Baker McKenzie Habib Al Mulla.

Client Alert
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There have been continuous discussions among law firms and commentators on whether the Coronavirus (**COVID-19**) pandemic constitutes a "force majeure" event, which is derived from the principle established in French Civil Law.

Some say that the principle of force majeure should be applied in the current crisis, as the conditions of a force majeure event are met: ***sudden, unpredictable and impossible to prevent***. Therefore, a contracting party may be exempted from fulfilling its contractual obligations citing to COVID-19, while the affected party may not claim compensation for damages sustained as a result of such breach of contract.

It is worth mentioning that the UAE bases the provisions of law relating to force majeure events on the idea of impartial justice whereby a creditor and a debtor participate in bearing the losses arising from a force majeure event.

Others say that the theory of "unforeseen events" should be applied. Unlike in the case of force majeure, this theory does not lead to the cancellation of contractual obligations. In the event that the theory of "unforeseen events" is applied, the courts intervene by reducing the onerous obligation to a reasonable extent so that the losses are shared between the parties to the contract.

The conditions for applying the theory of "unforeseen events" are: ***unpredictability of the event; the event occurring after the time of entering into the contractual obligation; and the event leading to an obligation becoming extremely exhausting/onerous rather than impossible***. This extreme exhaustion, which the Supreme Courts in Arab countries acknowledge, should exceed the normal levels of a usual loss in normal dealings under normal circumstances, regardless of the personal circumstances of the debtor.

Based on the above, it is safe to say that there may be contractual situations in which the COVID-19 pandemic can be considered force majeure events, and other situations as "unforeseen events". Ultimately, the decision is subject to the extent of the event's impact on the contract. If the event results in severe exhaustion for a party to the contract (*e.g.* increase in the cost of production or transportation prices), the theory of "unforeseen events" can be applied. If it causes the contract to be impossible to implement (*e.g.* transporting goods becomes impossible

due to the closure of ports, airports and/or roads), then the principle of force majeure can be applied.

A recent ruling from the Court of Appeal in Colmar, France, which was obtained by Baker McKenzie France, an associate firm of Baker McKenzie Habib Al Mulla (UAE), has qualified the COVID-19 pandemic as a force majeure event. This was a first of its kind judgment in which the Court considered that the failure of the litigant to appear in the hearing, insofar as he had been in contact with persons likely to be infected by the virus, cannot be overcome. The Court ruled that **"*these exceptional circumstances…constitute a force majeure event, being external, unforeseeable and irresistible*."** The judgment also demonstrated that no alternative measures allowed the litigant to attend the hearing even remotely.

Whether the Arab courts will follow the same approach and apply the jurisprudence and principles of force majeure events and "unforeseen events" to the COVID-19 pandemic, is yet to be seen. It should be noted that the French court issued the said judgment in relation to an administrative incident. However, nothing legally prevents the application of the same rules to contractual obligations.

Moreover, what we would like to see is for the Arab courts, whose legislations are derived from the jurisprudence of Latin laws, to go even further and enable investors, banks and companies contracting with the government (*e.g.* public utilities and infrastructure contracts and other administration agreements) to claim compensation for damages incurred as a result of actions and measures imposed by the government due to the current situation, which were unforeseen at the time of concluding the contract. Such claims, in our opinion, can be placed under the "Act of Lord" principle, provided that the following requirements are met:

1. The claim arises in relation to an administrative contract;
2. The harmful action/measure is issued by the contracting administration or government;
3. The action has caused harm to the contractor, regardless of the degree of severity;
4. Assuming the harmful act adopted by the administration does not constitute an error or a breach;
5. The harmful act issued by the administration is unforeseen; and
6. The contractor has sustained losses which are not sustained by other entities subject to the decision/measures adopted by the administration.

For further information, please feel free to contact one of the lawyers below or your usual Baker McKenzie contact.

You can also access our new **Baker McKenzie Force Majeure Tracker**, a high-level comparative analysis of force majeure and other alternative remedies in 28 jurisdictions, including in the UAE: https://forcemajeuretracker.bakermckenzie.com/force-majeure-tracker.

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