

## **COVID-19 and Force Majeure under Lebanese Legislation**

### **With a special attention to employment agreements**

Since the coronavirus has been spreading around the world, the majority of the affected States have taken strict measures in order to decrease the virus' spread, including full lockdowns, businesses shutdowns and closures.

These measures have been reported to affect the performance of contractual relationships, to disrupt business, notably trading, supply chains and business services, both at the domestic and international level.

The repercussions on employment have also been significant and have affected the contractual obligations of employers and employees.

On March 15, the Lebanese government has declared a state of "general mobilization" applicable until March 29, extended afterwards till April 12. The decision includes shutting down Beirut airport, seaports and land borders. It also states, beside the closure of all restaurants, shops, entertainment facilities, schools and universities, the suspension of work in the private sector (with some exceptions related to basic consumables and transport).

How are the various parties affected by this general mobilization likely to react? All speculations currently turn around the concept of Force Majeure.

Therefore, we reflect below on the concept of Force Majeure under Lebanese legislation and the extent of its application in the current circumstances to the affected parties, with a focus on employment agreements.

### **What is Force Majeure from the perspective of Lebanese Laws?**

The concept of Force Majeure in contractual obligations is referred to by article 341 of the Lebanese Code of obligations and contracts (COC) as the "impossibility of performance of an obligation" because of an external event to the acts or faults of the debtor.

In the absence of a clear definition of the Force Majeure in the Lebanese legislation, both doctrine and case law converge on the following definition: "*Force majeure is an unforeseen unavoidable external event beyond parties' control that prevents one or both parties to a contract from fulfilling their obligations*".

This said, the qualification of an event as a Force Majeure requires the fulfillment of three conditions cumulatively, developed by judges and courts. The event must be unforeseeable, unavoidable and exterior.

- **Unforeseeable** means that the event that led to the impossibility of execution of the obligation was unexpected and could not be reasonably predictable by the parties at the time of signature of the contract. Therefore, a recurring epidemic would most probably not be deemed as unforeseeable.
- **Unavoidable** means that the party with the obligation of execution was not able to resist or prevent the occurrence of such event. Since COVID-19 is declared by the majority of States and by the WHO as an epidemic, it is most likable to be considered as unavoidable.
- **Exterior** means that the event was driven by external factors unrelated to the will of any of the parties and beyond the control of the party invoking Force Majeure. The Lebanese Government's decision of public mobilization would most likely be deemed "beyond the control of the party invoking Force Majeure".

Needless to point out that an event will not be qualified as Force majeure unless it **prevents** the debtor of an obligation from performing it. This idea is in the core concept of "Force Majeure" as enshrined in the abovementioned article 341 COC and constitutes one of the required criteria of Force majeure under article 1218 of the French civil code.

This said, the fact that an obligation has become more onerous or more difficult to perform is not sufficient to qualify the event of Force Majeure. Therefore, if the impact of current epidemic is merely to make the performance of an obligation more difficult or onerous, it would most probably not be considered as an event preventing the performance of contractual obligations.

### **How do parties to affected contracts benefit from invoking Force Majeure?**

If the party invoking Force Majeure succeeds in demonstrating that its conditions indeed apply, two consequences are possible:

➔ In principle and as stated in article 341 COC, if Force Majeure leads to **permanent** non-performance of an obligation, it has the effect of **terminating the contract** and exempting parties from performing their obligations.

However, article 343 COC states that, the exemption of performance is always related to the extent of impossibility resulting from the Force Majeure. Therefore, if the demonstrated Force majeure partially prevents the performance of an obligation, parties will be merely partially discharged from their obligations.

➔ Another scenario could occur when force majeure leads to a **temporary** prevention of performing obligations. In such a case, Lebanese doctrine and jurisprudence state that the contract/agreement will be **suspended** for the duration of the Force Majeure, only if the end of the Force Majeure's impact is predictable within a reasonable period of time. This is explicitly stated in article 1218 of the French civil code.

### **So, will coronavirus be qualified by Lebanese courts as an event of Force Majeure?**

There is no such a thing that a certain event would constitute a Force Majeure in absolute terms. Lebanese courts proceed on a case-by-case basis in order to qualify an event of Force Majeure and examine the circumstances of each case *in concreto*. This explains why the same event can be considered as Force Majeure in some cases but not in others, and why **we** cannot, at this stage, qualify COVID-19 as a Force Majeure.

Generally, Lebanese courts tend to adopt a strict approach in applying the Force Majeure criteria.

There are no judgements or decisions related in particular to epidemic cases in the Lebanese case law. The cases mainly revolve around war situations and even war was not considered as a Force Majeure in some circumstances. Coronavirus seems to verify the conditions detailed above of a Force Majeure event, but its qualification as such depends on the circumstances of the case where it will be invoked and their appreciation by the court.

It remains to be seen how Lebanese courts will deal with COVID-19, depending on the impact it will develop on contractual obligations in the upcoming weeks, months.

### **Does the same reasoning apply to Employment agreements?**

The concept of Force Majeure does not change in employment agreements. However, its application is different. It is strictly limited by article 50 (F) of the Lebanese Labor Law.

Article 50 (F) of the Lebanese Labor law grants the employer the right to **terminate** all or some of his/her establishment's employment contracts in the event of Force Majeure or of compelling economic or technical circumstances, such as the reduction of size of the establishment, or replacement of a manufacturing process by another, or final stop of work; all this under two mandatory cumulative conditions:

- (1) The employer is required to notify the Ministry of Labor of his/her intent to terminate those contracts **one month prior the execution**.

