WHEN CRISIS APPEARS, HOW WOULD RESIST MARKET PRACTICE CLAUSES COMMONLY USED IN TRANSACTIONAL AGREEMENTS CONCLUDED IN THE UAE AND HOW WOULD JUDGMENTS DERIVED FROMS SUCH CLAUSES BE ENFORCED IN THE UAE

INTRODUCTION

The UAE has without doubt managed to attract people from all around the world by offering a great platform to conduct businesses and launch and/or consolidate international careers. Indeed, by (i) consisting of a strategical entry point to emerging markets (ii) having a pro-business government approach as demonstrated through the creation of free zones[1], and (iii) offering a friendly tax environment, the foregoing seems obvious.

Business put aside, from a legal perspective, it is not common to have on the same territory different sets of courts that apply different sets of rules, some of which being completely foreign to the national laws and customs. Dubai International Financial Center ("**DIFC**") one of the most famous free zones in the UAE, has for instance its own courts system and specific legal framework[2] derived from common law. Similarly, the Abu Dhabi Global Market ("**ADGM"**) adopts English law as a default position. As a consequence, parties dispose of a large set of combinations to define the laws and jurisdictions governing their relations when operating in this country.

Despite the fact that UAE is based on a civil law system [3] which many companies could feel familiar with, international corporate key players originating from civil law jurisdictions when entering into agreements in the UAE with foreign or Emirati counterparts are sometimes more likely to choose and elect, when the option is given, the laws of a common law jurisdiction to govern their contractual relationship than those of the UAE. In addition, even when governed by a civil law regulation, those players tend to use more and more market practice concepts derived from common law to cover damages and breach of commitments rather than referring to civil law in their contractual documentation.

Finally, arbitration is now considered as the ordinary forum for the resolution of disputes arising out of significant international commercial agreements.

When the time come for discussing early termination of commercial, financing or share purchase agreements, what are the consequences of such commonly observed trend ? and will such practices be modified by the ongoing pandemic of the coronavirus?

The virus has not only affected people's health worldwide but has also disrupted business, finance and general interactions and most business and legal players now have to analyze the accuracy of existing provisions in their contracts.

MAC CLAUSE OR FORCE MAJEURE, DIFFERENT MECHANISMS TO TAKE AWAY

The parties having recently concluded a contract will probably have more difficulty to raise Covid-19 as a Force Majeure event or as a Material Adverse Change and may certainly have dealt with this issue

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[1] A free zone or a free trade zone is a geographical zone within the UAE in which foreign investors can benefits from easy setups, preferential tax and duty, privacy of shareholders, assistance with the issuance of work permits and visas for employees and so forth

[2] See www.difccourts.ae

[3] See the UAE Governmental Portal- www.u.ae

through specific provisions, but what about contracts which have been concluded a couple of months or years ago?

One of the most important steps that the companies should take is to review their contracts to determine what conditions and/or exemptions might apply in the current situation. The affected contracting party (ies) should ask first if the Covid-19 outbreak is the main cause of the delay in performance or the non-performance of the obligations under the contract and if yes, if there are any adequate reasonable remedies other than early termination.

- **Force Majeure**

If performance of the contract is prevented, hindered or delayed due to events which are (i) unpredictable, (ii) unpreventable and (iii) external to the parties (not attributable to the affected contracting party), which is obviously the case of Covid-19 for most of the agreements executed before 2020, a force majeure provision in the agreement may, if drafted adequately, be an avenue of relief by giving the party the right to suspend or, terminate the agreement.

In common law jurisdictions, force majeure is not a doctrine applied by the courts unless the event in question falls within the express provisions of the contract. If the events of force majeure listed under the contract do not expressly encompass viral outbreak, epidemic or pandemic, then the case will be subject to the interpretation of courts which will, more likely disregard force majeure in the absence of a specific and express contractual provision. Common law jurisdictions are rather familiar with the concept of frustration[4] , not so commonly used today and which in many aspects has similarities with the concept of force majeure, but which may differ by the conditions and consequences regarding the events qualifying as frustrating act.

