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Legal Considerations for Projects in the Middle East, Part 2

In previous Client Alerts, the Curtis Middle East offices outlined the key provisions and practical considerations under the legal frameworks of the Kingdom of Saudi Arabia and the United Arab Emirates (the "UAE") (available here), as well as the Sultanate of Oman (available here), in light of the potential supply chain and project disruptions caused by the ongoing conflict in the Middle East. The UAE's legal landscape, however, is not limited to what was discussed in our previous Alert. In addition to its federal laws, the UAE includes two separate common law jurisdictions that operate independently: the Abu Dhabi Global Market (the "ADGM") and the Dubai International Financial Centre (the "DIFC"). Over the years, both have become major business hubs, with their own laws, regulations, and independent courts, the ADGM Courts and the DIFC Courts. Many parties affected by the current conflict may be subject to the laws of the ADGM and the DIFC. This Client Alert examines the positions under those laws.

Considerations Under the ADGM Law

In the ADGM, the common law of England and Wales applies unless there is a conflicting law. There is no stand-alone ADGM law addressing force majeure. Therefore, parties' rights and liabilities in the ADGM will be determined by the contract itself; in the absence of a contractual clause on force majeure, English common law principles will apply.

Thus, the first and most crucial question is whether the parties' contract contains a force majeure clause. If it does, the next question is whether the relevant event falls within its scope and if the affected party has fulfilled its conditions. In practice, disputes usually arise from the latter issue.

If the contract contains a force majeure clause, an ADGM Court is expected to apply it. Whether it releases the affected party from liability depends on the clause's language. For instance, a force majeure clause that requires an event to be "unforeseeable" may not free a party from liability if a court finds that the event was, in fact, foreseeable. Similarly, a clause that states an event must "prevent" performance may not exempt a party if the event did not make performance impossible. Courts in the ADGM usually set a high standard for such clauses, which is not met if performance becomes only more difficult, more costly, or less profitable.

An ADGM Court may also apply force majeure clauses narrowly in other respects. For instance, a party relying on the clause is usually expected to show not only that the relevant event falls within the clause, but that it caused the failure to perform. Such a party is also expected to demonstrate that it has taken reasonable steps to avoid or mitigate the event's effects. Therefore, parties should maintain evidence regarding any steps they have taken to mitigate the event's impact.

Furthermore, parties should carefully review their contracts to ensure compliance with any force majeure notice requirements. Failure to comply with such requirements could weaken a subsequent claim of force majeure and expose the affected party to losses suffered by the other party as a result of such failure.

In cases in which the contract does not contain a force majeure clause, or the relevant event does not fall within it, parties should consider whether the English law doctrine of frustration applies. Under this doctrine, frustration generally arises only in limited circumstances: where, through no fault of either party, a post-contract event renders performance impossible, illegal, or radically different from what the parties originally agreed. That is a high bar because courts usually require the event in question to be central to the contract, not attributable to either party, and not reasonably contemplated at the time of contracting. Crucially, frustration may not be available where the contract has already allocated the risk of the relevant event—in those circumstances, courts are likely to consider the parties as having contemplated the event.

Considerations Under the DIFC Law

Unlike the ADGM, the DIFC has expressly codified the concept of force majeure in Article 82 of the DIFC Contract Law (DIFC Law No. 6 of 2004). That Article provides a statutory framework for when non-performance may be excused.

Article 82 provides that a party may be excused from performing its contractual obligations where an event was beyond its control, and could not reasonably have been taken into account at the time of contracting, or its effects could not reasonably have been avoided or overcome. Thus, the DIFC requires more than mere disruption or inconvenience; the fact that performance has become more difficult, more expensive, or commercially unattractive will not necessarily be enough.

Importantly, Article 82 does not apply to payment obligations (Article 82(1)). A party will not typically be excused from making a payment merely because it has become more difficult to do so due to financial distress, market disruption, or related events. That distinction is likely to be especially important during times of regional uncertainty, when operational disruptions and liquidity pressures may occur.

In addition, Article 82 recognizes that some impediments may be temporary rather than permanent. The affected party can be excused from performance for as long as the temporary impediment continues, but only during that period (Article 82(2)).

Importantly, Article 82 imposes a notification obligation. A party that fails to perform must notify the other of the impediment and its effect within a reasonable time after it knew, or ought to have known, of the issue (Article 82(3)). If it fails to do so, it may become liable for any loss caused by the failure to provide timely notice, even if the underlying force majeure event would otherwise have excused performance. Parties

should not assume that a force majeure "speaks for itself." A prompt, clear, and properly documented notice is also often critical to preserving contractual protections. Therefore, parties should carefully consider their notice requirements and seek immediate legal advice if they believe that performing their obligations has been affected by a force majeure event.

While the DIFC law provides a clear statutory process for handling force majeure, the analysis remains fact-specific. Parties affected by the ongoing conflict should thoroughly review their contracts to assess their positions, particularly regarding causation, payment obligations, and notices.

Important Factors to Consider

In our previous Client Alert (available here), we provided a list of considerations for parties evaluating their positions in light of the current conflict. Most of those points equally apply to parties that are subject to the laws of the ADGM and the DIFC. However, for parties in the ADGM and DIFC, the following points require special attention:

- Prompt notice: Parties should notify their counterparties as soon as possible if they believe their obligations have been affected by the current conflict. Particular care should be taken to comply with contractual notice provisions and any applicable statutory notice requirements.

- Payment obligations: Parties should carefully review their agreements to determine whether they cover these obligations. As noted above, in the DIFC, a force majeure will not ordinarily excuse an obligation to pay money.

- Allocation of risk: Parties should also carefully review their agreements to determine whether they allocate risks and, if so, how. As noted above, such an allocation could impact any possible application of the English doctrine of frustration and should be considered in analyzing the parties' positions.

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