Beirut, April 9th, 2020

Force Majeure and COVID-19: Does COVID-19 constitute an event of Force Majeure excusing performance under commercial agreements?

Background:

Coronavirus disease ("**COVID-19"**) is an infectious disease caused by a newly discovered coronavirus. Coronaviruses are a family of viruses that cause illnesses ranging from the common cold to more severe diseases such as severe acute respiratory syndrome (SARS) and the Middle East respiratory syndrome (MERS). The disease was first identified in December 2019 in Wuhan, the capital of China's Hubei province, and it has since spread globally. On March 11th, 2020 the World Health Organization ("**WHO**") characterized COVID-19 as a pandemic. In view of the concerns resulting from COVID-19, numerous countries took safety measures, including lockdowns and travel restrictions. Evidently, such measures have had, and will continue to have logistical, social, economic and other impacts on a local and global scale. In this context, a variety of legal relationships are affected.

In Lebanon, the Government declared on March 15th, 2020 a state of general mobilization until March 29th, 2020; which was later extended till April 12th, 2020. As a result, work in private enterprises has been suspended (except for the production, storing and sale of basic consumables and pharmaceuticals; as well as air, land and maritime transport) and circulation is restricted.

Given that a number of our clients have inquired about the impact of the measures taken as a result of COVID-19 on their contractual obligations, as well as whether they qualify as a Force Majeure that excuses their non-performance of their contractual obligations, the following is an overview of COVID-19's legal implications on commercial agreements in general.

Given their particularity, COVID-19's legal implications on employment agreements in Lebanon is addressed in a separate Client Memorandum, which we invite you to refer to.

For your ease of reference, you may find below an Executive Summary of the Memorandum, followed by our detailed assessment of the matter being discussed.

I. Executive Summary:

1.1 The definition and consequences of Force Majeure under Lebanese law:

Force Majeure is (i) an unforeseeable and unexpected event, (ii) that may not be avoided or mitigated, (iii) which causes an impossibility to perform (and not merely rendering the performance more onerous), and (iv) that cannot be imputed to the party availing itself thereof.

If the conditions of Force Majeure are met, the parties are both absolved from their contractual obligations, and neither party is bound to indemnify the other party as a result thereof. However, if the main and essential obligations may still be carried out once the event of Force Majeure event has subsided, the agreement is deemed suspended, and its performance should be resumed once the event of Force Majeure has ended. In such a case, the term of the agreement remains the same and is not extended.

1.2 Contractual Force Majeure:

Parties routinely include a Force Majeure clause in their agreements, and such clauses are valid. If a Force Majeure clause is included in the agreement, it should be carefully reviewed in order to determine (i) whether its conditions are met or not, and (ii) the clause's formal requirements in order to exercise the remedies resulting therefrom.

1.3 COVID-19 and Force Majeure under international agreements:

Force Majeure is usually regulated by law in civil countries (e.g. Lebanon, France…). However, in common law jurisdictions (e.g. USA, UK, Hong Kong…), Force Majeure is not applied by courts unless it is contractually expressly provided for. As a result, Force Majeure clauses are systematically included in agreements in common law jurisdictions. Notwithstanding, the definition and application of Force Majeure included above applies in most jurisdictions with some variations (e.g. in some cases, in order to be absolved, performance should be impossible, whereas in others it could be sufficient that it be impracticable).

For our purposes, it is to note that the Kingdom of Saudi Arabia and the United Arab Emirates recognize and apply the concept of Force Majeure in a manner similar to the one described above. Under English law, barring a Force Majeure clause, the excusal of contractual non-performance due to unexpected circumstances is difficult to reach. The same applies under the Laws of the USA.

1.4 COVID-19 and Force Majeure under specific agreements

1.4.1 Banking and financial agreements:

Loans do not usually contain Force Majeure clauses. However, they may contain a Material Adverse Change clause that could be triggered by the consequences of COVID-19. Also, loans (and sometimes bonds) contain cross-default or cross-acceleration clauses that permit the lender (or bondholders) to require immediate repayment of all amounts due under the loan (or bond) in case of a default. In addition, it is to be noted that some standardized derivatives contracts do contain a Force Majeure clause.

