THE IMPACT OF COVID-19 on COMMERCIAL CONTRACTS

Effects in the Sultanate of Oman

13 April 2020

The spread of the Corona Virus ("COVID-19") over the past couple of months on a global scale has prompted governments, with the Sultanate of Oman ("Oman") being no exception, to implement drastic measures including limiting the movement of citizens and residents, closing international borders and suspending trade; to limit the further spread of COVID-19. While such measures are necessary, their impact on businesses and contractual obligations cannot be ignored, as the global economy approaches a standstill. The International Monetary Fund has hinted that the recession which is likely to follow COVID-19, will be worse than that that of 2008.

In view of such difficult economic times, businesses are desperately looking for legal solutions to either avoid or minimize the impact of the expected non-fulfillment of contractual obligations on their businesses; and Omani commercial enterprises are no exception. As we explore some protections available to commercial enterprises in unforeseen situations which may render the performance of obligations either impossible or burdensome, we advise readers to seek the opinion of local legal counsel with respect to their specific situations and challenges.

The Civil Transactions Law (Royal Decree 29/2013) ("CTL") provides protection to any contracting party when the obligations set out in a contract are either suspended or rendered redundant ("Special Circumstances"). This mainly includes circumstances where:

a. performance of contractual obligations becomes impossible on account of circumstances which are beyond human control ("Force Majeure"); or

b. performance of contractual obligations is possible but unduly burdensome to the extent that the obligor faces severe loss through performance of the relevant obligation ("Emergency Circumstances").

A requirement of invoking either of the foregoing Special Circumstances is for the aggrieved party to not have contributed to the occurrence of the Special Circumstance, and that the Special Circumstance must be unforeseen.

A. Special Circumstance: Force Majeure

Article (172) of the CTL outlines the principle of Force Majeure, a common clause in most commercial contracts. Force Majeure means an unforeseen event which prevents the fulfillment of a contractual obligation. It is pertinent to note that the event must be one which does not exist at the time of entering the contract and does not arise out of the negligence or act of the aggrieved party (Supreme Court in Appeal No. 11/2003). While Article (172) does not provide specific instances or situations which constitute a force majeure event, commercial contracts usually outline an elaborate list of events which can be used by a party to either terminate the contract, or evade performance of certain contractual obligations directly affected by the force majeure event. Notwithstanding the foregoing, even where a commercial contract does not contain a force majeure provision, Article (172) remains applicable.
Defining Force Majeure in Commercial Contracts

Where force majeure is defined in a contract, it becomes imperative to determine whether the consequences resulting from COVID-19 fall within the outlined circumstances in the contract which would thereby constitute a force majeure event. A usual definition of force majeure includes references to, ‘act of God’ or ‘epidemic/pandemic’ and COVID-19 can be argued to fall under either an ‘act of God’ and/or ‘pandemic’.

However, where a force majeure definition in a contract may does not encompass events which may cover the consequences of COVID-19, albeit by reference, then it would be difficult for the aggrieved party to invoke the application of the force majeure clause, as the competent court usually refers to the intention of the parties, and would not go beyond what is stipulated in the contract by including circumstances in the definition of force majeure which were not originally outlined.

Another important factor to bear in mind before seeking the enforcement of Force Majeure in contracts, is specifically determining the obligations which are affected by the force majeure event. It is important to note that only the performance of obligations affected by the specific force majeure event will be at issue, and not the entire contract. Obligations in a contract which are unaffected will remain enforceable.

B. Special Circumstance: Emergency Circumstances

Where the impact of COVID-19 does not render the performance of a contractual obligation impossible but rather, burdensome for reasons including the increase of costs for meeting the contractual obligation to an extent that the obligor faces severe loss, then in accordance with Article (159) of the CTL, the competent court would be inclined to reduce the burden of the obligation to make performance reasonable. It is important to note that to invoke the protection of Article (159), the aggrieved party must prove, to the satisfaction of the court, that the emergency circumstances were unforeseen and have occurred during the operation of the contract; as observed by the Ministry of Legal Affairs in Fatwa No. 2/28 of 2018.

However, a determination as to whether a contractual obligation has become burdensome is a matter of fact, and hence, a causal link needs to be established between the unforeseen situation, arising as a consequence of measures adopted by the government to tackle COVID-19, and the obligation which stands affected by the unforeseen situation.

CONCLUSION

Under the current circumstances, measures taken by the government in the wake of COVID-19 have either restricted or made it impossible to perform certain obligations under specific sectors of the economy; and it is expected that parties would either renegotiate the terms of their contracts, or turn to dispute resolution mechanisms to avoid any adverse consequences to the extent possible. Where the parties choose the latter, Articles (172) and (159) of the CTL would inevitably be involved. However, the party seeking protection under either Force Majeure or Emergency Circumstances must take into account the remaining terms of the contract, particularly the requirement to put the other party on notice where the performance of an obligation becomes impossible or burdensome.

The pandemic is an unprecedented challenge that Oman is facing. The current situation will be thoroughly assessed by the judicial bodies and authorities with judgements issued in relation to the relevant contractual disputes. Such judgements will no doubt serve as precedent for comprehending force majeure and emergency circumstances for times to come.
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