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Gowling WLG's in-house lawyer community



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Advanced Technical

EMERGING LEGAL ISSUES ARISING FROM COVID -19

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TOPIC

PRESENTER

Force Majeure: UK Law & perspective

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Force Majeure: UAE Law & perspective

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Directors Considerations

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Employment

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UK LAW & PERSPECTIVE

COVID-19 (UK)

English law - 3 possible typical routes

- Supervening illegality – background law
- Frustration – background law
- Force majeure – contract driven

Illegality/Frustration only apply if **no** force majeure clause.

Most contracts have a force majeure clause.

COVID-19 FRUSTRATION (UK)

Supervening Illegality

- Does the illegality prevent the contract being performed?

Frustration

- High bar - unforeseen supervening event and contractual obligations become:
 - **impossible**; or
 - **radically different** from the primary purpose for entering into the contract.
- Contract discharged

COVID-19 FORCE MAJEURE (UK)

Force majeure - Contractual clause

1. Trigger (eg “outside reasonable control”)
 - Could not be reasonably anticipated when contract formed
 2. Impact (eg “prevents, hinders or delays”)
 3. Implied duty to try to overcome
 4. Often requires notice
 5. Often after a period other party can terminate
- English courts interpret narrowly as see it as a liability exclusion

UK – REAL EXAMPLES

- Before or after mandatory shut down – film studio
- Conference booking in Paris in October 2020
- Late on delivery of major engineering work
- Office catering contract – who has risk of no customers?
- Private yacht charter
- Call centre – work from home

UK - LESSONS LEARNT

- Force majeure clause is not boiler plate!
- Avoid narrow definition of FM event
- Avoid requirement for performance to be impossible
- Be wary of short periods before termination trigger
- Business continuity plan matters
- Be clear how fits with charges

CONTRACTING IN THE TIME OF COVID

Covid-19 (and epidemics generally?) is here

1. Which means for new contracts it might be reasonably anticipated
2. And therefore no longer a force majeure
3. So needs specific wording
4. But saying what?



UAE LAW & PERSPECTIVE

FORMS OF RELIEF IN THE UAE?

- Force Majeure
- Exceptional events /oppressive performance
- Failure to perform

Note: In UAE:

- ✓ UAE Civil Code applies to all commercial arrangements
- ✓ Commercial contractual relationships are considered paramount to courts consideration in commercial disputes
- ✓ Civil Code and Commercial Code **supplement** paramount contractual rights

FORCE MAJEURE IN THE UAE

- Not a defined term (as in the UK)
- The legal “concept” of FM:
 1. may be contractually set out and drafted between parties
 2. is set out in Law ***UAE Civil Code (Federal Law No. 5 of 1985)***
 3. has been considered under UAE case law in various courts

WHAT CAN / SHOULD YOU DO?

- As in the UK – review your commercial contract terms
- Does your contract have a specific FM clause, definition and triggers relevant to its application to a party?
- **If Your contract has FM clause**
 1. as in the UK, it can be applied as a contractual remedy or relief for a party / claimant
 2. application of same considerations as in the UK i.e. the event was impossible, unforeseeable and unavoidable
 3. What is the Governing Law of Your contract
- **If Your contract has no FM clause**
 1. *Article 273 of the UAE Civil Code (Federal Law No. 5 of 1985)*
 2. *Case law*

ARTICLE 273 OF THE UAE CIVIL CODE

- Concerns force majeure events
- If the occurrence of a force majeure event deems the performance of a binding contract **impossible**, the contract shall be terminated and its obligations ceased
- Should the element of **impossibility be partial**, the impossible part shall be **extinguished** and **remainder of the contract that can reasonably be performed shall continue to be effective**

FORCE MAJEURE EVENT CASE LAW

What constitutes a Force Majeure event in UAE

- ✓ **Impossible performance** (case law - reflects very high threshold, must render performance impossible i.e. all obligations, and arising from external causes)
- ✓ **Unforeseeable** (case law - at times parties entered into contract, the event was not in their minds and not considered or risk allocated for such a risk i.e. fall in currency or 2009 economic crisis)
- ✓ **Unavoidable** (case law – beyond the parties control to avoid it happening)