1.4.2 Construction agreements:

FIDIC Conditions of Contracts contain a Force Majeure clause. Also, COVID-19's consequences could be grounds for requesting the suspension of works and/or an extension of time for the performance of obligations.

1.4.3 Insurance:

A variety of insurance policies could be affected by COVID-19's consequences. The relevant insurance policies should be reviewed and assessed, in order to comply with their provisions.

1.5 Possible International Alternatives to Force Majeure:

Should the conditions of Force Majeure not be met, other mechanisms could potentially affect the parties' agreements as a result of COVID-19. These would vary depending on the

agreement's (i) content, and/or (ii) governing law/jurisdiction. Nonetheless, in general, they could include (i) impossibility and impracticability, (ii) frustration of purpose, (iii) hardship, and (iv) Material Adverse Change clauses.

1.6 Recommendations:

Parties to agreements are advised to comply with the recommendations listed under Section 6. Specific recommendations are included to parties who wish to avail themselves of Force Majeure, to those against whom Force Majeure is invoked, as well as to parties who intend to enter into agreements in the future.

1.7 Summary:

It is not possible to provide a boilerplate answer to whether COVID-19 constitutes an event of Force Majeure that absolves a party from performing its obligations (in general or under commercial agreements). The answer may only be determined on a case by case basis. Each agreement and each essential obligation should be assessed independently. However, it should be noted that Force Majeure exclusions would be applied restrictively, given that, in general, the courts' intent is to (i) respect and enforce the parties' agreement, and (ii) provide for the specific performance of obligations.

In making such determination, due consideration should be made to the fact that many parties could be on both sides of this issue (depending on the agreement being considered). Therefore, such parties could wish to avail themselves of Force Majeure excusal under some agreements, and refute it for their counterparty under others. Parties should therefore be mindful when evaluating their options. In addition, it is important to consider reputational risks and potential damage to long-term relationships. Furthermore, it is essential to assess the consequences of a breach or default (by either party to an agreement) on any other agreement the party may be party to.

In any case, agreements should be closely scrutinized, particularly as to their Force Majeure and Governing Law clauses, in order to assess the measures that should be taken (if any) as a result of the COVID-19 consequences; and in particular, to comply with any notice requirements and deadlines.

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THE DETAILED OPINION FOLLOWS

II. Detailed Opinion:

1 Do the COVID-19 consequences qualify as a Force Majeure under Lebanese law:

1.1 The definition of Force Majeure under Lebanese law:

1.1.1 Definition of Force Majeure:

Lebanese law did not expressly define what constitutes Force Majeure. Nonetheless, the Code of Obligations and Contracts ("**CoC**") provides that a party is released from performing its obligations, when its failure to perform results from an impossibility to carry out the obligation, (i) provided that the impossibility cannot be imputed to the party availing itself of the Force Majeure, and (ii) to the extent of such impossibility; whereby the release could be partial. However, for that, such party must prove the existence of the Force Majeure that caused the impossibility of performance.

Based on such provisions, courts and doctrine defined Force Majeure as (i) an unforeseeable and unexpected event, (ii) that may not be avoided or mitigated, (iii) which causes an impossibility to perform (and not merely rendering the performance more onerous), and (iv) that cannot be imputed to the party availing itself thereof. It is worth noting that the conditions of Force Majeure could also be met if an event could have been expected, but could nonetheless not be mitigated, provided the other conditions are met.

1.1.2 Consequences of Force Majeure:

If the conditions of Force Majeure are met, then, in principle, the agreement is retroactively rescinded. The parties are both absolved from their contractual obligations, and neither party is bound to indemnify the other party as a result thereof. However, the agreement may survive and continue to be in effect, if the main and essential obligations (i) have been carried out, and those that may not be executed are secondary, and/or (ii) may still be carried out once the event of Force Majeure event has subsided (i.e. if the impediment is temporary). Therefore, in the latter case, the agreement is deemed suspended, and its performance should be resumed once the event of Force Majeure has ended. In such a case, the term of the agreement remains the same and is not extended (unless otherwise agreed).

