claimant cannot request the 2nd Defendant to take delivery of the 5 airlock units that the Claimant had supplied under the terminated contract and to pay their value (AED 21,614.28) to the Claimant.

The Court of Cassation accepted the appeal on the following basis:

- It is a settled principle that with respect to a binding contract, each party must perform that which he is obliged to do, failing which the other party may request that the contract be terminated in compliance with Articles 272 and 273 of the Civil Code. It is also settled that if the contract is terminated, the parties shall be returned to their pre-contractual positions and, if that is not possible, the court will award damages (but in this case only on the condition the Claimant submitted evidence of the force majeure event). The Court decided, however, that an extraneous cause such as an unforeseen occurrence, event of force majeure, fault of the aggrieved party or acts of a third party may be pleaded as a defence to liability in tort or in contract if it is unanticipated and impossible to resist, avoid or guard against.
- It is a further settled principle that the determination of whether an alleged extraneous cause would enable a party to avoid liability lies within the sole discretion of the Court. The fact that the Department of Civil Aviation had struck the Claimant off its list of accredited suppliers and refused to accept any of its work or use its equipment in the project would not in itself constitute an extraneous cause that would make the supply contract between the Claimant and the Defendants impossible to perform. The Court determined that such a situation could be classified as a normal commercial risk, which was capable of being anticipated and thus avoided. The Court decided that this commercial risk was something a prudent person would be able to guard against. According to the Court of Cassation it was possible for the 2nd Defendant to consult/review the list of the accredited suppliers of the Department of Civil Aviation.

In light of this the Court of Cassation overturned the lower's court decision as it considered that the fact the Claimant was struck off from the list of accredited suppliers of the Department of Civil Aviation was not to be considered as an event of force majeure requiring the termination of the contract.