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Legal Update
Investment Protection in the MENA-Region
Dr. Philipp Stompfe, LL.M. (London)
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Bilateral Investment Treaties / Force Majeure / Hardship

The current political situation in some states of the Near and Middle East and North Africa demonstrates, that political instability in host states (states in which the investment is made) might negatively affect general domestic circumstances to the effect, that the implementation of investment projects might become subject to tremendous impediments or even impossible. This also includes specific political interventions, which aim to harm foreign investors and foreign direct investment.

This contribution deals with protection options against detrimental state measures and the legal concept of force majeure and hardship in Arab legal systems.

I. Introduction

Government abuse emerges in particular in the following forms: withdrawal of licenses and approvals for arbitrary reasons, non-compliance with governmental assurances and contractual obligations, unilateral termination of contracts for improper purposes, as well as general arbitrary and discriminatory measures.

In addition, host states may, by legislative actions, change the investment climate for the worse, and thereby significantly affect the foreign investors opportunity to gain profit. This is achieved in particular by restricting the right to transfer profits, so that foreign investors are forced to reinvest within the host state.

The experience of recent years and current political developments give reason to fear, that existent foreign investment might adversely be affected, again, by government actions.

However, it has to be emphasized, that foreign investors are not defenseless against government abuse. In fact, the international law regime provides for a solid and efficient investment protection through so called bilateral investment treaties ("**BIT**"). Besides, current political developments have moved national-law provisions related to force majeure and hardship to the center of attraction.

II. Investment Protection through BITs

BITs are designed to provide substantive guarantees for foreign investors from the host state. Generally, they provide a wide range of protection standards against detrimental government measures. These standards are, inter alia, fair and equitable treatment ("**FET**"), full protection and security, protection against arbitrary and discriminatory treatment as well as protection against expropriation.

The concept of FET has undeniably emerged as the core substantive standard of bilateral investment treaties. At its most basic, it demands that public power is exercised along the lines of international established procedural and substantive rules. Additionally, the integrity of foreign investors and foreign direct investment is explicitly protected.

According to international jurisprudence, categories of FET violation include, inter alia:

- denial of licenses for improper purposes
- withdrawal of licences
- cancellation of concessions
- non-compliance with governmental assurances and contractual obligations
- unilateral termination of contracts for improper purposes
- inconsistency of conduct between different state agencies
- coercion and harassment by state officials

The standard of full protection and security aims to protect the investment against physical violence done by State organs or private third parties. The host state is under an international law obligation to take active measures to protect the investment from harmful effects.

Furthermore, it shall be highlighted, that a „foreign investor" in BITs is understood as any natural or legal person with a different nationality than the host state; minority shareholders of locally incorporated companies; indirect shareholders and local companies controlled by foreign investors.

III. Dispute Settlement

Investment arbitration cases against foreign states on the basis of BITs are predominantly administered by the International Centre for Settlement of Investment Disputes ("**ICSID**"), which is an administrative part of the World Bank Group in Washington D.C.

ICSID arbitration offers a high level of effectiveness for investors, including direct access to international dispute settlement and increased enforceability of awards.

In addition, ICSID arbitration proceedings not only combine the advantages of the institutional support but also the flexibility and party-autonomy of ad hoc arbitrations. Furthermore, ICSID arbitration is designed to function effectively even if one party fails to co-operate in the proceedings.

IV. Legal Situation

Countries in the Near and Middle East and in North Africa follow the international trend and maintain a wide network of BITs. By the year 2016 these states concluded a total of 915 BITs

of which about two thirds are officially in force. Thereby, BITs concluded by these states make about 30% of the worldwide existing BITs.[1]

Egypt is at the forefront in the Arab world with respect to maintaining BITs. Egypt has concluded 110 BITs of which 78 are in force, inter alia with Germany, France, Austria, Switzerland, United Kingdom and the United States of America.