1.2 Is COVID-19 a Force Majeure under Lebanese law?

As stated above, for an event to qualify as Force Majeure under Lebanese law and excuse a party to a contract from performing its contractual obligations, the event (i) cannot be imputed to the party availing itself thereof, (ii) must be unforeseeable and unexpected, (iii) should cause an impossibility to perform (and not merely render the performance more onerous), and (iv) may not be avoided or mitigated. However, provided all other conditions are met, the conditions of Force Majeure could still be met if the event could have been expected, but could nonetheless not be mitigated.

Therefore, in order to determine whether COVID-19 constitutes an event of Force Majeure, each of these conditions should be assessed.

1.2.1 Not imputed to the parties:

In all reasonableness, it may be asserted that COVID-19 is not caused by the parties to the agreements to be considered.

1.2.2 Unforeseeable and unexpected:

In this regard, a distinction should be made between agreements (i) entered into before COVID-19 was first identified (i.e. in December 2019), and those (ii) entered into subsequently thereto.

- In the case of agreements entered into before the outbreak of COVID-19: it may be assumed that the consequences of COVID-19 were unforeseen and unexpected.

  In this respect, it is worth noting that, given that epidemics are rather frequent in our days (e.g. SARS, Ebola and other severe flu outbreaks), it could be argued that epidemics should not be considered as unforeseeable events; whereby they should be contemplated in the contract ; and hence, should not be deemed events of Force Majeure. Nonetheless, given (i) the extent to which COVID-19 has spread (and its characterization as a pandemic by the WHO), and (ii) the measures taken globally as a result thereof, it may reasonably be argued that it was unforeseen and unexpected; and therefore, this condition is met, especially since this is not a normal risk of doing business.

- In the case of agreements entered into after the outbreak of COVID-19: it could be more difficult to argue that the consequences of COVID-19 were unforeseen and unexpected, given the speed and intensity with which it spread; as well as the drastic measures promptly taken by the Chinese State in order to control it.

1.2.3 Causes an impossibility to perform:

In our opinion, despite the gravity of the disruptions caused by COVID-19, it does not necessarily cause a total impossibility to perform contractual obligations. The fact that the performance of an obligation has become impractical, more onerous, or does not make sense financially or economically, is not sufficient for the consequences of COVID-19 to qualify as an event of Force Majeure. The performance should in fact cause an impossibility to perform that may not be avoided or mitigated, as discussed below. Also, the affected party should prove both, the said impossibility, as well as a causal link between the event of Force Majeure and the failure to perform; which should not be imputed to the said party's action or error.

1.2.4 May not be avoided or mitigated:

The possibility to avoid and/or mitigate the consequences of COVID-19 must be assessed on a case by case basis. The measure that could be taken in order to avoid and/or mitigate that these consequences cause an impossibility to perform are as varied as contractual obligations. Therefore, the party intending to avail itself of Force Majeure to avoid the carrying out of its contractual obligations should (i) first assess whether its performance is effectively impossible because of COVID-19, then (ii) determine if there are any measures it can take in order to carry out the same, even if it entails a higher cost or effort.

2 Contractual Force Majeure:

Parties routinely include a Force Majeure clause in their agreements, and such clauses are valid. Two (2) approaches may be adopted for such clauses. The clause may be (i) general in nature;

whereby it provides a general definition of Force Majeure and how the clause would apply; without enumerating triggering events; or (ii) extensively enumerates the events that would qualify as Force Majeure. These clauses usually provide for the suspension of the agreement during the event of Force Majeure, with a possibility to terminate the agreement if such event extends in time. They also typically include specific formal requirements that necessitate a prompt notification of a claim of Force Majeure prior to the exercise of the remedies resulting from the clause (i.e. suspension or termination).

As a result, in both cases, the clause should be carefully reviewed in order to determine (i) whether its conditions are met or not, and (ii) the clause's formal requirements in order to exercise the remedies resulting therefrom.

