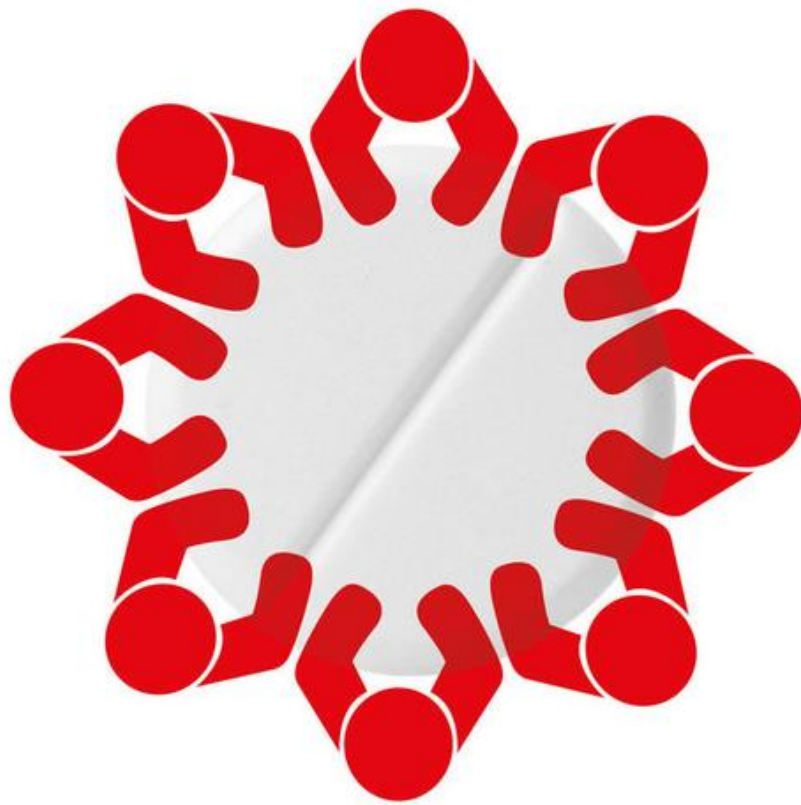


Keeping you up to date on COVID-19

A comprehensive multi-jurisdictional
analysis



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1. Introductory remarks

On 11 March 2020, the World Health Organisation officially declared the coronavirus (“**COVID-19**”) a global pandemic.

Unsurprisingly, the health, economic and legal ramifications of COVID-19, though likely still in its infancy stages, have led to widespread disruptions which have hindered businesses from conducting their day-to-day activities, and significantly impeded their ability to meet contractual obligations.

Accordingly, at the forefront of all of legal queries in the context of COVID-19, is whether parties can rely on Force Majeure (“**Force Majeure**”) provisions of law to obtain relief from COVID-19 consequences in a contractual setting.

This note provides an overview of:

- the measures enacted by the different governments in the jurisdictions within which we operate, namely the United Arab Emirates, Iraq, Jordan, Qatar, and KSA
- the legal framework governing Force Majeure, and Emergency Circumstances (“**Emergency Circumstances**”) in these jurisdictions
- alternative avenues for relief, where a claim for Force Majeure is unsuccessful



2. Measures enacted by governments around the region to date

United Arab Emirates

On 26 March 2020, the UAE Ministry of Human Resources and Emiratization (MoHRE) issued a decree requiring private sector entities to adapt to remote working, with only the minimum amount of staff necessary being physically present (to a maximum of 30%) in offices. Remote working for the private sector (save for a few exceptions) is now in place for two weeks, until 9 April 2020 (subject to further notice).

Movement around the UAE is also currently limited, in keeping with the country wide sanitisation programme.

Dubai

On 17 March 2020, the Dubai Courts have issued Decision No 30 of 2020, postponing all the hearings before the Court of First Instance, Court of Appeal, and Court of Cassation, scheduled from 22 March 2020, to resume starting 16 April 2020.

Decisions scheduled to be issued during this period will be filed online, and will not be affected.

The Court of Urgent Matters remains open for all applications/hearings and will proceed on remote basis, using the Court's smart applications and online platform.

On 19 March 2020, Dubai's Chief Public Prosecutor issued a decision:

- releasing, on bail and temporarily, all persons held for misdemeanours (except for DUI and vehicular manslaughter cases). Those released will be allowed to retain their passports but will remain subject to a travel ban – to be reviewed on 20 April 2020 onwards, subject to further notice
- postponing all investigative hearings held in relation to persons accused of misdemeanours until after 20 April 2020
- postponing all 1 day hearings from 22 March 2020 until 16 April 2020

On 24 March 2020, the Head of the First Instance Criminal Courts has issued a resolution number 7 of 2020 to postpone the criminal cases before the first instance court till after 16 April 2020.

Abu Dhabi

The Abu Dhabi Courts are now operating on a remote basis, with submissions made via their smart applications and online platforms.

Amongst other measures adopted in line with the latest developments relating to COVID-19, the Abu Dhabi Judicial Department has announced a two month suspension for the execution procedures for civil and commercial execution cases. A two month suspension is also placed on all execution measures for civil cases currently active; this includes debtor imprisonment, bank account attachments, as well as the seizure of vehicles, stocks and real estate.

