



UAE Employment and Contract Law Issues Corona Crisis

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Introduction

The COVID-19 outbreak is causing major disruption across industries and geographies.

As a consequence, employers all over the world review and adjust their business continuity plans and, in most sectors, take immediate measures to respond to the impaired commercial activity.

In this webinar we will cover two of the most pressing issues, namely **managing your workforce** and **impact on valid contracts**.

Workforce Management

- **Assess impacts** of temporary closure or business slump; outlook and need to manage employment costs
- **Review alternative measures** to redundancies in order to protect business and talent (including hiring freezes, withdrawing offers of employment, reducing temporary work, cutting salaries, delaying/freezing salary increases, freezing paid overtime, asking employees to work longer hours etc);
- If nothing else helps: **identify potential redundancies.**

Workforce Management

- Carefully review the **legal issues** triggered by the measures listed above: *assess what can legally and factually be done.*
- **Monitoring** support and legal measures as announced by public authorities as these might (temporarily) amend regular labour law and/or impose restrictions on restructuring options in return for financial support to businesses.

Restructuring of Workforce – Legal Background UAE

- **UAE Labour Law, Federal Law No. 8**
- **Resolution 279/2020 of the Ministry of Human Resources and Emiratization (“MOHRE”)**

MOHRE has issued Ministerial Resolution No. 279 of 2020 ([Link](#)) containing guidance for onshore based employers as to employment related measures they can take in response to the global Covid-19 outbreak. The Resolution is effective 26 March 2020. The Resolution aims to protect non-UAE national employees from termination of their employment.

Resolution 279/2020

- The Resolution expressly applies to **onshore private sector companies** regulated by MOHRE. However, it is to be expected that the rules will be also followed and applied in free zones (which should be confirmed in advance with the FZ authority).
- Importantly, the provisions of the Resolution only apply to **non-UAE national employees**, who are not afforded the same protections as UAE nationals under existing UAE legislation.

Resolution 279/2020

- Prerequisite for any measures taken pursuant to the Resolution is that the employer's **business is in fact negatively affected** by the **crisis** and/or the **precautionary measures** taken by the authorities to curb the spread of COVID-19.
- It defines a **set of measures** that may "**gradually**" be taken by an employer.
- The Resolution does not define such gradual application (timeframe, reasons for moving on to the next measure).

Resolution 279/2020

However, the Resolution defines the order of the measures that may be taken:

1. **Force** employee to work from home (implementation of a remote working system).
2. **Force** employee to take paid leave.
3. **Seek an agreement** with the employee to take an unpaid leave.
4. **Seek an agreement** with the employee to accept a temporary salary decrease.
5. **Seek an agreement** with the employee to accept a permanent salary decrease.

Step 1: Home Working

1. Review existing **home-working policies** and align them with the latest guidances/regulations.
 2. Provide additional **equipment and hardware**.
 3. Consider what to do/say about **benefits** that are not accessible during home working (e.g. free meals, access to gym etc).
 4. Consider **extra support** for those with **family** (e.g. young children).
 5. Clearly differentiate between extended (un)paid leave and home working.
 6. Address **overtime** (allowed or not, tracking).
 7. Consider, determine and document if a job simply cannot be done remotely.
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Step 2: Paid Leave

1. According to Article 76 of the UAE Labour Law may, at their discretion, **specify the dates on which employees must utilise their annual leave**, without the need for employee consent.
2. The Resolution only confirms that Article 76 may be invoked.
3. Employers may therefore fully utilise any accrued holidays to gain time and to reduce a potential liability, as unused holidays must be paid-out in case of a redundancy.
4. Of course, such utilisation of annual leave may result in employees not having enough accrued leave remaining e.g. to visit families overseas once travel restrictions are lifted but this is likely a secondary concern.

Step 3: Unpaid Leave

1. The Resolution allows employers to **mutually agree** on a period of **unpaid leave** with employees. This at least is a welcome introduction, as unpaid leave is not expressly recognized under UAE Labour Law and any such agreements previously carried a degree of uncertainty.
2. Both, employers and employees, may wish to utilise this option as an alternative to a dismissal.
3. Also, employees may thereby retain medical insurance while in UAE territory (i.e. at least for as long as current travel restrictions are in force).
4. In any case, at least basic medical care should be provided.

