

Coronavirus and Force Majeure

A Moroccan law perspective

Authors: Ghalia Mokhtari, Aicha Brahma, Yosra Faiz



On 30 January 2020, the World Health Organization declared that the coronavirus outbreak, which originated from Wuhan in China, constituted a public health emergency of international concern. The symptoms of the virus are similar to those of pneumonia and range from mild to highly severe and the rapid spread of the virus to the rest of the world is largely attributed to direct travel to China. So far, there have been over 70,000 confirmed cases and 1,776 deaths.

Many Chinese companies have resorted to invoking the Force Majeure clause in their contracts as a response to the Coronavirus epidemic. As the Coronavirus could potentially reach Morocco as well, some Moroccan companies might resort to declaring a Force Majeure event. But, in order to determine whether this virus could be considered a Force Majeure event under Moroccan law, we must first understand the impact this virus

outbreak has had on international trade, as well as study the elements that define a Force Majeure event from a Moroccan law perspective.

The Coronavirus has had a serious impact on the way Chinese businesses operate. In fact, the China council for the promotion of international trade has even provided Chinese companies with more than 1600 Force Majeure certificates. These certificates amount to over 109 billion Yuan (15 billion dollars) in contractual value and cover over 30 different economic sectors. More importantly, according to this council, these certificates are recognized by the governments, customs administrations and organizations in 200 countries. Subsequently, many Chinese companies, are suspending their business dealings with international companies. As an example, China National Offshore Oil Corporation (CNOOC), are starting to limit their import of liquefied natural gas by suspending their international purchase agreements with other countries and by blocking vessels transporting natural gas. And they do so by invoking the Force Majeure clause in their contracts. This situation has led to an alarming decline in gas prices due to the increasing imbalance between supply and demand in the sector.

What is Force Majeure under Moroccan law?

According to the provisions of Article 269 of the Moroccan Civil Code, an event of Force Majeure is:

“Any event which man cannot prevent, such as natural disasters (floods, droughts, storms, fires, an insect invasion), an enemy invasion, an act of State, and which make the performance of contractual obligations impossible”.

In any case, a Force Majeure event, should be unforeseeable and unavoidable. However, it is important to distinguish the Force Majeure clause from the Hardship clause. One is often about an unavoidable act of God or of State, while the other is about unforeseen changes of an economic or financial nature. Additionally, in the case of Force Majeure, its invocation can lead to the suspension and eventual termination of a contract as it becomes impossible for one of the parties to fulfill their contractual obligations. Whereas in the case of the Hardship clause, it is still technically possible for the parties to fulfill their contractual obligations, except that the performance of these obligations becomes economically worthless.

The consequences of invoking the Force Majeure clause in a contract are numerous, including but not limited to the suspension of contractual

obligations, excusing the party who invokes it from liability for non-performance or delay, and eventually the termination of the contract. Moreover, it could help renegotiate certain terms of the contract, relating to target dates or specific measures. As to compensation, parties usually contract to bear their own costs arising from any losses due to a Force Majeure event. Nevertheless, if a party feels that the Force Majeure declaration is frivolous, they can challenge it before the competent Courts.

The question here is whether or not the Coronavirus epidemic would be considered a Force Majeure event under Moroccan law?

For an event to be considered a Force Majeure event under Moroccan law, it needs to be unforeseeable unavoidable and external.

The unforeseeability element needs to be evaluated objectively in accordance with the principles of reason and common-sense, and take into account the circumstances surrounding the contract. As to the unavoidability of the event, some argue that it needs to apply to anyone in the contracting party's position, which means that the event should constitute an obstacle that could not have been avoided by anyone in the same position as the concerned party. While others maintain that the particular circumstances surrounding each contract need to be considered.

In addition to these conditions above, the contracting party should not have had a hand, whether directly or indirectly, in causing the event. A Force Majeure event needs to be entirely unrelated to the contracting parties' actions. These elements are easily evidenced in the event of war for example. But what of the declaration of Force Majeure in the case of an epidemic like the Coronavirus?

First, it is important to note that the list of events mentioned in Article 269 of the Moroccan Civil Code is not exhaustive. This means that other events could be included in this list if the aforementioned elements characterizing a Force Majeure event apply. As a matter of fact, the Moroccan Court of Cassation enshrined the necessity of these elements in its judgment n°608 and dated 18 October 2017[1].

Now all that remains is to assess whether such elements apply to the Coronavirus outbreak in particular.

It is worth highlighting that invoking the Force Majeure clause in the event of a pandemic such as the Coronavirus is not only a result of the risk of infection, but is also due to the restrictive measures taken by governments to contain the spread of the virus. Some of these measures include the quarantine of the impacted geographical areas, the closure of the borders, and of terrestrial, naval and aerial roads. Such measures impede the activities of the companies thus rendering the performance of contractual obligations impossible. As these are compulsory governmental measures, it could be argued that they fit into the list of events constituting Force Majeure mentioned in Article 269 of the Moroccan Civil Code as an “act of State”.

However, it would be difficult to ascertain whether a Moroccan Court would automatically decide that the Coronavirus outbreak is a Force Majeure event, as, so far, there doesn't seem to have been any precedent with respect to the declaration of Force Majeure in the case of a pandemic.

How to mitigate the risks?

In order to protect their interests, contracting parties should seek information about the outbreak, make a list of the existing contracts that could potentially be impacted and seek legal advice when in doubt about the applicability of this event to their contracts.

Ultimately, the best way for contracting parties to protect their interests in the case of such an event in the future remains the inclusion of clear and specific wording to describe Force Majeure events in their agreements.

About the Author

Ghalia Mokhtari is Attorney at Law.

She acts mainly on behalf of financial institutions and companies in the context of financing infrastructure and energy projects.

She graduated from Panthéon-Assas University and Ecole Nationale des Ponts et Chaussées in Paris.

She is currently pursuing an Executive Master in Public Administration and Policy at the London School of Economics and Political Sciences in London.