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Protecting Business In The Face Of Unrest

Law360, New York (April 19, 2011) -- In the past few months, the Middle East and North Africa have witnessed a period of unprecedented political, economic and social change. As a result of these changes, it has become difficult, if not temporarily impossible, to do business in certain countries.

It is expected that there will be an alarming increase in the number of business interruptions and disputes arising due to nonpayment and arbitrary nonhonoring of contracts that may arise in the region due to the recent events that have unfolded. For companies doing business in the region, there are already a number of immediate practical difficulties to be faced.

This raises the question of what steps companies operating in the region should be taking to mitigate their risks. To answer this question, companies need to begin by examining the terms of their existing contracts and the applicable law, and evaluate their position against the events and circumstances affecting them in the region. In this article, we consider some of the legal strategies that companies should consider to protect their ongoing business operations in the region.

Review of Contracts

The starting point for any company encountering difficulties in meeting its contractual obligations because of regional unrest is the wording of the agreement itself. Most importantly, parties should check whether their contracts contain force majeure provisions.

Indeed, force majeure clauses are especially important in light of recent events. Typically, force majeure clauses excuse nonperformance or delay for the period in which certain defined conditions exist. Whether it is an energy supply agreement or construction contract, parties will be looking at these force majeure clauses if performance is prevented or inhibited.

Where a contract includes a force majeure clause, parties may not be liable for their obligations in extraordinary events or circumstances beyond their control. If the contract does contain a force majeure clause, it is necessary to consider whether it covers the particular circumstances that are actually preventing performance. These circumstances may include difficulties in construction, transport problems, absence of workforce or government-imposed curfews. Whether any of these circumstances falls within the scope of a force majeure provision will depend largely on its specific terms.

The provisions of relevant law should also be considered as they may supplement or override the force majeure provisions in certain circumstances. Such considerations will be specific to each jurisdiction but a number of jurisdictions within the Middle East and North Africa have legal provisions that operate in this way. Due to the absence of a doctrine of binding precedent in such jurisdictions, it remains difficult to predict with absolute certainty how a court would address provisions of this kind.

That said, subject to generally accepted principles of law such as reasonableness and good faith which apply in a number of countries, such provisions appear to give courts the ability to declare a contract as canceled upon a force majeure event. A number of the legal regimes in the Middle East include principles which are similar to common law doctrines of frustration and impossibility

and have the effect of excusing a defaulting party from performance in certain circumstances.

If there is no contract, or the contract is silent on these matters, one must consider how the law applicable to the commercial arrangement would address such matters. In all instances legal advice should be sought to avoid the possibility of prejudicing the company's position. We are informing our clients in the region to review their contracting strategies and their contract templates to ensure they meet the challenges of the new environments in which they are conducting business.

Managing Disputes

The increase and magnitude of civil unrest seen in the last months was largely unanticipated. The civil unrest has seriously affected many foreign companies working in these regions. Many companies have seen their property damaged, stolen or destroyed, and have also evacuated their personnel from these countries. The affected companies should seek legal advice to ensure that they have taken the appropriate steps under their respective contracts and applicable law to protect their rights and obligations.

How a party responds to its business counterpart's failure to comply with its contractual obligations or to its own inability to meet contractual obligations is very important, especially in the midst of unexpected business interruption (such as a government-imposed curfew). Such communications are likely to have a significant impact on whether a dispute will arise and also whether the party's position is protected or reserved in that instance.

A party can jeopardize its position inadvertently if it does not obtain timely legal advice regarding its rights and obligations in such instances. International companies and citizens should also seek legal advice on bilateral treaties to give certain protections and benefits to investments made by them in these regions. These treaties, commonly known as Bilateral Investment Treaties or Multilateral Investment Treaties, offer foreign investors directly enforceable guarantees against government expropriation and other forms of unfair government taking and intervention, such as unfair taxation and discriminatory administrative treatment.