- (2) The employer is required to consult the Ministry regarding the method of termination of employment contracts taking into consideration the employees' seniority, specialization, age, social and family status, and means deemed to be necessary for their re-employment.

That being said, the only option foreseen by the labor law in case of Force Majeure, is the termination of contracts under the abovementioned conditions. The Ministry of Labor intervenes to verify if the termination is justified. The Ministry can also go further as to request that these measures be necessary for the survival of the company and be justified only and directly by the event of Force Majeure, in this case, by coronavirus.

If such procedure is not followed, termination shall be deemed unlawful.

It is obvious that the spirit of the Lebanese Labor law and case law is protective towards employees. No other provisions than article 50 (F) would be applicable on termination of employment agreements for Force Majeure and Lebanese courts tend to be strict regarding the application of the conditions of article 50 (F) and consider these conditions as part of the *Ordre Public*.

At this stage of the coronavirus situation does not justify by itself the termination of employment contracts. Where the prevention of performance caused by a demonstrated event of Force Majeure is only temporary, the consequence is in principle the suspension of contracts, as mentioned under the second question above tackling how contracts in general are affected by Force Majeure.

**In such a scenario, what would be the fate of the employees' salaries as long as employment agreements are suspended?**

In its decision of general mobilization on March 15, the Lebanese Government ordered the suspension of "work" in all private companies (subject to few exceptions) until 29 March, extended till 12 April 2020. However, the mentioned decision remained silent regarding the fate of employment agreements and salaries meanwhile.

Since the Labor law is also silent regarding such a particular scenario, some suggest the applicability of article 625 COC that enshrines the principle of "No work without remuneration", in order to infer that employees who are unable to perform their employment obligations immediately lose their right to remuneration. We do not favor such an opinion at least not with a radical and immediate effect, considering that the labor law - protective of employees' rights- prevails on the application of the general provisions of article 625 COC. In addition, article 7 of the Arab convention No. 15 concerning the determination and protection of wages of 1983, ratified by Lebanon in 2000 and applicable in this case, states that employee has the right to his complete remuneration even if he was prevented from performing his work when such prevention is caused by external factors unrelated to his will.

Within the same logic, legislative decree No. 17/77 that entered into force in 1977 in order to organize the consequences of work suspension caused by Lebanese war, distinguished at the time between the temporary failure of performance of obligations, for which the employment agreements were suspended, on one hand; and the definitive failure of performance of obligations, for which the employment agreements had to be terminated, on the other hand. It also had foreseen the payment of salaries (although lower than the initially agreed on salaries) even in the period of suspension, which aimed at having the employers and the employees share the burden of the ongoing circumstances

### **How could employers behave in the absence of definitive solutions?**

Currently and in the absence of any legislation determining the fate of employment agreements and salaries during general mobilization period, employers are invited to proceed, in our opinion, with **progressive and fair alternatives** for their employees, instead of immediately and completely suspending contracts and cutting salaries at this stage. We are of course limiting our reasoning here to acts arising directly and solely out of the coronavirus situation. Lebanese employers have already been struggling for months, sometimes years, because of the economic and financial situation in the country; the repercussions of which are different and will not be tackled below.

- In situations where the nature of work allows it, the employers shall be taking all necessary measures to ensure the work-from-home for their employees. In such cases, employees shall be considered on ordinary working hours and their salaries shall be normally paid.
- In other cases where working from home is not possible for employees, and the nature of work does not allow its suspension, the employers may negotiate with the employees a progressive and **temporary** plan applicable along the period of general mobilization. The plan may determine a replacement schedule among employees, or a decrease in salaries according to decreasing working hours; these plans being only temporary. In all cases, we suggest having the employees participate in discussions and consent on any measure taken, even if temporary. It is also recommended that the employers notify at least the Ministry of Labor all the plans they may be applying during the relevant period as soon as they can.
- In cases where working remotely is not accessible to employees and these latter are obliged to remain home, and since they will be in quarantine, employers can start by considering that employees are on sick leaves according to article 40 of labor law. Another possibility could be to consider employees on annual paid leave, since article 39 of the labor law stipulates that every employer has the right to fix the annual leave days of the employees according to work requirements.

All the above is provided under current legislation in force, we are hoping for new legislation which would put an end to the improbabilities caused by COVID-19 and fairly determine the fate of affected employment agreements.

**Away from statutory provisions of Force Majeure, what else could parties in a contract consider?**

- **Force Majeure/hardship clauses:** parties may have inserted a Force Majeure or a hardship clause in their contract, intending to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of them. These clauses, like any other contractual clause, will be interpreted and applied by the judge, according to the will of both parties. Parties shall also bear in mind that the effectiveness of these clauses **might** be foiled by judges if their existence threatens the rights of the weaker party (employment contract, consumer contract...) by making him/her bear liability even in events of Force Majeure.
- **Negotiations and revision of contract:** although the revision of contract could not be enforced by judges under Lebanese Law so far, even in cases of a major alter in the equilibrium of the contract, parties can however negotiate and decide on that by common agreement at any stage of the performance of contract.
- **Acting in Good Faith:** parties may tend to neglect the importance of “good faith” principle in contractual obligations. Under the Lebanese legislation, this principle has a particular importance as the parties are obligated to act in good faith at each and every stage of the contract, from its negotiation to its termination. That said, in these difficult times, acting in good faith is as relevant, if not more. Parties shall take all necessary measures to mitigate each other’s loss, to notify each other with steps that need to be taken, to communicate and negotiate when possible/necessary, and most importantly, to avoid the sanctioned behaviors of abuse and fraud.

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