COVID-19 and Force Majeure: Dealing with the Ongoing Waves of COVID-19

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As countries continue to grapple with the ongoing effects of COVID-19, the effects of the ongoing waves on parties vary widely. There have been recent discussions on force majeure and international arbitration on the Blog: see here, here, and here. This article will address the following points in relation to four key jurisdictions, being the UAE, Korea, Australia and the UK:

- the current COVID-19 situation;
- a recap of the law of force majeure; and
- force majeure issues associated with a second wave of COVID-19.

The Current Situation

The COVID-19 situation has changed repeatedly throughout 2020, with some having passed the first wave but not yet experienced a second wave, and some entering their second (or further) wave(s). Generally, the following is occurring in each jurisdiction:

- **Australia**: Parts of Australia experienced a second wave of COVID-19,

largely linked to issues with the return traveller quarantine system. The "second wave delivered harsh lessons about the role of borders and importance of isolating international arrivals". Hundreds of new cases were being reported every day after 12 weeks of a flattening curve but have been subsiding following lockdown measures set by each state (degrees of lockdown differ by state).

- **UK**: The UK is experiencing a second wave of COVID-19, and the government introduced a new, three-tiered set of restrictions (first tier: social distancing, second tier: curfews on hospitality venues and a ban on meetings between households, third tier: stricter lockdown measures) as the alert level has been raised to four out of the government's five-tier alert system. The government is also actively reviewing shielding policy to protect the vulnerable.
- **Korea**: South Korea was widely praised for its crisis response to COVID-19 earlier in 2020. In August, the country experienced a second wave of COVID-19 but the government immediately imposed tighter restrictions that have brought down case numbers to two-digit numbers.
- **UAE**: Certain parts of the UAE have been experiencing a second wave of COVID-19 as they see resurges in cases since September. In response, they have increased testing and introduced a new set of safety guidelines to curb the recent spread. From 1 August 2020, a COVID-19 test became mandatory for everyone arriving through the country's airports, including citizens, residents, tourists and transit passengers, regardless of the country they are flying in from.

The Law

- **UK and Australia**: In the case of common law jurisdictions such as the UK and Australia, force majeure is a solely contractual concept where the scope and application depends on how the particular force majeure clause is drafted. In broad terms, force majeure provisions will typically excuse a party from performing their obligations under a contract if the party's ability to perform the contract is affected by circumstances outside their control. Force majeure provisions will also typically include the requirement that the party could not have avoided the impact of the event itself or its consequences by taking reasonable steps, and that the party

claiming relief has satisfied any notification requirements in the contract. These provisions often impose express, ongoing obligations on parties to take reasonable steps (sometimes called "best endeavours" or "reasonable endeavours") to mitigate the impact of the force majeure event.

- **Korea**: Korean law does not provide a statutory definition for force majeure. However, the Supreme Court 2008 Da 15940, 15957 Decision has said in order to gain force majeure relief, the events must be outside of the party's control, and the party, despite having made reasonable efforts, was not able to foresee or prevent the event. The effect of force majeure under Korean law is to limit or exempt a party from liability for contractual breach. However, it is difficult to claim force majeure in the Korean courts as the Korean courts apply a very strict standard to events which constitute force majeure. For example, a drop in the number of tourists due to the MERS outbreak in 2015 was not accepted as a force majeure event (*see* Jeju District Court Decision 2016 GaHap 192 dated 21 July 2016). Unlike the common law jurisdictions discussed above, a party is not under any ongoing obligation to take reasonable steps to mitigate the impact of the force majeure event.
- **UAE**: UAE law does not provide a statutory definition for force majeure. However, Article 472 of the UAE Civil Code (Federal Law No. 5 of 1985, as amended by Federal Law No. 1 of 1987) states that an obligation is extinguished if the debtor establishes that its performance has become impossible by reason of causes beyond their control. Further, the Dubai Court of Cassation (*see* Dubai Court of Cassation Case No. 188 of 2009, dated 18 October 2009) has stated that in order for a party to rely on force majeure, the event "*should be a result of an unforeseen event … that could not have been guarded against or prevented*". The effect of a force majeure event under UAE law is to generally exempt a party from liability for contractual breach. Article 287 of the Civil Code states that if a party can show that it has suffered loss arising out of a "… *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*". Article 386 also states that an obligor is not liable to pay compensation where it can prove that it was impossible to perform the contract because of the external unrelated event. Furthermore, "*if the contract is binding on both parties, the corresponding obligation of the*

