

Client Alert: Iraqi Government: The Coronavirus crisis (Covid-19) is declared “*Force Majeure*” - What is the legal impact?

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This client alert discusses the recent decision of the Iraqi Government to declare Covid-19 a “force majeure” event.

Introduction

On 22 March 2020, an inter-ministerial committee, chaired by the (interim) Prime Minister of Iraq and tasked with managing the COVID 19 crisis, announced that the Coronavirus crisis is to be considered an event of “*force majeure*” for all projects and contracts, effective from 20 February 2020.

The decision does not seem limited to government projects and contracts and will most likely also have an impact on all ongoing major projects in Iraq, not to mention normal commercial operations and contracts. The issue will raise legal questions in the local and international business community.

Force Majeure and Hardship under Iraqi Law

In common with most Middle Eastern jurisdictions, the Iraqi Civil Code regulates “*force majeure*” and *hardship*. These doctrines have the common aim of excluding the parties’ liability to the extent that exceptional circumstances occur which are beyond the parties’ control and which prevent them from fulfilling their contractual obligations.

The main distinction between “*force majeure*” and *hardship* lies in the fact that, in the case of “*force majeure*”, implementation of the contract becomes impossible; in the case of *hardship*, whilst implementation is remains possible, it becomes onerous.

Under Iraqi law, an obligation is extinguished if its performance has become impossible for reasons beyond a party’s control. In that sense, “*force majeure*” releases a party from its contractual obligations and the other party from its corresponding obligations. Impossibility under “*force majeure*” must be objective rather than related to the debtor’s personal inability to perform.

If a “*force majeure*” event is of a temporary nature only, the contract may be “suspended” until the “*force majeure*” event ceases and the timeframe for performance is extended accordingly. This would normally be examined on a case by case basis.

Hardship, on the other hand, does not result in immediate suspension of a party's obligations but rather enables a court to alter the debtor's obligations to a reasonable degree, commensurate with the specific circumstances.

In line with Iraqi law and practice, *hardship* may be invoked when a debtor's obligations become onerous due to circumstances that are exceptional, general and unforeseen. In that case, an Iraqi court's remedy would be to decrease the onerous obligation to the extent that it restores the equilibrium of the contract between the parties.

Force Majeure and Hardship in the context of Contract Clauses

The ICC adopts the principle of freedom of contract. Accordingly, the parties are free to detail in the contract the scope and effect of a "*force majeure*" event.

While the defense of *hardship* cannot be excluded in a contract, Iraqi law permits an agreement whereby the debtor bears the consequences of a "*force majeure*".

The declaration of COVID - 19 as *Force Majeure* by the Iraqi government

Given that Iraqi law already regulates "*force majeure*" and permits a party to rely on it, there must be some question as to the background and underlying rationale of the Iraqi Government in issuing the declaration and its effect on contractual freedom.

The wording of the declaration expressly covers "*all projects and contracts*". This means that debtors can be expected to invoke this beyond government contracts and projects and their supply chains. This means that it will most likely affect all existing commercial, civil and labour contracts, thus creating considerable uncertainty for domestic and international businesses working in Iraq.

Prior to the Government's announcement, developers, contractors and employers were supposed to be handling the Covid-19 crisis on a case-by-case basis, based on existing contract clauses and the Iraqi Civil Code. Now, following this declaration, it is unclear whether a debtor will be relieved from establishing "*force majeure*" and impossibility even if COVID 19 did not, in fact, render its contractual obligations impossible but only onerous, or did not affect the performance of its obligations at all.

This may also result in parties relying on the aforementioned decision to deliberately default – without bearing any liability. Needless to say, no decision of the government can change the applicable Iraqi law and it remains to be seen how the Iraqi courts will treat the decision and whether it will be interpreted as some kind of "binding interpretation guidance for Iraqi public authorities".

In summary, the declaration of COVID -19 as "*force majeure*" by the Iraqi Government leaves some questions unanswered. It may be advisable for contracting parties – wherever possible - to agree on the way forward to avoid surprises in court.

If you would like more information about this topic, please contact us.

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