On the other hand, the courts of civil jurisdictions are used to deal with the concept of force majeure as expressly stated in the Code Civil and appear to have a more extensive interpretation to take into consideration the events which can qualify as force majeure. Unlike in the common law context, where force majeure may result in the suspension of contractual obligations, the default consequence is termination. In a decision dated April, 14 2016, the Supreme Court of France ("Cour de Cassation") has recognized that cancer could be a case of force majeure if the disease was unpredictable at the time the agreement had been signed and, on this basis, has ordered the early termination of such contract.

Consequently, force majeure being a general notion recognized under the civil law system, where a contract contains a general force majeure condition governed by a civil law regulation, it is highly likely that the affected party may in most cases seek for the termination of an agreement in the event of Covid-19. Even if the epidemic is not expressly identified in said provision, early termination of an agreement will certainly be claimed on such basis.

The UAE legal system based on civil law acknowledged the concept of Force Majeure and articles 273 (1) and (2) of the UAE Civil Code [5]provide alternatively that if a force majeure event supervenes that

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[4] In summary, while each case must be assessed on its own facts, it can generally be said that a frustrating event is one which renders performance impossible, illegal or radically different from what was originally contemplated by the parties, not due to the act of the party seeking to rely on it and is not envisaged by the contract.

[5] *Article 273 of Federal Law No. 5 of 1985 on the Civil Transactions Law (the "**Civil Code**") provides:*
"In bilateral contracts, if a force majeure arises that makes the performance of the obligation impossible, the corresponding obligation shall be extinguished, and the contract ipso facto rescinded.
If the impossibility is partial, the consideration for the impossible part shall be extinguished. This shall also apply on the provisional impossibility in continuous contracts. In both instances the creditor may rescind the contract provided the debtor has knowledge thereof."

renders performance of a contract partly or fully impossible, all contractual obligations will cease and the contract will be automatically cancelled (1) or alternatively the contract will partially be extinguished and the remainder, still applicable, will continue in effect (2). Regarding performance of obligations contained in many project contracts ("muqawal's contracts") article 893 of the Civil Code provides that if any cause arises that prevents performance or completion of a contract, any of the parties may require that the contract be cancelled or terminated as article 386 provides that nonperformance may not give rise to compensation in case of "external cause"[6] .

As a result, a party may be exempted from performing its contractual obligation in case of force majeure without indemnity[7] as stated in article 287 and article 386 of the Civil Code, subject to performance of certain conditions: the party would still have the burden to prove that the non-performance or delay of performance of its obligations under the contract is due to circumstances beyond its control which it could not reasonably predict and prevent. In addition, the Courts will examine the criterion of "extraneous" in order to define whether the event is not attributable to the affected contracting party.

At this stage, it is difficult to determine how the courts in the UAE or arbitrators considering contracts governed by UAE law, will analyze the COVID-19 in the light of force majeure but there is no doubt that being able to claim for termination of a contract on the basis of a force majeure clause may be considered as a major asset in this exceptional situation .

- **MAC Clause**

However as mentioned earlier, many international agreements, even if governed by Civil law, now refer to common practice originating from common law and hence use the concept of the Material Adverse Change (**"MAC"**) or the Material Adverse Effect (**"MAE"**) rather than the concept of force majeure and more surprising the concept of frustration. Indeed the mechanism is different as the main purpose of a MAC clause is to protect a party against a significant change to the economic rationale of a deal and not to terminate the agreement while the purpose of a force majeure clause is to enable a party to terminate an agreement without indemnities. Hence, the MAC aims at rendering the performance of the agreement more expensive, less profitable but not impossible. Some agreements both contain a force majeure and MAC clause but, in such uncommon cases, interpretation may raise several contradictory issues and most of the contracts now only refer to MAC clauses. Originally provided in financing contracts to address defaulting event of repayment, the use of Mac Clause is no longer so restricted and is now inserted in most commercial and share purchase agreements.