Step 4: Temporary Salary Reduction

1. The Resolution permits an **agreement** between employers and employees to **reduce salary temporarily**.
2. Employee consent is mandatory.
3. The Resolution outlines a process for the lawful implementation which requires, specifically, execution of a “temporary supplement” to the MOHRE employment contract.
4. The supplement must provide for its expiry either (a) at the end of a specified term; or (b) when the Resolution itself ceases to be enforced (whichever comes first). The supplement may be renewed prior to its expiration date if the employee consents.

Step 5: Permanent Salary Reduction

1. As last resort other than a dismissal, the Resolution permits a **permanent salary reduction**.
2. The permanent reduction must be **agreed** in principle between the employer and the employee.
3. Effectiveness of such agreement further requires (i) an **application to MOHRE** for an amendment of the registered employment contract, and (ii) corresponding **approval** and **registration**.

At Last: Redundancies I

1. The Resolution's catalogue of permitted measures **does not specifically include redundancies.**
2. However, it **recognises the concept of redundancy** in principle by providing procedural guidance where an employer identifies a 'surplus' of non-UAE national employees.
3. This is an interesting development as the concept of redundancies was to date not recognised by the UAE authorities.

At Last: Redundancies II

Under UAE Labour Law an unlimited term employment contract may unilaterally only be (legitimately) dismissed:

- by notice pursuant to the employment contract; and
- provided the employer can demonstrate a specific **valid cause** which must be connected to the employee's work (not e.g. economic considerations); or in accordance with the provisions of Article 120 of the UAE Labour Law which provides a list of instances where an individual may be summarily dismissed (for cause).

Any other unilateral termination may still be effective but is likely considered as **arbitrary** and triggers **damage claims** of the employee of up to three months' salary.

At Last: Redundancies III

1. The Resolution does not introduce any relief from existing claims of dismissed employees under UAE Labour Law.
 2. In our view, a dismissed employee may therefore, claim for all usual termination payments and benefits:
 - compensation in lieu of notice: UAE Labour Law provides for a minimum of 30 days notice which cannot be waived even with the consent of the employee;
 - accrued benefits (such as unutilised leave);
 - provided the employee has not participated in a company pension scheme, end of service benefit (severance);
 - repatriation if the employee does not find alternative employment.
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At Last: Redundancies IV

In addition to the regular end of service claims, the Resolution provides for the following additional obligations:

1. Any “surplus” employee, for which none of the other measures from the catalogue is feasible, must be offered to be registered with the MOHRE’s portal for jobseekers (Virtual Labour Market).
2. Employers are required to continue honouring existing obligations with regard to accommodation and all other entitlements (other than salary, e.g. housing or housing allowance) until the earlier of (i) the employee leaving the UAE; or (b) the employee obtaining alternative employment.

At Last: Redundancies V

1. As a result, implementing redundancies during the crisis are made difficult.
2. Not only does the Resolution not introduce any relief from end of service claims, it increases the threshold by imposing additional obligations, e.g. housing.
3. On the other side, it is possible that Labour courts would at least restrict the entitlement of a damage claim due to arbitrary dismissal, if an employer may demonstrate that all other measures from the catalogue were duly considered but not feasible and/or rejected by the employee.

Put in Practice – Step Plan

1. General assessment of impact of crisis on workforce, outlook, cash-flow.
 2. Assess for each employee if any of the measures of the catalogue suffice to retain the employee.
 3. Gain time and decrease liability for end of service benefits by determining annual leave.
 4. For employees for which home-office and/or paid leave are not sufficient: seek agreement for unpaid leave, temporary or permanent salary reduction.
 5. Redundancies should be carefully considered and planned.
 6. Practically, the outlook of a redundancy can nevertheless be used to achieve a mutual termination: even a reduced one-time payment may be more beneficial as a potential higher claim after proceedings at the Labour Court.
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PART II - Consequences for Contracts

- 1. What are the possible effects of the crisis on valid contracts?**
2. Many businesses are, or will soon be, facing problems by customers to fulfil their contracts or to fulfil contracts themselves.
3. Before evaluating the legal consequences and potential measures, there are a number of factual questions that every business should be raising right now.

