Let's dispel some myths. Force majeure clauses do not always relieve a party of its obligations. Not everything is an Act of God. There is no definition in Qatar law for what is force majeure. What does all this mean if you wish to rely on force majeure following an outbreak of coronavirus, causing your site to be closed or project to be put on hold, or your labour or materials quarantined?

In short, it means check carefully what your contract says. Well-crafted construction contracts will have envisaged this sort of scenario and prescribed, in full, the implications for both construction and employer. Ill-considered ones may raise more questions than they answer. This update attempts to address all of your force-majeure-related questions. To the extent it does not, please let us know.

Overview of force majeure

What is force majeure?

The concept of force majeure is widely recognised and operated broadly in the Middle East jurisdictions. There is no legal definition of force majeure in Qatar.

The expression "force majeure clause" is typically used to describe a contractual term by which one (or both) of the parties is/are usually:

- entitled to cancel the contract; or
- excused from performance of the contract, in whole or in part; or
- entitled to suspend performance or to claim an extension of time for performance,

upon the occurrence of a specified event or events beyond their control. As such, that party will not be liable for its failure to perform the obligations, in accordance with clause.

Most construction contracts contain a force majeure clause in order to address risks, which cannot necessarily be insured.

Are there different types of force majeure clauses?

In practice, force majeure clauses may assume a variety of forms, what they are and how they operate depend very much on how they are drafted.

Does a force majeure clause always allow me to suspend or terminate my contract?

The key in each case is to work out what your force majeure clause is intended to do and, in fact, does. It matters far
Does force majeure primarily protect the contractor?

Force majeure appears primarily to protect contractors since, in most cases, the employers' only obligation will be to pay.

However, force majeure also protects employers. It absolves the employer from responsibility for payment during any period of suspension. It affords employers a right of termination if the event of force majeure has gone on beyond a specified time. It can also be linked to step-in rights, which give the employer the flexibility it needs to ensure continuity of performance during the period of force majeure.

What is the position if I have no force majeure clause?

Where there is no force majeure clause, the provisions of Qatar law can potentially be invoked. There is no definition in Qatar law for force majeure although there are several provisions in the Qatari civil code which may be relied upon to protect a party suffering the effects of a force majeure event, it is therefore less clear the trigger events for force majeure provisions to apply.

There is a difference between force majeure and urgent circumstances. Force majeure occurs where the work is impossible to perform due a cause beyond the control of either party. The latter occurs where performance becomes more difficulty in which case tribunals / courts might reduce the onerous obligation to a reasonable margin or award compensation.

In case of force majeure, the courts will likely terminate a construction contract and the parties will be discharged from their obligations if they are satisfied that a party's obligations are impossible to perform.

The default position under Qatar law is where delay or non-performance is caused by circumstances or events beyond the control of a party, it is not obliged to compensate the other party for loss suffered as a result. However where the contract is terminated, the contractor has the right to reimbursement of any costs incurred and wages payable to him commensurate with the benefit the employer obtains.

That said, the parties are free to agree the arrangements around force majeure, and in particular, what compensation
is payable and in what circumstances.

Analyzing your force majeure clause

What might prevent me from relying on force majeure?

The protection offered by a force majeure clause generally only kicks in when a party is unable to perform (rather than it is more difficult or expensive to do so).

If a party would not have been able to perform even in the absence of the outbreak, it is unlikely that the party will be able to rely on force majeure as relief to perform its obligations.

In addition, the affected party will usually have to take steps to mitigate the effects of a force majeure event.

How specific must the force majeure definition be?

Whether a force majeure clause in a contract is triggered depends on the proper construction of the wording of that clause – including, in particular, the definition of force majeure.

Could I argue coronavirus is covered by general force majeure drafting?

The first thing to do is to consider whether your force majeure clause includes an appropriate trigger under which you may be able to invoke rights of suspension or termination. This might be specific reference to epidemics, pandemics, quarantines or government intervention as a result.

The fact that coronavirus itself is not officially classified as an epidemic/pandemic may not be relevant. The trigger may be the government action that causes the parties no longer to be able to perform the contract. Therefore, check whether the basis for non-performance is due to the virus itself or the resulting government action to limit the impact of the virus (e.g. limitations on transportation, quarantines, closures of premises).

What if there are no specific references to "diseases, epidemics or quarantines" as a triggering event, nor are there any to "government intervention" or "act of government"? Can you rely on an "Act of God"?

Would the outbreak of coronavirus amount to an Act of God?