If the performance of a contract (entered into before 2020 under common law) is prevented, hindered or delayed due to the case of Covid-19, could a MAC clause stated in the agreement be an avenue of relief by giving the party the right to suspend or, terminate the agreement as it is for force majeure?

The use of the MAC clause is more and more tailored made and will not be triggered without a scrutiny case by case analysis. In order to be enforceable, the MAC must expressly provide the event that may trigger the termination of an agreement. Unless there is an event of default caused by one of the listed events within the clause and this is a critical issue to identify in the current circumstances how the MAC clause will address the COV-19 and remedies, the MAC clause will not be effective.

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[6] *Article 386 of the Civil Coed states that :If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation.*

[7] *Article 287 of the Civil Code states:*
"In the absence of a provision in the law or an agreement to the contrary, a person is not liable for reparation if he proves that the prejudice resulted from a cause beyond his control such as a heavenly blight, unforeseen circumstances, force majeure, the fault of others or of the victim."

Let's take for example a share purchase agreement. If drafted in a pro-buyer way the clause will refer to forward looking language (such as "could reasonably be expected to have changed the circumstances "), in addition the list of direct consequences on which the material change may impact will be limited (i.e. assets, business) and will contain very few exemptions. However the drafting of listed events may appear to be vague (" … circumstances, effect or other matters that could be reasonably expected to have .. a material effect on the business … ") and may be challengeable clauses, hardly to be used to terminate an agreement in the case of Covid -19 .

On the contrary the pro-seller clause will exclude the forward-looking language, address a broader list of the elements that can be affected by the MAC and will provide an extensive list of exemptions such as strikes or terrorist attack, which would typically be covered by a force majeure clause. MAC clauses being the result of generally tough negotiations between the parties and their lawyers, forward looking language and limitations of such clauses are more subject to interpretation and discussion. Consequently, if not expressly stated, pandemics or epidemics may trigger sharp discussions between the parties in order to agree on the consequences of Covid-19 regarding the performance and financial rationale of a deal. Looking at many ongoing contracts, it seems that expect for contracts applicable in certain countries, especially in Africa, epidemic events are until now not so often stated as a MAC clause event or as a MAC exemption.

This will undoubtedly raise debate on the interpretation of such clauses, and we can expect that next MAC clauses drafting on epidemics and pandemics cases will be most keenly scrutinized and debated and will in any case be directly addressed in the future agreements such as it is now systematically the case for terrorism attack event.

Consequently, parties which will seek for the early termination of an agreement because of Covid-19 will, in many cases, be better protected by a force majeure provision provided in a contract governed by civil law (or to a certain extent, frustration if subject to common law) than by a MAC clause. The key element for the force majeure being the "unpredictability", a party will by definition be always in a stronger position to terminate a contract with a general mechanism as provided by civil law than with a never-ending list of defaulting events when something no one could predict three months before, finally occurs. On the other hand, if a party is seeking for renegotiation or would like to reschedule installments and terms of a contract, a MAC Clause may still be appropriate.

TO WHAT EXTENT CAN AN AWARD DEALING WITH FORCE MAJEURE OR MAC CLAUSES (WHETHER GOVERNED BY COMMON LAW OR A CIVIL LAW) BE ENFORCED IN THE UAE?

Considering the shock wave of Covid-19 on the economy, it is likely that in most cases parties will not be able to amicably settle disputes related to the outbreak in view of the divergences between the present circumstances and their commercial needs.

For that reason, parties should start to review their contracts, identify all the points mentioned above and collect evidence in order to be prepared for a potential dispute. Let's also hope that the parties have inserted well drafted/sound arbitration clauses on the basis of which they would be able to submit any potential dispute to arbitration.

As mentioned earlier, it has become market practice for international business players and/or big local companies to resort to arbitration for the settlement of their disputes. This can be explained by the fact that arbitration is more flexible, time and cost efficient and party oriented than state court proceedings or litigation, in addition to being private.

However the enforcement of an award is critical to any party to arbitration. For the purposes of this article, we will assume that the enforcement of the award settling a dispute related to MAC or Force Majeure clauses whether governed by common law or civil law is meant to take place in the UAE.