other party (which may not be impossible to perform) will likewise come to an end, and the contract will be automatically rescinded … by operation of law" (*see* Union Supreme Court, 827/Judicial Year 24 dated 21 February 2006). Much like Korean law, UAE law does not impose any obligations on a party to take reasonable steps to mitigate the impact of the force majeure event. Moreover, there is no reference to any standard of "reasonability", but only that the event in question could not have been guarded against or prevented.

In broad terms, the following are required to gain force majeure relief from performance:

- an event occurs which fits the "force majeure" definition in the contract (which often includes a list of examples);
- the event is beyond a party's reasonable control;
- the event affects the ability of the party to perform the contract;
- the party has taken reasonable steps to avoid or overcome the event (unless negated by the contract's wording, case law suggests that proof that non-performance was due to circumstances beyond the party's control is required); and
- in the two common law jurisdictions, there will also usually be a provision stipulating that the party must have taken reasonable steps to mitigate the impact of the event.

The Issues

There are therefore two main points of consideration:

1. ***Whether the event was outside the party's reasonable control, and whether the party took reasonable steps to avoid or overcome it***

It is clear that a party cannot control the response of governments to COVID-19. As the failure to perform must be caused by the force majeure event in order to give rise to relief, in order to benefit from force majeure relief, the affected party must show that it took reasonable steps but could not reasonably have protected against the impact of a second or further wave and associated government

restrictions. Given that a second or further wave is a current or anticipated risk, to what extent will a party be expected to have taken reasonable steps to avoid any second or further wave from impacting its contractual performance? This will be considered against what is reasonable in the circumstances. For example:

- the extent of current restrictions, how the restrictions are eased, whether further restrictions are imposed for a subsequent wave, and the amount of time between the restrictions (i.e. what could be achieved in the intervening period);
- the availability of resources and materials required to fulfil the contract, and whether it is possible to find alternate supplies; and
- whether re-scheduling maintenance, hiring or training more staff, putting different work arrangements into practice, or other activities required to fulfil the contract are possible prior to subsequent waves.

A relevant example regarding the issue of foreseeability is the case of *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC). In this case, CDs and DVDs owned by the claimant were being stored in a warehouse in London owned and run by the defendant. During a period of rioting in London in August 2011, a group gained access to the warehouse and lit a fire that destroyed the building. While the riots were unforeseen, the judge found that the defendant had not taken reasonable precaution against break-in and fire damage, and it was therefore unable to rely on the force majeure clause.

2. ***Whether reasonable efforts were made to mitigate the effects of the event***

While Korean and UAE law may not strictly require this, unlike the common law of the UK and Australia, it may nevertheless be sound business practice to seek to mitigate the effects of a force majeure event.

While individual circumstances must always be borne in mind, when considering a second or further wave of COVID-19, the same response as to the first outbreak of COVID-19 may not be sufficient, and it may be harder to meet the force majeure requirements because:

- the party may be expected to respond more quickly given previous

experience of the first wave and an opportunity to implement changes based on that experience;

- the appropriate response to the second or further wave may actually be different, even when compared to an ideal response to the first wave; and
- the contract may contain the right for one or both parties to terminate for prolonged force majeure. A question may arise as to whether a further wave is considered a part of the same force majeure event for purposes of termination.

The Kluwer Arbitration Blog is closely following the impact of COVID-19 on the international arbitration community, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.