UAE COURTS CONSIDERATION OF FM

- UAE courts will ultimately consider:
 - ✓ what constitutes a FM event
 - ✓ What impact it had on ability to perform
 - ✓ The fair and equitable compensation to a party
- If claiming relief or remedy - You must establish how the FM event has either fully or partially rendered impossible to perform
- Civil law regime in the UAE (unlike common law UAE regime)
- (in theory) FM easier to enforce in the UAE as greater discretion of courts to apply terms and civil law is underpinned by concept of “good faith”

EFFECT OF ARTICLE 273

- If FM has a permanent effect on party – contract automatically cancelled (ab initio and all rights and liabilities will come to an end if loss was solely caused by the FM event)
- If FM has a temporary effect, the customer can elect to be released from the contract
- Risk of unlawful termination - don't incorrectly assert an FM event as may give rise to a right for unlawful termination by the Supplier under UAE law.
- So be sure you are able to meet the legal thresholds



DIRECTORS DUTIES



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INTRODUCTION

- Directors duties
- Liabilities of Directors
- Liabilities in distressed situations
- Liabilities of shareholders
- Considerations to minimise risk and exposure

DIRECTORS DUTIES “ONSHORE”

Directors duties and those of General Manager are inter-changeable.

Duties under federal law:

- To comply with legislation and all laws
- To act for the benefit of the Company with the care of a prudent person
- To act in accordance with its objectives and MOA
- If losses reach 50% of the Company's share capital duty to call a meeting of shareholders
- Requirement to submit a request for initiation of bankruptcy procedures to the court if a Company has stopped paying its debts as they fall due for over 30 working days or is in a negative net asset position

DIRECTORS DUTIES IN FREEZONES

Typically codified and will often include:

- Act as reasonably diligent person
- Act in good faith to promote the success of the Company
- Short term gain may not be enough, may also be required to consider employee's interest
- Exercise independent judgment
- Avoid conflicts of interest
- Prohibition on financial assistance to Directors

LIABILITIES OF DIRECTORS “ONSHORE”

- Circumstances where Directors can be liable for losses to shareholders and third parties include:
- Distributions in breach of Companies Law or the companies MOA
- Fraud or improper use of power in contravention of law or articles of association
- Gross error
- **Mismanagement**

DIRECTORS LIABILITIES IN DISTRESSED SITUATIONS “ONSHORE”

- Distribution of profits or bonuses in breach of law or MOA
- Payment of preferences
- Sales at an undervalue
- Carrying on non-core, speculative business, i.e. outside the scope of the company's licence
- Fraud, embezzlement, altering company records

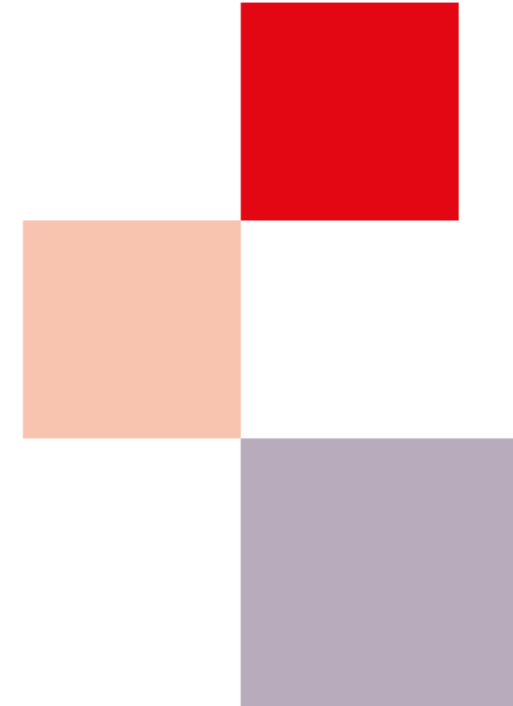
LIABILITIES OF SHAREHOLDERS

Generally liability is limited to the amount of paid up share capital.

Consider position where local partner involved.

Exceptions include:

- Fraudulent misrepresentation to creditors or misappropriation of funds
- Distributions in breach of relevant laws or regulations
- “Shadow directors”



CONSIDERATIONS TO MINIMISE RISK AND EXPOSURE

- Regular board meetings clear minutes explaining rationale for decisions being made
- Early consultation with banks and creditors
- Maintain diligent financial records
- Keep a close eye on cash flow and record and diarise any post-dated cheques or guarantees
- Once in financial difficulty be wary of paying any creditors in preference to others
- Review all decisions in light of current Covid-19 situation
- Minute any specific issues that have arisen as a direct result of Covid-19
- If concerned about the financial viability of a Company, the directors must take all action to minimise the potential loss to the Company's creditors and take advice



EMPLOYMENT



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EMPLOYMENT ISSUES ARISING FROM COVID – 19

- MOHRE and the DIFC have announced similar measures in response to COVID-19. ADGM yet to make detailed measures.
- The measures announced by MOHRE and DIFC are designed to allow flexibility in the labour market so employers can re-shape their head count and costs for a temporary or permanent period.
- The measures are principally focussed on the expatriate labour force.