First of all, the choice of the governing law will have no effect on the enforcement. One would assume that the judge[8] looking into an enforcement claim would be more comfortable with a certain set of rules considering his background; however that is not the case.

A judge will never look into the merits of the case for the governing law to make a difference[9], not even if he refused the execution of the relevant award or declared its annulment. The only aspect that could influence enforcement is the place in which the award is meant to be enforced.

However, prior to answering the foregoing, we will need to draw the distinction as to whether the concerned award was rendered outside or in the UAE ; in other words, whether the award is foreign or domestic?

This is not to be confused with whether the seat of the arbitration proceedings is outside the UAE or not.

Even though the seat of arbitration might determine the law of procedure that will govern the proceedings such as the grounds on which a party (usually the losing party) can initiate an annulment claim against an award[10], the enforcement of an award will have to abide by the rules of the place in which it is actually intended to be executed. If the seat of arbitration and the place of enforcement of the award are one and the same then there is no issue.

For instance, an award that was annulled at the seat of arbitration can still be executed in France[11] but will obviously not be enforceable in the place of the seat.

The distinction between foreign and domestic awards is made under the UAE Arbitration Law but not under the DIFC Arbitration Law or the ADGM Arbitration Regulations. This again goes to show the originality of the UAE of having different types of courts with their respective sets of laws and regulations.

We shall examine in further detail how the enforcement on an award can be pursued whether against assets that are onshore[12], or in the DIFC[13].

- **Enforcement of foreign award onshore**

The provisions on enforcement under the UAE Arbitration Law (see below) do not apply to foreign awards. The enforcement of a foreign award in the UAE is be made in accordance with the Convention

[8] Considering that to enforce an award you will still need to pass by the local court who monopolize the powers to order execution considering that they are branches of the state

[9] Prior to the entry into force of UAE Federal Law No.6 of 2018 (Arbitration Law) local courts permitted themselves to look into the merits of the case upon declaring the annulment of an award on the basis that the annulment of the award entailed the annulment of the arbitration agreement.

[10] The seat will also determine how far the local courts can interfere in the arbitral process

[11] See « L'exécution des sentences annulées dans leur pays d'origine » Par Emmanuel Gaillard Professeur à l'Université de Paris XII

[12] And where the distinction between foreign and domestic awards is made

[13] We will suffice with the DIFC Comparison to for the sake of keeping this article brief, especially since the ADGM Courts and those of the DIFC operate in similar manners and have both adopted common law rules and regulations

on the Recognition and Enforcement of Foreign Arbitral Awards[14] (**New York Convention**)[15] and with the recently amended procedures of the Civil Procedures Code (**Executive Regulations**)[16]. Article 85.2 of the Executive Regulations provides that an application for enforcement of a foreign award in the UAE shall be brought directly before the competent Execution Judge who shall render his/her order within three days from the date of filing. Despite the fact that the enforcement order remains subject to appeal and cassation, the modifications of the Executive Regulations were quite welcomed.

- **Enforcement of a domestic award onshore**

The Arbitration Law has expedited the procedure for the enforcement of arbitration awards. A party seeking to enforce an award has to file an application to the Chief Justice of the Federal Court of Appeal or local Courts of Appeal in the UAE. Pursuant to Article 55(1), the Chief Justice of the Court should issue an order confirming ratification and enforcement of the award within sixty days from the date of the submission of the application, unless any of the grounds for setting aside of the award exist.

Article 53 entitles a party to challenge the enforcement of an award by filing an application before the Court and referring to one of the grounds, which grounds are similar to those set out under the New York Convention. Additionally, the Court shall set aside an award if the subject matter of the dispute is inarbitrable[17] or contravenes public order.

We are yet to see any enforcement judgments concerning awards settling disputes triggered by the COVID-19 pandemic, as the most expedited arbitration proceedings would need about 6-9 months from initiation to settlement.

Nothing would preclude the Enforcement Judge from promptly deciding or refusing enforcement given the nature of the COVID-19 circumstances.

