1. What is COVID-19, and how has it affected Business in the UAE so far?

Coronaviruses (COV) are a large family of viruses that cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS-COV) and Severe Acute Respiratory Syndrome (SARS-COV).

Global manufacturing and supply chains are continuing to feel the effect of the new coronavirus epidemic as factories and logistics providers seek to resume operations now face labour shortages and regulatory uncertainty.

The economic impact could increase unpredictably, with credit implications not just for China but the GCC. The effects on oil prices, economic growth, and real estate prices are direct effects of the virus’ outbreak.

Additionally, GCC’s construction sector, which is heavily reliant on Chinese imports, will also be facing an imminent crisis as shipments from China have been temporarily halted. Several on-going projects will face delay or disruptions if normalcy in shipments originating from China is not restored as soon as possible.

City-wide lockdowns and quarantines have triggered labour and supply shortages as Chinese authorities seek to contain the coronavirus outbreak.

Elsewhere, countries have imposed travel restrictions on anyone coming from mainland China. Flights have also been temporarily suspended in the Middle East, Europe and America to contain the virus. The knock-on effects of such constraints and lockdowns are being felt around the globe, and global markets are on course for their worst week since the 2008 financial crisis.

Parties in quest of discharging their obligations and avoiding liability would resort to the contracts they have entered into and should be focusing on the clauses highlighted below. In the absence of such terms, the parties should refer to the governing law of their agreements.

2. Which law is applicable?

Governing Law - A governing law clause in any agreement states the law which governs the agreement in the event of a dispute. The parties should, therefore, determine whether their contract is governed by Chinese law, UAE law, or different law.

In the absence of a governing law clause, UAE law may apply if the transaction was made, formed, or supposedly formed in the UAE, an event occurred in the UAE or if the defendant is domiciled in the UAE.
Jurisdiction – Quite frequently, parties overlook the importance of jurisdiction clauses in their well-negotiated contracts, and this could result in hindering the enforcement procedures. Parties to an agreement are free to choose between UAE Courts or Chinese Courts, and this does not violate Chinese law. The UAE and People’s Republic of China have entered into an agreement on Judicial Assistance in Civil and Commercial Matters, as a result of which, judgments issued in one country can be enforced in the other. In the absence of such a treaty, a foreign judgment may still be enforceable in China based on the Laws on Civil Procedures of China. However, it should be noted that the Chinese courts may implement their discretion to refuse the enforcement of foreign judgments.

3. Which clauses could provide relief?

Force Majeure - Force majeure is derived from French law and refers to unexpected external circumstances that must be unpredictable and irresistible and must prevent a party to a contract from meeting their obligations. While force majeure clauses rarely mention diseases, they frequently provide relief in the event of unforeseen acts.

The UAE Civil Code envisages the use of force majeure events to contractual obligations for contracts governed by UAE law. Article 287 of the UAE Civil Code stipulates that if a person proves 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 the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.

The mere presence of a force majeure clause may not be sufficient for a party that wishes to rely on the provision to limit its liability due to non-performance resulting from the complexities caused by COVID-19.

Exceptional Circumstances - According to Article 249 of the UAE Civil Code, if there are exceptional circumstances of a public nature, due to which execution of a contract becomes immensely arduous for a party, the court may reduce such obligations to a reasonable level, keeping in consideration the interests of both the parties.

However, the parties have not been able to successfully rely on the above provision during the 2008 financial crisis as the UAE Courts ruled that variations in the economy should not be considered as an exceptional circumstance as this is usually predictable.

Whether the spread of COVID-19 and the resulting disruption in the supply chain would be considered as an exceptional circumstance is yet to be seen.

4. How can the risks be mitigated?

Besides ensuring operational continuity, employee protection, and market preservation, businesses must take a fresh look at their exposure to complex and evolving inter-dependencies that could compound the effects of pandemics and other crises.

If contractual obligations of corporate entities are severely impacted, they should consider inserting specific infectious diseases or epidemic clauses in their new agreements as well as amending prevailing agreements provided that their agreements allow them to do so. Companies should also assess their insurance arrangements as well as the governing law of their contracts in order to limit their liability.

5. Conclusion

As it remains difficult to foresee how the outbreak will continue to unfold, especially when it may peak, authorities have indicated that drastic measures to curb the epidemic should be avoided as much as possible due to their significant economic impacts. That having been said, recent actions carried out by governmental bodies across the GCC suggest another approach. In light of the past measures, logistics capacity, and rates for shipments from and to China are unlikely to return to normal before April 2020. Given the fluidity of the situation and the vast operational and financial implications across multiple industries, it may take several months to assess how the event will have impacted an organization’s bottom line.

UAE entities which have been impacted by COVID-19 should:

- weigh their options at the outset and preferably before the due date of delivery or other performance deadlines to pursue the best legal action given the circumstances;
- consider their breach of obligations towards their customer which may result due to the violations by their counterparties;
- seek advice to ensure that they are contractually or legally protected and can be relieved of their obligations thereby containing their liability/risk exposure; and
- evaluate whether invoking force majeure protection outweighs the risk of lasting consequences, i.e., whether the counterparty may terminate a long-term arrangement, which would, in turn, lead to long-term losses.
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