

Force Majeure: Preserving Contractor Rights During Qatar Diplomatic Crisis; What You Need to Know

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On 5 and 6 June 2017, the **United Arab Emirates (UAE)**, Kingdom of Saudi Arabia (Saudi), Egypt, Bahrain, Yemen and the Maldives all separately announced that they were severing diplomatic relations with Qatar. In the days that followed, Mauritius, Libya and Mauritania all followed suit. The measures taken by the UAE and Saudi are particularly restrictive with the closure of all land, air and sea routes to or from Qatar, including prohibiting Qatar Airlines from flying in UAE or Saudi airspace. While the legality of the actions taken by UAE and Saudi is far from certain¹, for the time being, Qatar appears to intend to comply with the prohibition. As a result, the sudden and comprehensive ban on major transportation routes to and from Qatar will significant effect the ability of contractors in Qatar to perform their obligations under existing contracts. This article examines one of the key defenses available to a contractor whom is unable to perform its contractual obligations—the defense of force majeure.

What is Force Majeure

Force majeure is a legal doctrine that provides relief (a shield) to a party whom is unable to fulfill its contractual obligations due to circumstances beyond that party's control.

Force majeure relief may be available either: (1) pursuant to the express terms of a contract; or (2) in some cases, by virtue of the local law applicable in the place of performance of the contract.

Force majeure clauses may contain either an exclusive or inclusive definition of events that would constitute force majeure. An exclusive force majeure clause provides an exhaustive list of events or circumstances that may provide relief to an affected party. An inclusive force majeure clause provides an indicative list of events that may constitute force majeure. Force majeure clauses tend to be interpreted narrowly; that is, only the events listed and events similar to those listed will be covered.

The types of events that will give rise to relief are not codified under Qatari law and are therefore left to the parties to contractually agree. However, the doctrine of force majeure is recognized under Law No. 22 of 2004 (the Qatari Civil Code). Articles 204 and 258 both articulate the concept of force majeure and provide relief to the non-performing party in circumstances where another party's loss can be attributed to an external cause², or, more in-line with the traditional concept of force majeure, where the non-performance itself is due to an extraneous cause³.

Some contracts provide that "*acts of state or governmental action that prevent, hinder or delay a party from performing its obligations*" amount to a force majeure event. The Qatari diplomatic crisis may be a qualifying event for contracts that contain a similar definition.

Applicable Law

With limited exception, the parties to a contract for performance of obligations in Qatar are free to choose the governing law of the contract. However, there are two key circumstances in which the governing law of the

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contract will not be the only relevant law in determining the rights of the parties.

Firstly, wide discretion is given to the Qatari courts⁴ to look beyond the terms of the contract and consider the implied terms relating to a party's rights and obligations. If the Qatari courts take jurisdiction over a dispute, the rights afforded to the court cannot be fettered and a party may find itself burdened with obligations that extend beyond the express terms.

Secondly, various Qatari laws (including the Qatari Civil Code) contain mandatory provisions that cannot be 'contracted out of' or excluded by the terms of a contract.

Article 171(2) of the Qatari Civil Code is an example of one such mandatory provision, which is relevant to the current circumstances. Article 171(2) sets out a test for "exceptional events" that would relieve a party (either fully or in part) from performance of its obligations. As a mandatory provision of the Qatari Civil Code, Article 171(2) will prevail over any provision of the contract that purports to exclude such rights. The requirements for relief under this provision are that the event or incident:

1. is public;
2. is exceptional in nature;
3. could not have been anticipated or reasonably foreseen;
4. renders the contractual obligations onerous; and
5. cause, or threaten to cause, great loss to the party burdened by performance.

Prima facie, the Qatari diplomatic crisis appears to satisfy the test under Article 171(2).

Likewise, Article 700 of the Qatari Civil Code provides that price escalation due to an "exceptional event" may give rise to additional rights for the contractor or otherwise vary the contractor's obligations. Price escalation is a likely consequence of the Qatari diplomatic crisis given the limited options for importing raw materials and supplies.

However, the mandatory provisions of the Qatari Civil Code need to be balanced with Article 258 of the Qatari Civil Code, which permits the parties to contractually agree to allocate risk for force majeure events to the contractor. The interplay between the mandatory provisions of law and the rights afforded to the parties to contractually agree would require an analysis of the particular contractual provision and circumstances of the case.

Contract Administration - Preserving Your Rights

The operative portion of a force majeure clause will generally contain requirements regarding notification of the occurrence of a force majeure event and the need to mitigate the effect of the force majeure event. Claims for relief may be barred to the extent that a party fails to follow a mandated procedure set out in the contract.

As a minimum, prompt notice from an affected party may well be required in order to preserve that party's rights to claim force majeure relief at a later date. In addition, many contracts may contain unilateral termination rights if a party's performance is affected by a force majeure event for a prolonged period of time (with some contracts allowing termination for prolonged force majeure following as little as 90 consecutive days of a force majeure event). Consequently, it is vital to give notice and record the date on which time starts to run under such a provision.

Contractors should also ensure that all communications and documents relating to the force majeure event are being retained and preserved. Any contractor wishing to rely on force majeure will need to be able to establish that the events in question had a sufficiently serious effect on continuing with the project—whether as regards work on site or the financial implications of continuing with the work (if relevant under the contract in question). This is particularly important if either party to the contract may trigger a formal dispute.

Triggering a Dispute

If the events described above frustrate business dealings to the point where a dispute may be imminent, it would be advised to review the dispute resolution provisions in the impacted agreements, to check whether disputes would be heard by the Qatari courts (or the courts of another country) or be referred to international arbitration.

Foreign investors may want to consider their political risk options, whether that be an analysis of their existing political risk insurance or a review of bilateral investment agreements ("BITs") and other types of investment

agreements that touch the contracting parties. For instance, Qatar has ratified 23 BITs, most of which provide for arbitration for foreign investors impacted by governmental acts.

Conclusion

For contractor's affected by the Qatari diplomatic crisis, now is the time to review key provisions of your contracts to determine the extent to which force majeure relief may be available and to strictly follow the operative requirements of a force majeure clause. Contractors should also check both the contracts with their employer and those with any sub-contractors before finalizing their approach to any force majeure clause.

1. This article does not examine the legality of these actions, but commentators have raised concerns over, inter alia, compliance with the requirements of the International Air Services Transit Agreement, of which UAE is a member state.

2. Article 204.

3. Article 258.

4. Article 169(2) of the Qatari Civil Code

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