The **United Arab Emirates** have concluded 43 BITs of which 19 are currently in force, inter alia with Germany, France, Austria, Switzerland and the United Kingdom.

Turkey has concluded 93 BITs of which 76 are in force, inter alia with Germany, France, Austria, Switzerland, United Kingdom and the United States of America.

Libya has concluded 30 BITs of which 20 are in force, inter alia with Germany, France, Austria and Switzerland. In addition, Libya has signed a BIT with the United Kingdom which, however, has not entered into force yet. Though, Libya has not signed a BIT with the United States of America.

V. Force Majeure

The concept of force majeure is used in legal systems in the Near and Middle East as well as in North Africa to cover events that are unforeseen, unavoidable and are beyond the power and control of the contracting parties. In particular, those events include natural disasters, such as earthquakes, armed conflicts, riots and economic sanctions, such as trade embargos. As a consequence, a contract may be prematurely terminated or the contract implementation may be suspended.

It is a general legal principle of civil codes in the Near and Middle East as well as in North Africa that any event resulting to force majeure is a solid defense, which reliefs the debtor from liability.[2] In fact, force majeure is usually invoked by a contracting party aiming to exonerate himself from any liability for non-performance of contractual obligations.

Article 215 of the Egyptian Civil Code ("ECC") states:

> *„When specific performance by the debtor is impossible, he will be condemned to pay damages for non-performance of his obligation, unless he establishes that the*

[1] Worldwide there are about 3250 BITs of which three forth have entered into force. Germany is the world leader with respect of maintaining BITs. It has concluded 160 BITs of which 150 are in force.

[2] **The legal situation for States in the Near and Middle East and North Africa will be demonstrated by means of the Egyptian law.** This is due to the fact, that, with the exception of Saudi Arabia and Oman, all these states have almost applied in full the Egyptian civil and commercial code. However, the relevant provisions of the UAE Civil Code ("**UAE-CC**") and the Libyan Civil Code ("**LCC**") will explicitly be shown.

impossibility of performance arose from a cause beyond his control. The same principle will apply if the debtor is late in the performance of his obligation."[3]

This provision does not provide for a conclusive definition. However, civil code provisions in the Near and Middle East as well as in North Africa are clearly at one with respect to the mandatory requirements which qualify as an event of force majeure. In this light, force majeure is defined as „an event which is unforeseeable, unavoidable and renders the execution of contractual obligations impossible".[4]

These requirements are applicable for private law contracts and for contracts with the public sector alike.

1) Requirements

First, the supervening event must be **unforeseeable**. In this regard, the event must not been anticipated or foreseen at the time the contract was concluded.

In addition, the supervening event must be **unavoidable**. It is necessary in this context that the event must be external; outside of the defaulting party's sphere of influence and control. In other words, the impossibility of performing the contractual obligation must find its origin in a cause which cannot be attributed to the party potentially defaulting on its performance.

Furthermore, the essential element for a supervening event to qualify as force majeure is that **it must render the performance of the contractual obligation impossible.**[5] As the general rule, it is mandatory, that the impossibility caused by a supervening event must be absolute. In consequence, a supervening event which makes the execution of the defaulting party's obligation solely more challenging or cost-intensive does not constitute a case of force majeure. If the impossibility of fulfilling a contractual obligation is solely temporary, the supervening event does not in principle constitute a case of force majeure.

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[3] Identical provision in Article 249 UAE-CC and Article 218 LCC.

A similiar provision is contained in Article 136 of the Turkish Code of Obligations (Law No. 6098/2012): „*If it is impossible to perform all the obligations under the contract due to the reasons that are not attributable to the obligor, the obligor shall be released from performing the related obligations. However, unless the obligor dully and timely notifies the creditor on the impossibility of the performance of the obligations and takes necessary precautions to prevent the increase of loss, the obligor shall be liable for the compensation of the resulting losses*."