Nonetheless, in the meantime, it may be noted that:

- Clauses with a general definition of Force Majeure are usually more extensively interpreted; whereby any event that meets the agreed upon definition of Force Majeure can trigger the clause's remedies.
- Clauses enumerating the events of Force Majeure are usually more restrictively interpreted; whereby only the events listed in the clause would trigger the clause's remedies.

3 COVID-19 and Force Majeure under international agreements:

Since a number of our clients operate internationally and have agreements governed by laws other than Lebanese law; the following is a high-level overview of some legal considerations concerning Force Majeure that could be relevant to their commercial agreements.

The concept of Force Majeure derives from French civil law and it has been adopted in other civil law countries. In common law jurisdictions (e.g. USA, UK, Hong Kong…), Force Majeure is not applied by courts unless it is contractually expressly provided for. As a result, because of the limited remedies available under common law when performance becomes more onerous or impossible for events outside the parties' control, Force Majeure clauses are systematically included in agreements in common law jurisdictions.

Notwithstanding, it should be noted that in general, the above detailed definition and application of Force Majeure applies in most jurisdictions (whether as a result of statutory laws or contractual practice); with some variations (e.g. some jurisdictions may only require that performance be impracticable, whereas some contracts may set a different standard, such as performance being "inadvisable").

- Under the Laws of KSA and UAE:

In view of the above, and given the prevalence of our clients' commercial agreements in and/or with these countries, it is to be noted that both, the Kingdom of Saudi Arabia and the United Arab Emirates ("**UAE**") recognize and apply the concept of Force Majeure in a manner similar to the one described above.

- Under English Law:

Since, by practice, the governing law of numerous commercial agreements in these countries (and particularly the UAE) is English Law, it should be noted that Force Majeure is not a standalone concept of English law. Under English law, barring a Force Majeure clause, the excusal of contractual non-performance due to unexpected circumstances can only be based on

the doctrine of frustration (which will be discussed under Section 5.2). Nonetheless, courts recognize Force Majeure clauses, though interpret them narrowly. Therefore, it is hard to successfully rely on a Force Majeure clause to avoid contractual responsibility under English law.

- Under USA Law:

Under USA Law, the matter may differ depending on the State. In general, Force Majeure is a contractual matter. Also, courts generally construe Force Majeure clauses narrowly. In fact, it is not enough that performance is more difficult or more economically burdensome. As for the available statutory options, they are impossibility and impracticability of performance (which will be further discussed under Section 5.1). Proving in court that performance is impracticable is a high bar. It is insufficient that performance becomes merely unprofitable or inconvenient. As for impossibility, performance must be rendered objectively impossible, and the party availing itself thereof must show that it made reasonable efforts to overcome the obstacle to performance .

4 COVID-19 and Force Majeure under specific agreements

4.1 Banking and financial agreements:

Loans do not usually contain Force Majeure clauses. However, they may contain a Material Adverse Change clause (which shall be discussed under Section 5.4 below) as an event of default. Though such clauses do not have the same effect as a Force Majeure clause and do not excuse performance of the contractual obligations; whereby instead, they permit the lenders to (i) refuse to lend any undrawn portion of the loan, or (ii) demand early repayment… parties thereto should be prudent as to COVID-19's impact thereon. Also, it is to note that some standardized derivatives contracts do contain a Force Majeure clause.

Notwithstanding, in view of the current situation, and given that agreements between different parties are frequently correlated, whereby failure of a party to perform could affect the other party's performance under a different agreement, parties should be prudent that a failure to meet a collateral demand can lead to the close-out (i.e. termination) of all outstanding derivatives transactions. Also, loans (and sometimes bonds) contain cross-default or cross-acceleration clauses that permit the lender (or bondholders) to require immediate repayment of all amounts due under the loan (or bond) in case of a default.

4.2 Construction agreements:

In the construction context, the internationally used FIDIC Conditions of Contracts contain a Force Majeure clause. Also, COVID-19's consequences could be grounds for requesting the suspension of works and/or an extension of time for the performance of obligations.

