FORCE MAJEURE CONCEPT IN CONSTRUCTION CONTRACTS UNDER CIVIL AND COMMON LAWS

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Abstract - Force majeure is one of the most critical risks that affects the obligations of the contract parties in the construction industry. The concept of force majeure, basically, is a civil law concept that is found, in a way or another, in the civil codes of most civil law jurisdictions, while common law does not recognize such concept with the same wide definition and application. Thus, without drafting an adequate and proper force majeure clause, the parties of the contract, especially that is govern by the common law, will be at the mercy of the rigid provisions of the law. The aim of this paper is to provide a comprehensive comparison on the concept of force majeure in civil law and its related doctrines in common law in light of the legislation in several Middle East and European countries that adopt one of the two legal systems.The performed comparison indicates that force majeure concept in civil law aims to excuse the parties of the contract from their obligations upon occurrence of events which are beyond their control. On the other hand, there are some doctrines in common law that could be similar to force majeure but in narrower meaning such as the doctrines of impossibility, impracticability, frustration and hardship.

INTRODUCTION

Construction industry faces a lot of risks and inherent uncertainties like market price fluctuating, competitive bidding process, adverse weather change, productivity on site, government actions and decisions, political situation in the territory, inflation, parties contractual rights, market competition, etc. Thus the construction industry suffers a lot of risk more than the majority of other industries (Azari & Mousavi, 2011). One of the most important sources of risk and contingency which contract parties should measure is the risks of force majeure.

The term "Force Majeure" arose from the French law which was called Code Napoleon and now the Code Civil. Such law provides that if the debtor is prevented from performing his obligations as a result of force majeure, then there is no place for any damages. However, "Force Majeure" has not been recognized as having a precise meaning in English law.

II. FORCE MAJEURE IN CIVIL LAW

Force majeure, basically, is a civil law concept derived from the Roman law. Such concept was adopted and recognized by the codes of the civil law countries particularly in the French Civil Code. When a force majeure event takes place, parties of the contract are excused from performing their obligations in spite of the express provisions of the contract. According to French civil law, an event is considered as force majeure if it is external, unexpected and unavoidable (Azfar, 2012). Hagedoorn&Hesen (2007) have discussed the legal consequences of force majeure. According to their study, such consequences are concluded either in termination or suspension of the contractual relationship. If the contract is terminated, each of the contracting parties shall carry his own risk and the consequences of such risk. In some cases, the parties might be compensated for the part of work already performed before the date of occurrence of the event constituting the force majeure (Hagedoorn & Hesen, 2007).

In so many cases, an external event may only cause a temporary impossibility of performance. This is often the case where performing a contract has been disrupted for a limited period of time, and it is foreseen that performance can be resumed after the causes of the impossibility (e. g., strike, rebellion, war, flood, revolution, acts of terrorism, etc.), or the aftermath of those causes, cease to exist. In such case, the execution of a contract will be suspended rather than terminated (Amkhan A. , 1991).

The definition of the requirements to apply the force majeure concept are not unified worldwide. Different approaches are applied by different laws and jurisdictions (Augenblick & Rousseau, 2012). Hereinafter, the concept of force majeure, its events and consequences are discussed in light of the civil law jurisdiction in Egypt and some Arab and European countries.

Force Majeure in Egyptian Civil Law

Although force majeure is not specifically defined under Egyptian law, the force majeure concept is mentioned in article 165 of the Egyptian Civil Code which states “In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the damage resulted from a cause beyond his control, such as unforeseen circumstances, Force Majeure, the fault of the victim or of a third party.” (Egyptian Civil Law, 1948) According to the article, and based on precedents issued by the Egyptian Cassation Court, to

apply the Force Majeure concept, two conditions must be achieved: the impossibility of performing the obligations due to an event that was not expected or the debtor could not prevent or avoid; and the reason for performance impossibility is a foreign cause out of the debtor control and not caused by him (Force Majeure under Egyptian Law, 2011).

The concept of impossibility is also mentioned in the following articles in Egyptian Civil Code: Article 159 "In contracts binding to the two parties, if an obligation is terminated as a result of impossibility of its implementation, counter obligation shall also be terminated and the contract shall be rescinded by itself" (Egyptian Civil Law, 1948), Article 373 "An obligation shall be terminated if the debtor proves that fulfillment has become impossible for an alien reason in which he has no hand" and Article 664 "The construction contract is terminated with the impossibility of carrying out the work for which the contract is concluded" (Egyptian Civil Law, 1948).