Many force majeure definitions include reference to Acts of God or similar wording. Avoiding philosophical arguments that everything is potentially an Act of God, from a purely legal perspective, there is no one-size-fits-all answer as to whether a particular event falls within this sort of language.

Generally, Act of God appears to denote events due to natural causes without any human intervention. It has also been labelled as "an irresistible act of nature" and some are advising that the phrase (or other catch-all provision) may suffice to cover an outbreak such as coronavirus.

Ultimately, and most importantly, the issue depends on an assessment of all of:

- the nature and context of your particular contract;
- the words in the relevant force majeure clause; and
- the general terms of the contract, including the substantive law / governing law clause.

What do I do if my employer terminates as a result of a claimed force majeure?
If one party invokes termination as a result of a force majeure event, this must be in respect of a valid event of force majeure. The party invoking it should be unable to determine an alternative way to perform the contract. The prescribed contractual procedure should be followed. Otherwise, the risk is that the party terminating is in breach.

If, due to force majeure, an employer chooses not to make contractual payments, he would need a contractual provision permitting him to withhold payments (commonly, pending resolution of a dispute) otherwise there is risk of him being in breach of contract.

**Must force majeure be the sole cause of failure to perform?**

Force majeure must be the sole or dominant cause of the failure to perform an obligation. The question in such cases is generally one of construction of the relevant contract.

**Strengthening your force majeure clause**

Should I take a different approach as employer and as contractor?

As a general rule, where an employer’s only obligation is to pay, it will want:

- a narrow definition of force majeure;
- possibly the right to step-in, take action to remove or relieve the force majeure and back charge any cost to the contractor; and
- the opportunity for termination after a certain period of time (see below).

Contractors may prefer:

- a wide definition of force majeure, covering specifics and also elements outside the control of either party;
- suspension rights; and
- restricted rights of termination as a result.

**What do I need to consider in my definition of force majeure?**

Ultimately, the issue will turn on interpretation. Therefore, it helps to cover particular events relevant to the nature of your contract, so state these specifically. If you include general, non-specific language, expect an argument at a later stage over what it covers.

Avoid including events that are potentially within a party’s control, such as strikes/industrial action.

**What else should my clause cover?**

- **Consider the consequences of an event of force majeure**

  It is often preferable for your clause to provide for a period of suspension of the contract (e.g. 30 days) or an extended time for performance, instead of providing that the contract terminates.

  Be careful to consider the impact that suspension might have on other clauses in the contract – for example, in respect of payments (which are often suspended), time for completion (which cannot be met).

  Consider whether the employer should have the opportunity to appoint a third party contractor to provide services during the continuance of the force majeure event (by way of a step-in rights clause).
Consider the mechanics of force majeure

The mechanics of how the force majeure clause will be enforced should be clearly specified. If, at the end of the period, performance is still not possible, you may wish to ensure a further extension.

The party claiming force majeure should be required to inform the other party of the event in order to bring the clause into effect. Notice requirements, to whom the notice should be addressed, the form of communication (eg by email or otherwise in writing) and the consequences of failing to provide notice should all be taken into account.

Consider the impact of force majeure

Make sure the clause is conditional upon the other party taking steps to avoid events of force majeure.

At the heart of the force majeure clause lies the procedure which is triggered by the event of force majeure. Try to ensure that there is an option to terminate the agreement on a force majeure event. Immediate termination may be neither practical nor desirable.

Summary: invoking force majeure to deal with the coronavirus

- Check that your definition of force majeure makes specific reference to events such as "epidemic", "pandemic" or "outbreak of widespread illness".

- Alternatively, is the trigger in fact some government action as a result of the outbreak that means the parties are no longer able to perform the contract?

- Do not assume standard force majeure sweeper/general wording will be sufficient.

- Be confident (and ideally make sure both parties agree) that coronavirus falls within such classification before invoking any force majeure clause rights, in particular termination.

- Check the other provisions of your force majeure clause carefully. One of the primary reasons why tribunals/courts usually find that a force majeure claim or defense fails is where the party involving it did not comply with the notice and claims requirements in the force majeure clause.

- Check also whether there is an alternate way to perform the contract.

Drafting tips

- Force majeure clauses protect both contractors and employers.

- Employers will generally want a narrow definition of force majeure and will be limited to force majeure occurring in the country; limited or no compensation rights for the contractors; and the opportunity for termination after a certain period.

- Contractors will generally want a wide definition of force majeure so it applies to events globally, covering specifics example circumstances; compensation; suspension rights; and rights of termination.

- Consider carefully the consequences of an event of force majeure (primarily, rights of payment, suspension, step-in
Further information

If you have any queries on force majeure clauses, please contact Paul Prescott.

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