Some scenarios may also give rise to the need to take legal action against governmental bodies. Such bodies may be protected by sovereign immunity, unless immunity is waived and waiver is permitted by local legislation. For example, foreign citizens can target U.S. companies in lawsuits under the U.S. Alien Tort Claims Act. In order to avoid such liabilities, foreign companies conducting business in these regions should seek legal advice to manage all phases of crisis situations.

Insurance

For international companies that are conducting businesses in the region, it may also be important to consider the possibility of revising insurance arrangements to ensure they have adequate cover should similar events occur in the future.

It is also important to consider the provisions of any applicable insurance policies such as those concerning business interruption or professional indemnity. In an event of business interruption and in order to gain the benefit from the protection given by the policy, we often advise our clients to make a timely notification to insurers to gain the benefit from the protection given by the policy and to ensure compliance with all policy conditions in that regard. Failure to do so may result in a lack of coverage and consequential financial losses.

Insurers have also been reviewing their policies to safeguard their interests since the uprising in the region began. Close attention should be paid to the law and jurisdiction clauses governing the policy. In particular, if the policy refers disputes to arbitration, insurers may have difficulty enforcing their awards because some of countries, for example Libya, have not acceded to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and therefore all arbitration awards must be approved by the Libyan courts before they can be enforced. Enforcing arbitral awards in such cases may be costly, complex and time consuming, with no guarantee of success.

It is also important for companies to be clear that no country is ultimately immune from the unrest seen in recent months. Even countries that are now classified as low-risk regions are also prone to political upheaval. Foreign companies should not only continue to monitor events but also take this opportunity to think hard about their potential exposure not only in regions experiencing civil unrest currently, but also in other regions where coverage is currently more easily available and premiums are comparatively more reasonable.

Protection of Employees

For many companies the protection of employees and their families is the paramount concern upon the occurrence or threat of civil unrest such as we have seen in the Middle East and North Africa recently. However, businesses should be careful to ensure that both their legal and commercial position is protected with respect to business interruption, and also to ensure that they do not, through their actions, leave themselves open to potential claims.

From a safety and security perspective, political unrest poses potentially catastrophic problems. There can be unpredictable security situations affecting companies and citizens of foreign countries. Foreign companies should ensure that procedures are in place in the event that an employee gets into any difficulties such as imprisonment while working abroad.

Employment laws and legal obligations vary greatly across jurisdictions. Most jurisdictions, however, impose requirements upon employers to maintain a safe workplace. This duty can extend beyond the physical confines of the workplace and, in the case of business travel, require a different risk assessment and management approach than that for the typical workplace.

When facing an unexpected political crisis or natural disaster, employers should be ready with protocols for a variety of response scenarios: evacuation, partial shutdowns, repatriation and alterations to working hours. In the event that an employee is imprisoned or dies while working abroad, procedures should be put in place for repatriation and to deal with the unfortunate situation.

Risk and Compliance

It is expected that the current political situation in the region is likely to result in an upsurge in the laundering of corrupt or looted funds to other countries. A heightened risk specifically for all regulated companies is the flow of illegal funds from countries currently experiencing unrest.

In particular, companies need to be vigilant in enhancing due diligence procedures for politically exposed persons, close associates or family or legal structures owned or controlled by politically exposed persons, ousted regime leaders and other public officials.

Companies need to remain abreast of announcements from the U.N. and international regulators and ensure their practices are exceptionally robust. Steps need to be taken not just for new businesses but also for existing ones. Companies should be particularly aware of the risks of not just the laundering of corrupt funds but also of not having robust systems in place to ensure compliance.

A case in point is the recent ruling wherein the Dubai Financial Services Authority, the regulator of the Dubai International Financial Centre, censured Saxo Bank Dubai Ltd. for breaching anti-money laundering rules and systems.

Conclusion

While our clients have shown continued interest in conducting business in the region, companies should be careful to ensure that their legal and commercial position is protected, especially when faced with business interruption. It is difficult to predict how current events in the region will unfold. Past experience indicates that international companies may be able to resolve their disputes and continue operating in the region.

It is also expected that there will be many opportunities in the future for companies willing to invest in the region. Jurisdictions such as Dubai have proven time and again to be stable havens in times of political unrest elsewhere.

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