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## GCC e-alert

In times such as these, it is important to get the best available legal information and advice and remember that not all information and advice will be applicable to a particular situation or contract.

Many businesses in the United Arab Emirates (the **UAE**) and the countries of the Gulf Cooperation Council (the **GCC**) are wondering what to do with respect to their obligations or those of their co-contracting parties.

### Measures to Contain the Impact of Covid-19 and Ensure Business Continuity

The UAE Cabinet has approved a new decision to ensure business continuity as follows:

- the *extension of residence permits expiring on 1 March 2020* for renewable period(s) of **three months** without additional fees upon renewal;
- the *extension of any Emirates ID* for renewable period(s) of **three months** effective 1 April 2020;
- the *extension of the validity of documents, permits, licences and commercial registrations* expiring 1 March 2020 and thereafter for renewable period(s) of **three months** starting 1 April 2020.

### Obligations and *Force Majeure*

*Force Majeure* is a concept invoked both in civil law (the system applicable on-shore UAE and in countries of the GCC) and common law (the system applicable in certain Free Zones such as the Dubai International Financial Centre (the **DIFC**)) in connection with the performance (or non-performance) of contractual obligations.

The UAE civil law does not provide an exhaustive list nor definition of *Force Majeure* events but *Force Majeure* is typically invoked in cases of natural disaster, industrial actions, changes in the law which give rise to an inability to perform an obligation.

Generally, federal laws (such as the Civil Code of the UAE) apply on mainland UAE as well as in the various Free Zones. However, certain Free Zones such as the DIFC have adopted their own laws and regulations applicable in the event of *Force Majeure*.

It is to be noted that not all agreements contain a *Force Majeure* clause and even though such clause is often included in contracts there is no standard wording.

#### Scope of *Force Majeure* Clause

A typical clause of *Force Majeure* reads as follows:

“Unless otherwise agreed in the Agreement between the parties expressly or impliedly, where a party to the Agreement fails to perform one or more of its contractual obligations, the consequences of *Force Majeure* set out in this Agreement will follow and to the extent that party proves:

- that its *failure to perform was caused by an impediment beyond its reasonable control*, and
- that it **could not have been reasonably expected to have taken the occurrence of the impediment into account** at the time of the conclusion of the Agreement, and
- that it **could not reasonably have avoided** or overcome the effects of the impediment.

In the absence of proof to the contrary and unless otherwise agreed, a party is presumed to have established the conditions described above in the event of the occurrence of one or more of the following impediments:

- war
- civil war
- act of terrorism
- act of authority (whether lawful or unlawful)
- act of God
- explosion, fire
- general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow”.

In order to invoke *Force Majeure*, a party must

- make a claim in relation to the Agreement;
- demonstrate that the relevant event has rendered performance of the obligation(s) under the Agreement impossible.

Whether under the law applicable on-shore UAE or in the Free Zones, generally there is a requirement to provide notice without undue delay as soon as the party becomes aware of the *Force Majeure* event.

Each party is also under the obligation to act in good faith and mitigate the damages.

The UAE Courts tend to interpret *Force Majeure* clauses narrowly. It must make performance of the contract *impossible, unforeseeable and uncontrollable*. If only part of the contract is rendered impossible, the remainder remains effective.

*For e.g: if part of the work under a contract has been completed by one party, the co-contracting party may be obliged to pay for the work done and the remainder of the work affected by the Force Majeure may be terminated.*

Also, it is advisable to provide updates and detailed reports of the *Force Majeure* event. A delay in providing such updates may prevent invoking and reliance on the *Force Majeure*.

## Best Practices and Course of Action

If you consider invoking a *Force Majeure* event:

- **review the relevant contract(s)** and consider the specific obligations set out in such contract(s);
- **ensure that you continue to perform the unaffected obligation(s)** if possible;

- **consider the impact and the consequences of the event** and the extent to which it hinders performance;
- acknowledge possible and **reasonable steps/actions that can be taken** to overcome, or minimise, the effects of *Force Majeure*;
- **notify the other party of your intention to activate the *Force Majeure* clause; do not delay.**

If you are served with a *Force Majeure* Notice:

- **examine the exact language of the *Force Majeure* clause** (if there is one) and ensure that pandemic, closure of borders etc qualifies as a *Force Majeure* event;
- **confirm the causal link between the *Force Majeure* and the assertion** by the co-contracting party of its **inability to perform**;
- **request updates and evidence** from the party claiming *Force Majeure*;
- **consider renegotiating the contract but ensure that all parties agree to the changes.**

Finally, in either scenario even if the contract is governed by foreign law, the UAE Courts may still apply UAE law if the matter is litigated in the UAE.

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