Force Majeure in Arab Countries Civil Law

The Emeriti Code is, to a great extent, similar to the Egyptian Civil code in dealing with force majeure. Article 273 in the Emeriti Civil Code has a very close meaning to article 159 in Egyptian Code. Moreover, Article 287 in Emeriti Code is similar to article 373 in Egyptian Code. Article 287 states that: "If a person establishes that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of that person himself, he shall not be bound to rectify the losses unless there is a legal provision or agreement to the contrary" (Emeriti Civil Law, 1985). Article 386 is also dealing with force majeure by stating: "If it is impossible for an obligor to give specific performance of his obligation, he shall be ordered to pay compensation to the other party for such non-performance of the obligation, unless it is proved that the impossibility of performance was a result of an external cause in which the obligor has no hand. The same shall apply in case that the obligor delayed in the performance of his obligation".

Force majeure doctrine is also expressly mentioned in Qatari legislation. According to Article 204 which deals with force majeure in the same way as Article 165 in Egyptian Civil Code and article 273 in Emeriti Cavil Code.

In Algerian Civil Law, it is a general principle that any event amounting to force majeure is a viable defense which, if successfully proven, exonerates the wrongdoer from liability. Article 127 establishes such principle by stating: "Save for a legal or contractual obligation, a person is relieved from the obligation to repair damages if he proves that said damages were caused by external factors, such as a fortuitous event, a force majeure, the victim's fault or a third-party's fault" (Algerian Civil Law, 2007). In Lebanese Code of Obligations and Contracts, Art 341 explicitly adds that the event of force majeure is possible to be act of legislation. The article states: "The obligation is extinguished when the performance which is its object has become impossible, either natural or judicially, without the debtor's fault or mistake" (Lebanese Code of Obligations and Contracts, 1932).

Force Majeure in Europe Countries Civil Law

In France Civil Code, force majeure is mentioned in two Articles, 1147 and 1148. The first article states that the debtor is obliged to pay for the damages, whether for non-performance or the delay of the obligation, if he does not establish that the failure to perform derives from an extraneous cause which cannot be imputed to him, even though he has no bad faith. Under the second article, there is no place for compensation when, as a result of a force majeure or an accident, the debtor has been prevented from doing what he was obliged to or has done what was forbidden to him. Despite that, force majeure is not a public policy theory, so parties of the contract can deviate from the provisions of the law regarding the definitions of what is considered a force majeure event and the consequences of such event (Kessedjian, 2005).

The German law has a concept that is similar to force majeure which is the concept of 'contractual impossibility'. Such concept is composed of two distinct doctrines. The first doctrine is known as 'the collapse of the bases of the contract' which is, to a great extent, similar to the doctrine of 'hardship'. The other doctrine is the 'objective impossibility', which is codified under Article 275 of the German Civil Code (Impossibility for which one is not responsible) (Polkinghorne & Rosenberg, 2015).

In Italian regulation, an event is considered a Force Majeure if it is extraordinary, beyond the normal cases and beyond the contingencies that the contract party can reasonably take their effects into consideration when pricing the contract so that he can continue working without disruptions. Such approach was codified by the Italian regulator in 2000. Force Majeure events include civil disturbance, revolutions, strikes, acts of governmental bodies or authorities and exceptional natural events leading to natural disasters such as volcanos, floods and earthquakes (Fumagalli, Schiavo, Salvati, & Secchi, 2006).

The concept of force majeure is also applicable in Dutch Civil Code and indicated in Article 6:75 "Legal Excuse for a Non-Performance" which provided that: "A non-performance shall never be attributed to the debtor if he is not to blame for it nor responsible for it according to law, a juridical act or generally accepted principles" (Dutch Civl Law, 1992).

Force Majeure in Common Law

Several comparative studies has been conducted between civil law system and common law system regarding the force majeure concept. According to Amkhan, 1991 in his paper entitled "Force majeure and impossibility of performance in Arab contract law", comparatively speaking, the concept of force majeure, which is an effective theory in civil law legal system, is not existing in the general English common law. Despite the term is sometimes recognized and applied in contracts governed by common law, such application is limited, in respect of events and consequences, to what has been expressly agreed between contract parties. So, the context of the force majeure clause and its provisions define the extent of the application of the theory and its boundaries of coverage. (Amkhan A. , 1991).

No-Fault Liability

Perillo (1997) pointed out that in the common law systems, contract liability is no-fault liability. However, lately some sort for excuse has been allowed. Despite in civil law system the fault is considered to have a greater role regarding the breach of contractual liability than in the common law system, there are some exceptions in common law system presented in the doctrines of hardship, frustration of contract and impossibility of performance (Perillo, 1997)

In further support of the finding, Theroux & Grosse(2011) affirmed that contracts were absolute under the traditional common law. Therefore, the contract parties were obliged to perform their duties even if such performance had become impossible because of certain events. Only the provisions of the agreement was the way to avoid such situation. The parties have to include in their agreement provisions protecting them from the consequences of the contingency. If they did not do so, according to court decisions, the affected party had to perform his obligations, otherwise be liable for breach (Theroux & Grosse, 2011).

