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Building Qatar: diplomacy and the contractual bargain

In June 2017, in an unprecedented move by Saudi Arabia, Bahrain, Egypt, the UAE and Libya, the State of Qatar was subject to an economic blockade. Overnight, 50% of the *GCC* had closed land, sea and air connections to the peninsular. A *list of 13 demands* have been issued to the Emiri Diwan in Qatar. Qatar's refusal this week to meet what it considers to be unreasonable demands means that it can expect a potential escalation in the economic sanctions already meted out.

By *Paul Fisher*

Barrister at *4 New Square*

Inevitably there are repercussions for commercial parties operating throughout the region. With stadia, roads and a metro network to build in the run-up to the *2022 World Cup* and *Qatar's 2030 Vision*, these are particularly acute for the construction industry.

This post considers three potential avenues that contractors and sub-contractors might pursue in circumstances where the performance of their obligations becomes either impossible or increasingly and prohibitively difficult should this period of political confrontation be prolonged.

Three options to pursue

The three potential avenues are:

- Force majeure.
- Economic hardship.
- Impossibility.

In my opinion, the sanctity of the commercial bargain in English law (see the classic frustration cases such as *Herne Bay Steamboat Company* and *Davis Contractors Ltd v Fareham UDC*), may well be reflected in disputes arising in Qatar.

Force majeure

In theory, the *doctrine of force majeure* fits neatly into the context of this diplomatic rift. Materials previously carried over land into the small peninsular will now be refused passage north of the Saudi border. The emirate of Dubai, which was a major transport hub for the transportation of goods by air to Doha until recently, is now closed to such traffic.

In the medium to long term these significant economic sanctions will likely lead to claims for prolongation costs, costs of disruption and extensions of time. Might there be a case for the party in "default" to release themselves from their obligations by pleading force majeure?

This will very much depend upon the interface between *Law No. 22 of 2004 Promulgating the Civil Code* (the Qatari Civil Code) and the standard form adopted by the contracting parties.

The starting point is that the provisions of the Qatari Civil Code are mandatory and cannot be contracted out of unless a specific right of derogation is provided for by the relevant provision.

Article 204 of the Qatari Civil Code sets out the basic regime regarding force majeure events:

"Where a person proves that damages have arisen from a cause beyond his control, such as force majeure, unforeseen incident… such person shall not be liable for such damages, unless there is a provision to the contrary."

Article 256 of the Qatari Civil Code provides that:

"Where the obligor fails to perform the obligation in kind or delays such performance, he shall indemnify any damages suffered by the obligee, unless such non-performance or delay therein was due to a cause beyond his the control."

Article 258 of the Qatari Civil Code states that:

"… the parties may agree that the obligor shall bear liability for force majeure or unforeseen incident."

Crucially then, it is open to the parties to agree a different contractual mechanism for dealing with "causes beyond their control". If a force majeure clause exists then that will very likely take precedence. This sits well with *Article 169 of the Qatari Civil Code*, which stresses that where the wording of the contract is clear, the courts should not deviate from it.

At its most basic, the Qatari Civil Code has the potential to facilitate an argument for force majeure. However, in almost all standard form contracts a force majeure clause will exist, which will strictly govern the application of the doctrine.

Consider, for example, the argument based on force majeure within the context of the FIDIC suite of contracts – the most popular in the region. Clause 19 of the *FIDIC Red Book (1999)* is particularly informative in this regard.

Clause 19.1 defines force majeure as "an exceptional event or circumstance" which:

"(a) Is beyond a Party's control

(b) Such Party could not reasonably have provided against before entering into the Contract

(c) Having arisen, such Party could not reasonably have avoided or overcome; and

(d) Is not substantially attributable to the other Party (A non-exhaustive list of such events is provided at sub-clauses 19.1(i) to (iv))."

Where a party is "prevented" from performing its contractual obligations, it can give notice pursuant to sub-clause 19.2 within 14 days of the force majeure event arising and, in so doing, release itself from performing the obligation that has been affected by the qualifying event for the entire period that the event subsists. If the execution of substantially all the works in progress is prevented for a continuous period of 84 days by reason of the notified event (or for multiple periods which total more than 140 days), then either party may give notice of termination of the contract.

The key here is that clause 19 requires "prevention", such that a party "could not reasonably have avoided or overcome" the exceptional event or circumstance. There can be no real doubt that what is happening in the Gulf is "exceptional". However, the politics of the region has not stopped goods getting into the country, though it has made it more difficult. An arbitral tribunal or Qatari court may well conclude that though supplies are hampered by these events, materials can still be delivered to site with the right planning and that this factual matrix does not amount to an event that "could not reasonably be overcome".

Impossibility

Impossibility is a different ground for the rescission of contractual obligations under Qatari law. It is properly distinguishable from the concept of "*frustration*" in English law, though it is undoubtedly its closest cousin.

Article 188(1) of the Qatari Civil Code states that the contract is automatically rescinded in circumstances where:

"… performance of an obligation by one party is extinguished by reason of impossibility of performance due to force majeure beyond the control of the obligor."

Once more, the defaulting party is in the difficult position of proving "impossibility" by reference to a blockade that is by no means universally enforced. There remain routes into Qatar for goods and materials. The logistics of securing these may be more expensive, but any election not to procure goods in circumstances merely of unforeseen expense is highly unlikely to meet the legal test.

Economic hardship

Article 171(2) of the Qatari Civil Code states that where "exceptional and unforeseeable events" mean that the "fulfilment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss", the Qatari courts are entitled to "reduce the excessive obligation to a reasonable level", though this is dependent upon the circumstances and is permissible only "after taking into consideration the interests of both parties".

There are three important points to make here:

- The remedy does not take automatic effect but lies in the court's discretion.
- In order for the Article to be engaged, what is required is an "exceptional and unforeseeable event".
- The judicial remedy is less draconian than the doctrines of force majeure and impossibility in that it affords a tribunal the power to meaningfully recognise the hardship caused to a party without releasing them from their obligations in full.

It is, in my opinion, quite conceivable that the argument from "economic hardship" under Article 171 may be triggered by the political events in the Gulf. The legal test is, on its face, far less stringent than the force majeure provisions contained in standard form contracts.

Contrast this with the position in English law and it is clear that the English courts have consistently guarded against mere onerousness becoming a premise for releasing either party from their obligations. One is reminded of the famous words of Viscount Simonds, wherein he denied in *Davis Contractors* that:

> "… where, without the default of either party, there has been an unexpected turn of events, which renders the contract more onerous than the parties contemplated, that is by itself a ground for relieving a party of the obligation he has undertaken."

Conclusion

It is likely that both arbitral tribunals and the Qatari courts will narrowly construe force majeure clauses in standard form contracts with the aim of avoiding parties escaping the "bad bargain". Arguments that borrow from "impossibility" and "force majeure" are notoriously difficult to deploy in any jurisdiction.

On the other hand, arguments based on economic hardship, which require only "excessive onerousness" as opposed to "impossibility" set the bar ever so slightly lower in Qatar. This is in stark contrast with an English law jurisdiction that sets itself against "onerousness" of contractual performance as a basis for releasing parties from their word.

In practice, the *Qatari Court of Cassation* and arbitral tribunals will be very keen not to permit an economic blockade – however serious – becoming an excuse not to perform contractual obligations.

The excitement in Doha surrounding force majeure may be premature. *Pacta sunt servanda* remains the golden rule of the civil code jurisdiction as much as the common law.