Factual Assessment

1. Is contract performance impeded?
2. Is performance **impossible** or only **difficult**?
3. Does the contract include an explicit **force majeure provision** (which need not be labelled 'force majeure') and, if so, is the impediment caught by that provision?
4. Does the contract require **notice** of a force majeure event?
5. How is the impediment measured, how long will it last and when can it reasonably be said to have ended?
6. Is the impediment due to an event under one party's control? Could one party reasonably have mitigated or avoided the consequences of non-performance altogether?

Factual Assessment

7. Can the impediment be dealt with by mutual amendments to the contract?
8. Whether or not the contract contains a force majeure clause, what is the governing law of the contract and what does that law say about force majeure or similar doctrines?
9. Where a business is entering into a new contract, how does it intend to allocate the risk of non-performance caused by the pandemic?

Force Majeure under UAE Law

1. Force Majeure, or an “Act of God”, is an uncontrollable event that renders the performance of a contract partially or entirely impossible, not just difficult.
2. Impossible: e.g. hotel accommodation or flights in times of lockdown and grounding of airplanes.
3. Difficult: performance of a supply contract “just” because a business runs out of money. As long as the business has, or can obtain, funding to fulfil the contract, it is not impossible.

Force Majeure under UAE Law

1. The force majeure doctrine has been applied to earthquakes, volcanic eruptions, floods, heat waves and other unforeseeable natural-caused incidents as well as to wars, riots, chaos, slowdown and unexpected legislation.
2. Under UAE law, force majeure may be relied upon by a party to a contract, even if the contract does not specifically addresses force majeure.
3. Article 273 of the UAE Civil Code: a bilateral contract shall be ipso facto **rescinded**, if a **force majeure event** makes the performance **impossible**. If the impossibility is partial, the partially impossible part shall be extinguished.

Force Majeure under UAE Law

1. UAE law does not provide for an exhaustive list of force majeure events.
 2. However, force majeure may consist on a physical or legal (statutory/legislative) impossibility.
 3. Physical impossibility: natural disasters.
 4. Legal impossibility: a change of law and expropriation for public interest in a sale contract.
 5. The lockdown rules may possibly be subsumed under both types.
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Force Majeure under UAE Law

1. Contract performance must become impossible due to an event that falls beyond the affected party's control.
 2. The force majeure event must further be **unforeseeable and unavoidable**. Therefore, parties of contracts concluded e.g. in February 2020 may not rely on force majeure (the WHO informed about the Wuhan outbreak on 31 December 2019).
 3. The corona crisis may fulfil these criteria in principle but also the available mitigation measures must be made impossible.
 4. Once an event qualifies as force majeure, the contract is deemed rescinded by law, and the parties revert to their pre-contractual positions, and if possible, damages are to be awarded to restore the parties' positions.
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Force Majeure under UAE Law

1. So far, UAE courts have been interpreting force majeure clauses very narrowly and restrictively.
2. It is to be expected that reliance on force majeure under the COVID-19 crisis will see a rise but it remains to be seen if such claims are successful.

Hardship under UAE Law

1. Instead of relying on force majeure, contractors may also incur Article 249 of the Civil Code.
2. If exceptional circumstances of a public nature that could not have been foreseen occur, as a result of which performance of a contract becomes oppressive for a party, but not necessarily impossible, the judge (or arbitral tribunal in an arbitration) has discretion, after weighing the interests of each party, to reduce the obligation to a reasonable level if justice requires it.
3. It is necessary for a party to commence court or arbitral proceedings if it seeks to obtain relief under Article 249.

Hardship under UAE Law

1. Article 249, which is equivalent to the hardship doctrine available in other jurisdictions, does not result in the termination but an adaptation of the contract.
2. In such event, Article 249 of the UAE Civil Code grants the judge a wide discretionary power to amend the parties' obligations to reset the contract economic balance, and the contract shall remain valid.

Put in Practice – Step Plan

1. Assess if contract performance is **impossible** or **difficult** (consider economic outlook, degree and measurement of impediment, etc).
 2. Assess all available mitigating measures.
 3. Consider to what degree the event and/or the mitigating are in or outside my **control**.
 4. Consider if crisis was unforeseeable at the time of contract execution.
 5. Check eventual **force majeure, material adverse change or hardship provisions**.
 6. Ask for legal advice on potential reliance on force majeure or Article 249.
 7. Based on the assessment: start negotiations with contract partner.
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Thank you very much for your attention!

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