Frustration Doctrine

While the force majeure concept is adopted by civil law system, the doctrine of frustration is adopted by common law system. In her paper entitled "Competing Approaches to Force Majeure and Hardship", Kessedjian explained that generally, the non performing party is not excused by unforeseen circumstances in English law. Application of the doctrine of frustration determines whether the defaulting party is exempted from nonperforming its obligations if extraordinary events occur after entering into the contract. If a supervening event happens and materially hinders one or more of the contract parties from performing his/their obligations so that the contract cannot be continued, the contract is said to be frustrated. When the contract is frustrated, the contractual relationship is consequently expired even if the parties did not want that. On the other hand, if the contract is not frustrated, the parties are obliged to continue performing their duties, regardless the difficulty of such performance and regardless the change in circumstances. In such case, the courts have no authority to restore the contract financial equilibrium and neither party is bound to compensate the other. On other words, force majeure and hardship are entirely left to contractual provisions in English common law (Kessedjian, 2005).

Van Dunne's (2002) view on frustration of contract was in the same firm line. He indicated that the doctrine of frustration was developed to reduce the severeness of the common law and its strictness in execution the contracts literally. On the other hand, the frustration has a significant disadvantage as it leads to the collapse of the contract instantly and automatically and cease the parties from future performance of their obligations. So, the doctrine should not be easily invoked and to be applied in very narrow limits in order to maintain the stability and steadiness of contractual relationships(Van Dunne, 2002).

Hardship Doctrine

The concept of hardship is applied by courts in some countries such as Switzerland, Austria, Turkey, Romania and Spain despite the wide variety in hardship principle in such countries. Although the existence of such variety, the core of the principle suggests that the hardship is resulted from occurrence of supervening events disrupting the performance of the contract obligations which, in turn, leads to sever economical unbalance between contract parties. The effect of the aforementioned unbalance ranges between the excessive increase in the costs of performance and sharp reduction in the level of performance. (Girsberger et al, 2012).

In 2009, Burnner compared between the concepts of hardship and force majeure. Force majeure concept and doctrine of hardship are correlated to each other as the basis of both is the same. Hardship is considered as a particular case of force majeure where the performance encounters obstacles as a result of change in circumstances. Both force majeure and hardship result in drastic change in risk allocation and, consequently, the contract equilibrium. Meanwhile, both are different in legal consequences as force majeure constitutes an excuse from performing the obligations but hardship does not constitute such excuse because the change in contract equilibrium, alone, does not make performance of the contractual obligations physically impossible but make it impracticable in light the original terms and conditions of the contract. Therefore, hardship requires flexibility in the legal solution as the disadvantaged party shall have the right to renegotiate the contract conditions in his favor. If such negotiation failed, the court may intervene by compensating the disadvantaged party or reducing

some of his obligations in order to restore the economic equilibrium of the contract(Brunner, 2009).

Impossibility and Practicability Doctrine

It is generally accepted in both common and civil law systems that the performance of the contractual obligations which becomes impossible or commercially impracticable under certain adverse extraordinary circumstances might be ceased. The question here is under which circumstances the performance will be ceased? Actually, there is not unanimity of the approach in all legal systems. Moreover, most tribunals and courts recognize the standard of commercial impracticability so that performance is excused when it is not practical and could be done only at unreasonable and excessive cost (Augenblick et al, 2012).

The concept of impossibility was also discussed by Wehle who revealed that under Roman-Civil law, notably French and German, impossibility of performance due to force majeure releases the obligor from liability. Anglo-American common law, using the act of God as the preventing force, ordinarily does not relieve the obligor from his duties unless the court is inspired the excuse by interpreting the terms and conditions of the contract that are related to such impossibility. Moreover, in American law, where the act of God calls for a higher degree of foreseeability and irresistibility than do the above Latin, French and Germane expressions for impossibility, there are also rigid limitations on invoking the concept of impossibility as a defense (Wehle, 1950).

CONCLUSIONS

From the study, it is concluded that force majeure is a civil law concept aiming to excuse the parties of the contract from their obligations upon occurrence of events which are beyond parties control and are neither predictable nor avoidable. Such events might be natural disasters, acts of state or governmental actions, military or civil disturbances, acts of terrorism or war and nuclear catastrophes.

On the other hand, in common law legal system, force majeure is not a term of art. The concept of force majeure will never be considered in the absence of specific contractual terms and provisions. The parties deal with the unforeseen events shall be to the extent to such provisions that are defined in the contract between them. There are some doctrines in common law that could be similar to force majeure but in narrower meaning such as the doctrines of impossibility, impracticability, frustration and hardship.

Force majeure event may result in work suspension either partially or totally. It may also result in contract termination if it is clear that fulfilling the contractual obligations becomes impossible or if the duration of the event extends for long period. Neither Party should be held responsible or liable for delay or failure in performing or fulfilling any of its obligations under the contract.

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