4.3 Business Interruption Insurance:

A variety of insurance policies could be affected by COVID-19's consequences. It is to note that, even though business interruption insurance policies most frequently relate to physical property damage, several companies were able to recoup business interruptions after the global outbreak of SARS in 2002-2003. Therefore, and even though many insurers have now excluded viral or bacterial outbreaks from standard business interruption policies, parties should review

their policies to assess if they might be covered for losses due to business interruptions resulting from COVID-19.

5 Possible International Alternatives to Force Majeure:

Should the conditions of Force Majeure not be met, other mechanisms could potentially affect the parties' agreements as a result of COVID-19. These would vary depending on the agreement's (i) content, and/or (ii) governing law/jurisdiction. Nonetheless, in general, they could include the following:

5.1 Impossibility and impracticability:

These common law doctrines may excuse nonperformance where a party establishes that (i) an unexpected intervening event occurred, (ii) the parties' agreement assumed such an event would not occur, and (iii) the unexpected event made contractual performance impossible or impracticable.

5.2 Frustration of purpose:

This principal permits parties to cease performing contractual obligations when the main purpose of the contract becomes impossible to perform in circumstances entirely beyond the remit of the parties. However, frustration of purpose tends to have limited application and is even more difficult to establish than Force Majeure, especially that frustration must be near total; whereby it is not enough that a transaction was previously expected to be profitable but is now unprofitable.

5.3 Hardship:

This civil law concept is where a contract becomes unbalanced due to a change in circumstances that was not foreseeable at the time of its conclusion. It requires that (i) the change in circumstances was unforeseeable at the time of conclusion of the contract, (ii) none of the parties have expressly contractually accepted to assume the risk of hardship, and (iii) the execution of the contract has become excessively expensive.

5.4 Material Adverse Change clauses:

This contractual practice is typically used in financing contracts, and increasingly in most commercial and share purchase agreements. Such clauses do not excuse performance of the contractual obligations but instead, they protect a party against a significant change to the economic rationale of a deal. Per instance, it permits a lender to (i) refuse to lend any undrawn portion of the loan, or (ii) demand early repayment… if it would not have lent at all, or would have lent only on much more onerous terms in the current situation. However, it is to note that in general, the test is a high bar. Therefore, for such a clause to result in termination or any other remedy, the triggering event must be expressly stipulated.

6 Recommendations:

The following are our recommendations for the measures parties to agreements should take today.

6.1 All parties to agreements:

Parties to agreements should:

- Assess the impact of COVID-19 on their activities; including as to the following: (i) if their ability to perform their obligations is affected, (ii) if performance is partially or completely prevented; as well as if such prevention could be overcome or not, (iii) if the obligation can be performed in a different way, and (iv) the impact of those obligations that cannot be carried out on the agreement in general, and on the other party's expectations therefrom.
- Take proactive steps to ensure continuity of operations sufficient to meet their existing contractual obligations; as well as evaluate if counterparties are also taking such steps.

  Taking affirmative steps early on is important given that it may contribute to mitigating any potential operational impacts (e.g. securing alternate supply streams, planning for how employees can continue working remotely, determining if any functions need to be transferred to other locations…). Even if such steps are not successful, they will be highly relevant to a court's determination of whether reasonable steps were taken to continue to satisfy contractual obligations, and whether performance was truly impossible (it may even be grounds for the court to grant an extension of time for the performance).
- Determine if all counterparties are able, and will continue to be able, to perform their contractual obligations.
- Closely scrutinize agreements, particularly as to their Force Majeure and Governing Law clauses; in order to identify the rights, remedies, and requirements resulting from COVID-19 (of either party to the agreement).
- Identify and assess the consequences of a breach or default (by either party to the agreement), including any potential supply disruptions, loan cross-default or cross-acceleration clauses... Accordingly, parties should communicate together as early as reasonably possible in order to coordinate their actions (if any).
- Carefully review any relevant insurance policies; particularly as to their coverage and the insurer's notice requirements (to ensure scrupulous compliance with these provisions in the event coverage is ultimately sought).
- Consider reputational risks and potential damage to long-term supply relationships; as well as the possibility to be flexible about amending or restructuring the contract in case of COVID-19 disruption (e.g. by postponing deliveries) to accommodate the affected party.