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- MOHRE (Cabinet Resolution 279 of 2020) has been effective since 26th March 2020 to provide a framework for employers and employees to put in place measures to deal with COVID-19. It applies to expatriate employees only:
 - WFH policy (subject to exemptions recently announced for 30% of work force and key sectors, which includes the financial sector)
 - Managing headcount and costs through:
 - Paid Leave
 - Unpaid Leave
 - Temporary Salary Reduction
 - Permanent Salary Reduction

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- Employers cannot use the Cabinet Resolution to force changes through rather, any variation to an employment contract requires employees' consent. A permanent salary reduction requires MOHRE consent. All amended contracts of employment must be filed with the MOHRE
- Introduction of a Virtual Labour Market (<https://careers.mohre.gov.ae>)
 - Register details of vacancies and to match these with employees
 - Employee can whilst on unpaid leave work for another employer (provided any housing benefits are paid by the original employer)

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- Within the DIFC Presidential Directive No. 4 of 2020 applies, effective since 21 April 2020
 - Introduces a concept of "**Emergency Period**" which expires on 31 July 2020 (subject to extension by the DIFC)
 - During this Emergency Period, an employer **may without the employee's consent** implement any of the following on 5 days' notice:
 - Reduced Working Hours
 - Vacation Leave
 - Leave without Pay
 - Reduce remuneration on a temporary basis
 - Reduce Workplace Access
 - Introduce Remote Working Conditions.

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- The Presidential Directive specifically dis-applies provisions of DIFC Labour law that obliged an amendment to an employment contract to be agreed (Article 14(3))
- Any employee suffering of COVID -19 or required to go into Quarantine shall not be treated as being on "sick leave" and is entitled to full pay (based on salary prior to any Emergency Period measures)
- The Presidential Directive dis-applies Articles 43 to 53 of the DIFC Labour Law relating to health and safety at the workplace whilst an Employee is working from home – so this alleviates some of the employer liability risks.

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- Post Termination Obligations of Employer:
 - Visa Cancellation may be deferred (provided health insurance is maintained)
 - Retail and Hotel sector employees dismissed must have their accommodation paid until visa is cancelled.
- DIFC Employee Database:
 - Similar principles as the "Virtual Market" – sharing of employee details (dismissed employees and surplus employees) to allow for employers and employees to be matched.
- ESG Protection
 - ESG is determined by reference to salary prior to 1 March, so no downside to ESG if employee salary is reduced during the Emergency Period
 - Transfer of ESG into the DEWS scheme shall be based on salary prior to 1 March, although contributions going forward will be at new salary

EMPLOYMENT ISSUES ARISING FROM COVID – 19

- Other Associated Measures by the DIFC
 - **Data & Privacy**
 - IT monitoring by employers is permitted provided employer can demonstrate this outweighs data privacy concerns
 - Collection of data from remote working systems is permitted for health and safety purposes or to share with authorities for legal purposes.
 - **Wrongful Trading Suspended**
 - Directors exempt from liability under the Insolvency Law from sanctions for "wrongful trading". This is to allow directors to avoid personal liability for decisions made in current uncertain trading conditions e.g. taking on more borrowing.

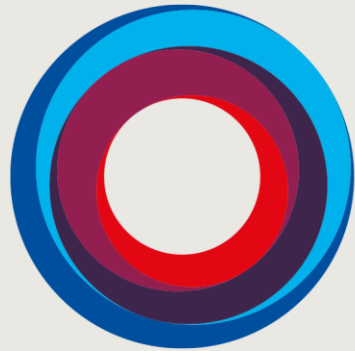
EMPLOYMENT ISSUES ARISING FROM COVID – 19

- ADGM has not issued specific COVID-19 measures
- Employer/Employee rely on the ADGM employment laws:
 - Consult employment contracts
 - Review HR manuals
 - Comply with ADGM law



QUESTIONS





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