

# IS LACK OF ELECTRICITY CONSIDERED AN EVENT OF “FORCE MAJEURE” FOR NON- PERFORMANCE OF A DEVELOPER'S CONTRACTUAL OBLIGATIONS?



Ashraf El Motei

Ashraf El Motei, Managing Partner of Motei & Associates, shares an insight into a recent judgment in the UAE.

The fact that a government authority has refrained from supplying electricity to a project under construction, doesn't constitute an event of "Force Majeure" for exempting the developer from their contractual obligations, as long as the authority's action is not the direct cause for delaying the completion of the project.

In an unprecedented case, an Arbitral Tribunal has rejected a developer's request to reject a buyer's claim for cancellation of a Sale Purchase Agreement (SPA) of a high end-residential unit to be constructed on an island in Ras Al Khaimah, and refund of the advance payment made towards the unit's purchase price. The developer argued that based on a "Force Majeure" event, it couldn't fulfill its contractual obligations to complete project and deliver the unit to the buyer on the agreed completion date. The developer explained that due

to the government's failure to supply electricity to the project, the financing banks have refrained from continuing financing the project, as result of which the developer couldn't complete the project.

However, the Tribunal has concluded that:

1. The fact that a government authority has refrained from supplying electricity to the project, doesn't constitute an event of "Force Majeure" as long as the authority's action is not the direct cause for the developer's failure to fulfill its obligations;

2. It is established that "Force Majeure" event must be neither expected nor controlled at the time of signing the contract, and beyond the parties. However, it is clear that the developer, at the time of contracting with the buyer (our client), was well aware of the lack of electricity in the plot of land on which the project is expected to be constructed;

3. The fact that the banks have stopped financing the project is the developer's sole responsibility not the buyer who has never been aware of such financing requirement at the time of contracting. Such event may not constitute a "Force Majeure" that would exempt the developer from performing its contractual obligations under the SPA.

Therefore, the Tribunal has ordered: 1. Cancellation of the SPA; 2. Developer to (i) refund buyer the advance payment; (ii) to pay 9% interest from the date of filing the case until full refund of the money; (iii) compensate the buyer for losses incurred; (iv) pay all arbitration costs and lawyers' fees.

#### Author's Profile:

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