

# A litigation revolution?

Rebecca Kelly and Katherine Seager of Morgan Lewis offer their thoughts on the future of litigation trends post COVID-19 in the Middle East region.

Initial COVID-19 predictions were that world-wide disruptions caused by the pandemic would have an immediate effect on the ability of contracting parties to honor their obligations, leading to endless breach of contract and civil damages disputes across a myriad of sectors.

The majority of post-COVID-19 cross-border litigation cases have been either a disruption in a supply chain triggering an alleged inability to perform, failure to deliver goods and or services due to government interventions, and allegations

of party's failure to adequately mitigate against a pandemic. At the outset, the issue most discussed was whether COVID-19 would of itself be considered a force majeure event. With hindsight, we can analyse how and why these claims may have been avoided, but this article looks at a few of the major trends and highlight changes in the practice that may remain part of managing disputes in the future.

## LITIGATION ISSUES

### Mitigation against COVID-19

The purpose of a force majeure clause is to



protect contracting parties from breach of contract exposure if it is unable to perform obligations because of certain events that are outside the parties' control. In the absence of a UAE statutory definition of force majeure or even a force majeure event in English Law, the parties have the freedom to mutually agree in their contracts about what may amount to a force majeure event and also agree what the consequences will be if such an event happens. Before COVID-19, most contracts did not address whether or not a pandemic constituted a force majeure event. The substantial disruptions caused by COVID-19 prevented many parties from performing under their agreements, with little contractual guidance concerning the applicability of any force majeure clauses.

International supply chains were especially vulnerable during COVID-19. The problem was exacerbated through numerous government border closures, mandatory flight suspensions and indeterminate periods of lock-down, which all led to an inability to move products, both locally and internationally.

Assessing whether COVID-19 is a force majeure event in a particular contract has been uncertain where there is no express contractual basis stipulating a pandemic, or similar, would constitute a triggering event. Therefore, parties seeking to suspend or terminate contractual obligations without such express stipulation could risk having their actions being overturned in any subsequent proceedings or being liable for any award for damages in instances of unlawful termination.

#### **Data privacy Regulations and data collection**

Throughout the GCC, there have been some substantial legislative amendments concerning data privacy and this has changed the manner in which litigants access, transfer and share data throughout both the GCC and internationally. As a result of COVID-19, one of the immediate issues which litigators faced was securing information in jurisdictions where they would normally either attend personally to take witness statements, collate and review evidence, and access and collect data in jurisdictions where data privacy prevented or limited cross border transfer of the data. During COVID-19, all data and evidence

collection had to be online as opposed to in person. Interviewing witnesses, taking statements, briefing counsel, updating clients, party conferences all moved from a largely personal experience to virtual. Both DIFC and ADGM updated their Data Privacy regulations over the past 12 months, and we are expecting a stand-alone Data Privacy Regulation for the UAE in the next 12 months, so data collection changes will continue to evolve.

#### **Employer health and safety considerations**

The spread of COVID-19 led to legislation requiring global companies, through various government issued guidelines, to better understand obligations to care for their employees both locally and in other jurisdictions and implement immediate changes to workplaces to ensure their safety.

Employers developed flexibility to respond to the ever-changing government mandates in order to respond to a dynamic risk environment in their workforce. What may have been a sufficient response in the early phases of the pandemic developed into more aggressive social distancing, identification of at-risk individuals, isolation and quarantine of infected employees, and requirements to work remotely where possible. We have not seen the breadth of potential claims that may arise against those employers who did not aggressively protect their employees, and we also have not seen the end date to the possible mental and physical toll the pandemic has had on people. Given the potential for compensation claims, employers could be at risk for claims relating to the spread of infection in the workplace, and/or overworking employees leading to injury and injuries arising from working from home. This is definitely an area where employers are well advised to evaluate their policies, communicate with their employees, and adequately respond to the changing workplace.

#### **PROCEDURAL CHANGES TO STAY Implementation of remote hearings**

Prior to 2020, remote hearings were extremely rare and usually permissible only with leave from the Court and, at the very least, consent from all of the parties. In this post-COVID-19 dispute landscape, both

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international and local courts, mediation centers, and arbitrators have adapted to conduct hearings virtually. This has allowed more flexibility with timetabling hearings, access to counsel and witnesses and provided for what many would argue a far more expedited and efficient means of accessing justice.

In the UAE, the arrangement of such remote hearings was undertaken with commendable urgency with both on shore Emirate and Federal Courts, as well as both the DIFC and ADGM Courts announcing the closure of the physical premises and moving virtually from as early mid-March 2020. All hearings from that day forward, were conducted virtually. The benefits of virtual, well-orchestrated, proceedings have been seen by the seamlessness with which international parties can now fully participate in proceedings and in any decision-making processes. In the UAE, this has been implemented by the remote process of notarising powers of attorney. The inability to attend the Notary Public in-person was mitigated by parties adding provisions in the documentation stating the agreement to use of notarisation via a government-approved application. A Notary Public representative would the video call the parties using the approved application, and officially notarise the document.

Some jurisdictions continue to impose restrictions on the taking of testimony remotely and counsel are urged to consider any applicable local laws that may impose restrictions.

All litigators and counsel should consider the possible use of remote hearings for their civil disputes. In many instances, this will provide for speed and efficiency, although the facts and circumstances of some disputes may warrant in person hearings when available.

In addition to embracing the remote hearing landscape, it would be beneficial for all cross-border litigants to have access to a universally acceptable means of e-service of court process, as can be done through most arbitration centers. The inability to arrange through various government departments service of documents has created significant delays; legal changes including the implementation of a cross border treaty, may be the only way to overcome the many issues cross border litigants face in this context. As commerce continues to globalise, there is a distinct need for a global standard for the service of process.

## CONCLUSION

COVID-19 continues as a major business disruptor, and we therefore cannot envisage any decrease in COVID-19-related litigation soon. What is clear to all litigation practitioners, however, is the need to rapidly adapt to change, including the need to embrace and become adept at remote advocacy. Parties must also now specifically consider how to address pandemic events in their future agreements.

Both local and cross-border disputes will continue so long as products and services remain undelivered, or delayed, and health concerns remain unanswered. It is possible that the situation may change once restrictions are lifted and COVID-19 truly becomes a thing of the past, but if the current litigation landscape is “the new normal,” then we may have witnessed one of the greatest litigation revolutions in terms of how we may conduct proceedings in the future. 🏛️



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