



Navigating COVID-19 Business Disruptions in the Middle East

In recent weeks, the world has been engulfed by the spread of COVID-19 as governments scramble to protect their citizens and avoid the collapse of public health systems and long-term damage to their economies. The wide-ranging efforts to flatten the curve of COVID-19 has created a tidal wave of ramifications for an international business community that is today more interconnected than ever, and led to high levels of uncertainty surrounding current and future contractual obligations. At a time when government policies fluctuate daily and courts and arbitration centers are becoming increasingly inaccessible to resolve active disputes, it is difficult for a party to seek or obtain interim measures or relief. From country to country and company to company, the responses have not been uniform: some commercial parties have continued to perform their obligations, while others have argued for wholesale abdication of their responsibilities, and still others are somewhere in between. Certain trends of government action and commercial response are emerging worldwide, no less so in the hyper-connected global businesses that are found in the Middle East.

Kuwait was among the first countries in the Middle East to take restrictive measures after announcing the first COVID-19 case on February 23. A nationwide evening curfew was imposed; all non-essential businesses have been closed; and all commercial flights have been grounded. In Qatar, while a curfew has not been imposed, all non-essential businesses have been closed since March 27. Qatar Airways is still largely operational, but entry into Qatar is restricted to Qatari nationals, permanent residency holders and their families. Saudi Arabia suspended all international travel for two weeks starting March 15 and has since closed its land borders. The capital of Riyadh, along with other major cities, including the Holy Cities of Mecca and Medina, are under lockdown and a strict 24-hour curfew. In the UAE, the nationwide overnight curfew first imposed on March 26 has been extended indefinitely. Dubai has been placed under a two-week lockdown starting April 4 and anyone wanting to leave their home must apply for an online permit through the Dubai Police.

In a business environment as complex and globally intertwined as the Middle East, the current challenges are particularly acute. To understand both your and the counterparty's obligations in this environment, it becomes necessary to examine not only the operating laws in the relevant locales, but also their practical business realities – a tough proposition that will inevitably lead to disputes once the region fully come back into a “new normal” of business activity. Nevertheless, there are some basic principles and contractual issues that every company conducting business in the Middle East should assess when examining its own contractual obligations, attempting to enforce a counterparty's obligation, or contemplating future contracts.

The main contractual provision triggered by the COVID-19 crisis is the *force majeure* provision. Standard to nearly all contracts, the concept refers to circumstances that are outside of the parties' control. Although there are variations, most *force majeure* provisions follow a similar format and



the extent to which such clauses may be triggered in relation to the COVID-19 pandemic depends on numerous factors, including the nature and timing of the shutdowns and their impact upon the specific obligation in question. Of particular note, some *force majeure* clauses set out an exhaustive list of circumstances that may amount to *force majeure* such as war or flooding, whereas others use broad wording simply stating “events beyond the reasonable control of the parties.” In addition, the excuse from performance is not total and may be for a temporary period corresponding to the impossibility. Pursuant to the Qatari Civil Code, for example, while a party may be excused from performing the obligations for a time due to *force majeure*, it can still be liable for the consequences of that event and the company may not be completely off the hook. Where the impossibility of performance is permanent, however, Qatari law recognizes that the fundamental basis of the contract has been frustrated; hence the contract will terminate automatically. It is important to emphasize that if an event only makes the performance of a party’s obligations more onerous, however, it generally will not excuse performance of the original obligation.

Detailed record keeping is essential for the party seeking to rely on *force majeure* as it has the burden of proving that performance of its obligations was hindered, delayed or rendered impossible by a qualifying event. To utilize the *force majeure* clause, a party may be required to prove that the event occurred, that the event qualifies as *force majeure*, that the event impacted the performance of its obligations and that there were no reasonable or alternative steps that could have been taken to limit or avoid the *force majeure* event or its consequences.

In addition to the various complexities raised by the contrasting country responses and business realities, the nature and extent of the effects of COVID-19 across varying business sectors is illuminative. For example, in Dubai, while there has not been an announced shutdown of construction works, the government has imposed a number of other measures which are impacting the local construction market. While projects have not been completely halted, delays resulting from shortages of foreign workers and potential disruptions in the supply chain may impact the projects going forward. In the field of technology, media and telecommunication, COVID-19 is unlikely to constitute grounds for claiming *force majeure* in respect of the supply and delivery of materials because cargo flights are generally still operational, inventory is generally still available, and alternative delivery methods can be arranged. A strong impact is likely to be seen in the area of services relating to technology and network systems, which require specialized technicians to resolve issues that often cannot be outsourced or resolved remotely.

Businesses should take the time to understand the relevant contractual provisions of existing contracts concerning *force majeure*, possible suspension and termination. Companies should review related insurance policies to see if they cover COVID-19 and if arguably they do, notice should be timely provided. Parties should consider reaching out to their counterparties and seeking agreement concerning the suspension of obligations and/or the renegotiation of terms

of the contract. With respect to new contracts under negotiation, specific wording should be included that clearly allocates the risks related to COVID-19 and similar potential future events.

The extent of the impact of COVID-19 is unknown. However, businesses should ensure they are aware of and protecting their rights and interests. Navigating the business environment during this challenging time where courts and arbitration centers may be less available to intervene presents unique challenges. Gaining a proactive understanding of your rights and obligations under your contracts and engaging with competent counsel to assist you protect are steps that every business can and should take today.

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