6.2 Parties that wish to invoke Force Majeure:

In addition to the recommendations listed under Section 6.1, parties that wish to invoke Force Majeure should:

- Duly consider that many parties could be on both sides of this issue (depending on the agreement being considered). Therefore, such parties could wish to avail themselves of

Force Majeure excusal under some agreements, and refute it for their counterparty under others. Parties should therefore be mindful when evaluating their options.

- **Comply with the notice requirements and deadlines that have been or may need to be triggered**. Many contracts require the party invoking a Force Majeure clause to provide prompt written notice to its counterparty, often within a specific time period. Failing to comply therewith could preclude reliance on Force Majeure.

  In some jurisdictions, there remains uncertainty as to whether such notices must be given before non-performance actually materializes or if it could happen afterwards. Therefore, promptness is of the essence.

- Where possible, keep the evidence (particularly documents) that prove that the party took the measures necessary to try to mitigate or avoid the nonperformance.

6.3 Parties against whom Force Majeure is invoked:

In addition to the recommendations listed under Section 6.1, parties against whom Force Majeure is invoked should:

- Determine if (i) the party availing itself of such remedy has in fact taken all measures to mitigate the consequences of COVID-19 on its performance, (ii) its impossibility to perform is partial or total, (iii) there are other ways for such party to perform its obligations, and (iv) the impossibility is permanent or not.
- Determine if the party availing itself of such remedy has taken any measure to mitigate or avoid the nonperformance.
- Scrutinize the agreement, particularly as to its Force Majeure, Governing Law and Dispute Resolution Clauses.
- Determine the consequences of a successful excusal of performance on their performance under other agreements (whether for supply, loans, insurance…); as well as any alternate manners to avoid default thereunder. Where necessary, discuss the matter in advance with the counterparties that could be affected by such nonperformance.

6.4 Parties entering into agreements:

Given that some court precedents have considered that epidemics are rather frequent in our days (e.g. SARS, MERS, Ebola and other severe flu outbreaks); whereby they should be contemplated in contracts as a risk of doing business; and hence, should not be deemed events of Force Majeure, it is not excluded that such rationale be extended to pandemics like COVID-19. Therefore, Force Majeure clauses should be adapted to account for the same.

7 Conclusion:

It is not possible to provide a boilerplate answer to whether COVID-19 constitutes an event of Force Majeure that absolves a party from performing its obligations (in general or under commercial agreements). The answer may only be determined on a case by case basis. Each agreement and each essential obligation should be assessed independently. However, it should be noted that Force Majeure exclusions would be applied restrictively, given that, in general, the courts' intent is to (i) respect and enforce the parties' agreement, and (ii) provide for the specific performance of obligations.

In making such determination, due consideration should be made to the fact that many parties could be on both sides of this issue (depending on the agreement being considered). Therefore, such parties could wish to avail themselves of Force Majeure excusal under some agreements, and refute it for their counterparty under others. Parties should therefore be mindful when evaluating their options.

In this respect, it is also important to remember that the current situation will pass. Though it may result in significant changes in our dealings and activities, it remains that relationships will continue to be essential. Therefore, wherever possible, options should be duly and thoroughly discussed with the counterparties in order to reach reasonable solutions for all involved.

In any case, agreements should be closely scrutinized, particularly as to their Force Majeure and Governing Law clauses, in order to assess the measures that should be taken (if any) as a result of the COVID-19 consequences; and in particular, to comply with any notice requirements and deadlines.

Disclaimer: This Memorandum is a general overview of its subject matter. Its content is not exhaustive, and it is not intended as legal advice. No legal and/or business decisions should be made based on its content. You are advised to consult an attorney prior to acting upon any of the information contained herein.