Additionally, despite the fact that Dubai Courts have displayed a pro-arbitration attitude over the last years by enforcing more and more foreign and domestic awards, public policy remains a concept one should be aware of.

Indeed, an award settling a dispute concerning MAC/force majeure clauses whether under common law or civil law should in principle be enforceable in the UAE. Firstly, because as mentioned above the governing law and the law of the place of enforcement are irrelevant; and secondly because force majeure is a concept found under UAE law and MAC Clauses under DIFC law.

Things may however be different if in the said award interest on damages where ordered against a certain party at a rate which may be perceived as contravening to public order and thus set aside. Public order under UAE law is a vast notion, colored by Sharia 's law and needs to be accounted for prior to the fact.

- **Enforcement of foreign and domestic award in the DIFC**

In reference to Article 42(1) and 42(4) of the DIFC Arbitral Law an arbitral award, whether foreign or domestic shall be recognized as binding in the DIFC following a written application to the Court; Article

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[14] As of September 2019, the Convention has 161 state parties, which includes 158 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine. The central obligation imposed upon the states that have ratified the Convention is to recognize all arbitral awards as binding and enforce them, if requested to do so, under the *lex fori*. Each Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement (Key provisions of the New Convention)- For more info on the New York Convention visit www.newyorkconvention.com

[15] Despite the fact that Article III of the New York Convention requires contracting states to ensure non-discrimination between foreign and domestic awards as in to ensure that foreign and domestic awards are susceptible of enforcement in the same way, the UAE still draws the distinction but has however reduce its impact with the Executive Regulations

[16] The Executive Regulations of the Civil Procedures Code under Cabinet Decision No. 57 of 2018 amended several articles of the Code in view of facilitating and expediting the process of ratification and enforcement of foreign arbitration awards

[17] Not subject to conciliation – cannot be arbitrated

44 of said law sets out the grounds on which an award can be set aside. The grounds to set aside an award under the DIFC Arbitration Law echo those stated in the New York Convention and in the UAE Arbitration Law. (Public Order included)

The DIFC Arbitration Law does not provide for a timeframe in which an enforcement judgment is be rendered. However, the DIFC Courts are likely to abide by the same (new and speedy) time limit as that of their fellow Dubai Courts to ensure a certain coherence between the different judicial processes in the UAE.

Once more, we are yet to see any DIFC Courts judgement enforcing or refusing an award governed by DIFC Laws and/or where the dispute was triggered by the COVID-19 pandemic. As mentioned earlier, nothing should forbid the DIFC Courts from going as fast as they can, considering the circumstances.

Despite the fact that what matters most (if not only) when enforcing an award dealing with MAC, or force majeure clauses is the law of the place where the award is sought to be enforced[18], one should still be minded about the Execution's Judge understanding of the award's findings and how the judge would assimilate them with his/her understanding of public order. Some would believe that DIFC Courts judges are less likely to set aside an award for public order considerations and therefore that it would be more opportune to pursue the enforcement of an award in the DIFC pursuant to Article 7 of the DIFC Judicial Authority Law [19]than to enforce the order upholding its enforcement onshore The DIFC Courts will serve as a circuit jurisdiction in this case. This maneuver seemed more obvious a couple of years ago[20] as it presently got restricted. It wouldn't hurt to try anyway.

CONCLUSION

Dealing with renegotiation or early termination of agreements will inevitably derive from the current Covid-19 crisis, and force majeure or MAC clause will have to be carefully scrutinized. Additionally, one will need to consider how the outcome of an award rendered in a dispute concerning the same may coincide with the concept of public order at the place where the award is sought to be enforced.

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[18] Rather than the governing law

[19] Which establishes the cooperation between onshore courts and those of the DIFC- in the sense that the onshore courts would enforce orders by the DIFC Courts as if they were their own

[20] See "Enforcement of Foreign Judgements and Foreign Awards: The DIFC Conduit''- Karim J. Nassif and Farah El Hajj Purice- International Journal of Arab Arbitration, Volume 9, N°1 – 2017