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COVID-19 and Force Majeure in Saudi Arabia

Contractual Force Majeure provisions are enforceable in Saudi Arabia, and if they are present in the contract they will control the rights and liabilities of the parties. Those provisions should be carefully reviewed, with particular attention given to any notice requirements that may be provided. The wording of the particular provisions in the contract will determine whether or not the current situation with COVID-19 constitutes an event of Force Majeure that may give one or both parties relief under the contract.

Even if the contract does not specifically address Force Majeure, the concept exists under general principles of Shariah law. This would, in theory, include Saudi public works contracts that do not actually have Force Majeure conditions. In contracts without specific provisions, the application of the Force Majeure doctrine is based on the application of *Shari'ah* principles, and ultimately its effect will be determined by Saudi judges on a case by case basis.

It is generally accepted that Force Majeure requires that an event be i) unforeseeable, ii) unavoidable, and iii) one that prevents performance of the contract. However, even this basic definition leaves many unanswered questions.

First and foremost, must the event permanently prevent performance forever, or can an event that only delays performance also qualify as an event of Force Majeure? If a delay can qualify, how long must the event prevent performance? Would an event that is indefinite in duration constitute Force Majeure in Saudi Arabia? Does any of this depend on the nature of the contract, or the identity of the Parties? Is the potential availability of government support a factor to consider?

In an effort to combat the spread of the COVID-19, Saudi Arabia has issued a number of circulars and announcements affecting the operation of many business, culminating in twenty-four curfews that greatly restrict travel close almost all retail business except for grocery stores and pharmacies. The travel restrictions have effectively closed many other businesses, and the restrictions are imposed until further notice. Some employers responded by requiring their employees to accept leave without pay status.

With respect to employment contracts, the Ministry of Human Resources and Social Development confirmed that employers could not require their employees to accept leave without pay on the grounds that binding employment contracts could not be unilaterally changed due to what it called

“temporary special circumstances.” On April 6, 2020 it issued a Ministerial Resolution that amended the Saudi Labor Law to allow the employer and employees to agree on certain modifications to employment contracts in connection with events such as COVID 19. Portions of this amendment seem to imply the recent government actions were taken to avoid a Force Majeure situation that would allow the cancelation of employment contracts; while other provisions seem to imply that an employment contract could be terminated under the present circumstances provided that the employer had not taken advantage of any government assistance. On balance, and as of the date of this update, the Ministry seems to be taking the position that the current situation does not justify terminating employment contracts on the basis of Force Majeure.

Although the Ministry’s position is not necessarily binding on Saudi courts, (which, apart from accepting case submissions online, are at the moment prevented from working), it will obviously carry great weight. Also, the Ministry is in a position to create substantial difficulties for companies that flout its pronouncements. Nevertheless, at some point at least some companies will reach the point where they are not in a financial position to pay their employees, regardless of their intentions.

Regarding MAE/MAC provisions, relying on a material adverse effect or material adverse change (MAE or MAC) as a basis to terminate a transaction has long been extremely difficult under the laws of many states. As a general matter, a MAE or MAC is intended to capture unforeseen events or consequences that have a long-term, dramatic adverse impact on the value of the target. The impact of COVID-19 and its consequences continue to evolve. Whether the impact of the virus will be considered a MAE/MAC will depend upon both what is known at the time a transaction is signed and what the relevant agreement’s MAE/MAC definition says about the inclusion or exclusion of the virus. A pre-crisis MAE/MAC definition that makes no reference to COVID-19 (or even to pandemics or epidemics generally) may or may not be found to include the effects of COVID-19 in determining whether a MAE/MAC has occurred. In such cases, disputes may focus on whether definitional language that typically excludes general economic or market conditions and other broad-based factors impacting the business climate or the target’s industry generally is sufficient to exclude the impact of COVID-19. Parties also may debate whether the potential impact of the virus was reasonably foreseeable at the time the agreement was signed or whether the impact is sufficiently long-lasting to be considered a MAE/MAC under applicable state law.

There is no clear legal solution to the many problems caused by the COVID-19 pandemic, and each argument of force majeure should be considered on a case by case basis as the principle is not universally accepted by all Saudi Courts. Companies should be aware that the concept of Force Majeure may, at some point, offer relief from contractual obligations in Saudi Arabia. The fact that there are no precise legal formulas creates confusion, to be sure, but it also provides an environment where the parties are encouraged to find reasonable solutions to address common problems.

We will be happy to schedule a consultation, either in person or remotely, where we can provide more specific advice after a review of your contracts and a better understanding of your particular circumstances, concerns, and priorities.