[4] Cf. *Egyptian Court of Cassation*, Case No. 273, 13.12.1966; *Egyptian Court of Cassation*, Case No. 2, 19.03.1979; *National Oil Corporation v. Libyan Sun Oil Company*, ILM 1990, pp. 565 et seq.

[5] In this regard it has to be emphasized, that the contracting party invoking force majeure bears the burden of proof regarding the impossibility.

It has to be highlighted, that a potential case of force majeure will always have to be determined by taking into account all factors relevant to the circumstances of the particular case.

2) Legal Consequences

The legal consequences of force majeure are gained from Article 159 ECC[6], which provides:

> *„When an obligation arising out of a bilateral contract is extinguished due to impossibility of performance correlative obligations are also extinguished and the contract is rescinded ipso facto*."

In addition, when a contract is rescinded the contracting parties are reinstated in their former position; in cases where reinstatement is impossible the Court may render compensation for value.[7]

However, it has to be considered that the provisions related to force majeure do not constitute mandatory rules. On the contrary, contracting parties are permitted of adjusting the conditions and consequences of supervening events/force majeure in contracts individually. Hence, it is permissible that the debtor may by agreement accept liability for unforeseen events and for cases of force majeure.[8]

VI. Hardship

If, as a result of exceptional and unpredictable events of general nature, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the Judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive.[9]

Therefore, in cases of hardship, the obstacle of performing the contractual obligation must result in a financial loss. Further, the scope of application of Article 147(2) ECC requires a causal link between the impediment of executing the contract and the supervening event. In such a case, the competent state court or arbitral tribunal has to abbreviate equitably such disequilibrium. Within this context, the precedence of contractual adjustment is characteristic for civil codes in the Near and Middle East. It should finally be stressed that, contracting parties cannot opt out of this legal situation, and that any agreement to the contrary is void.

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[6] Identical provision in Article 273 UAE-CC and Article 161 LCC.

[7] Article 160 ECC; Article 274 UAE-CC; Article 162 LCC.

[8] Article 217(1) ECC; Article 220(1) LCC.

[9] Art. 147(2) ECC; Article 287 UAE-CC; Article 147(2) LCC.

However, Article 658(4) ECC[10] contains a special provision for construction contracts, which entitles the Court under exceptional circumstances to grant an increase of the agreed remuneration or to terminate the contract.

VII. Conclusion

1) BITs provide for a solid and efficient framework to respond appropriately to adversed government actions.

2) States of the Near and Middle East and North Africa maintain a wide network of BITs, inter alia with Germany, France, Austria, and Switzerland. In addition, most States maintain BITs with the United Kingdom and the United States of America.

3) ICSID offers an impartial, efficient and proven dispute resolution system.

4) Force majeure clauses contained in contracts should be legally examined. Supervening events which could qualify as force majeure should be clearly documented.

5) Economic and financial losses incurred due to supervening events should be clearly quantified, and the application of hardship should be legally examined.

6) It is strongly advisable to observe and review the current political situation and analyze potential impacts on investments at an early stage.

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AUTHOR

Dr. Philipp Stompfe, LL.M. (London)

Rechtsanwalt / Attorney at Law

Within the team of Alexander & Partner, Dr. Philipp Stompfe is primarily involved in international litigation and arbitration. He is constantly acting as counsel in commercial and investment arbitrations before all of the major arbitral institutions mainly related to construction, energy, distribution, real estate and M&A disputes. He is specialized in international investment law and further advises on international contract law and on the structuring and implementation of cross-border investment projects.

[10] Art. 657(4) LCC; Cf. Art. 892 et seq. UAE-CC.

For more information about this topic please contact us

Alexander & Partner Rechtsanwälte mbB
Dr. Philipp Stompfe, LL.M. (London)

Joachimsthaler Straße 30, 10719 Berlin, Germany

ps@alexander-partner.com
T +49 (0)30 887780526
M +49 (0)176 32327868
F +49 (0)30 887780599

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