Criminal cases before the Abu Dhabi Criminal Courts have been postponed until after 21 April 2020.

DIFC

Effective 17 March 2020, the DIFC Courts have been operating on a fully remote basis, with Courts and Registry offices physically closed until 26 April 2020 (until further notice).

All hearings are conducted via teleconference, with dial in arrangements circulated by the Registry team in advance. For urgent applications or urgent queries outside of office hours, applicants are asked to contact the Registrar on Duty.

DIFC pro bono clinics are temporarily suspended until 26 April 2020 (subject to further notice).

Jordan

In an effort to prevent the spread of COVID-19, the Jordanian Judicial Council and the Jordanian Bar Association ("**JBA**") have announced the early commencement of the annual judicial recess, to begin on 16 March 2020 and ending 16 April 2020 (subject to further notice). The annual judicial recess is typically a two month break scheduled between July and August. All hearings scheduled to take place during this time are adjourned to resume from 16 April 2020 onwards. The new hearing dates can also be found on the JBA's [website](#).

On 17 March 2020, a Royal Decree was issued approving the Council of Ministers' decision to enact the Jordanian Defence Law ("Defence Law")¹, as of 18 March 2020, for the first time since its coming into force. As a result:

- Jordan is now under ordered lockdown, with a non-emergency movement and travel between provinces banned. A nation-wide curfew is imposed until 21 March 2020, or further notice
- cargo and commercial traffic movements from sea ports, ground crossings and airports are exempt to ensure the continuous supply of goods and commodities
- commercial shops, entertainment outlets and other such venues are ordered to close. Supermarket, pharmacies and outlets open for basic necessity needs are open for a limited time each day, in order to allow citizens to meet their basic needs according to a mechanism to be set at that time

Iraq

The Iraqi Government Crisis Cell has declared the application of Force Majeure to all projects and contracts with retrospective effect starting as of 20 February 2020.

Travel between provinces is banned until further notice. The Government has also imposed an Iraq wide curfew until 11 April 2020. The curfew excludes pharmacies, medicine stores, food stores, bakeries and petrol stations. It also excludes medical, security and media personnel, and staff of internet service providers (ISPs). Flights to and from Iraq to remain suspended until further notice.

¹ Jordanian Defence Law No. 13 of 1992

Qatar

The Supreme Judicial Council announced the suspension of the sessions of the Court of Appeal, the Court of First Instance, Labour Disputes Settlement Committee and Rental Disputes Settlements Committee as of 15 March 2020 for two weeks. This period of suspension is expected to continue until further notice.

80% of government employees are now working from home and the vast majority of private sector employees are also doing the same where their duties allow.

From 16 March 2020, only Qatari citizens are allowed to enter the State of Qatar and they are subject to a 14 day period of mandatory quarantine. Passport holders of other countries will not be allowed entry until further notice.

Various social restrictions have been imposed with all shops (other than supermarkets and pharmacies) ordered to close along with restaurants, cafes, gyms, public parks, beaches, pools, museums, theatres and places of worship. All residents have been advised to stay at home unless a trip outside is essential, avoid social gatherings and generally maintain social distancing.

Kingdom of Saudi Arabia

KSA also took several measures to contain the spread of COVID19, this includes a ban on international flights to and from KSA, an obligatory quarantine for those travelling from an infected country, a nation-wide curfew and intra-country travel ban, closure of all places of public gatherings, shopping malls and leisure venues, and nation-wide instructions for remote working for both governmental and private sectors.

The KSA Ministry of Justice issued a circular instructing courts and litigants throughout KSA to deal with cases remotely through the national courts' online platforms.



3. Force majeure and exceptional circumstances

At the forefront of all of legal queries in the context of COVID-19, is whether parties can rely on Force Majeure provisions of law to obtain relief from COVID-19 consequences in a contractual setting.

Force Majeure is a civil law concept most notably found in the French Civil Code, dating back to 1804. A Force Majeure event is one which, when it occurs, excuses the performance of a contract, overriding its provisions, and – subject to any agreement to the contrary – releases a party from liabilities for which it would have otherwise been responsible.

There is no firm definition of what constitutes Force Majeure. Traditionally, and subject to these not having been foreseeable prior to entering into contract, earthquakes, floods, natural disasters – often referred to as 'acts of God' events – and, more recently, wars, riots and acts of government, have been accepted as Force Majeure events.

Generally, in order for an event to be considered a Force Majeure event, an event **must** (a) be unforeseeable, (b) arise out of an extraneous cause beyond the control of the party, and (c) be insurmountable, such that the performance of the obligation in question – or wider contract – has now become impossible as a result.

The event must also be insurmountable in nature such that it does not simply cause financial difficulty and/or economic hardship. The performance of the contract must have become impossible as a result and not merely onerous or impractical.

If the event in question could have been foreseen at the time of entering into the contract, parties will be expected to have taken it into account and contracted on the agreed risk allocation, to the extent that it is not specifically provided for as a Force Majeure event.

It follows that parties are able to agree which events as constitute Force Majeure events within their contracts.

United Arab Emirates

In the UAE, relief in the face of impossibility of performance is codified in Article 472 of the UAE Civil Code², as follows:

Art. 472: *"A right shall expire if the obligor proves that the performance of it has become impossible for an extraneous cause in which he played no part."*

When a party's performance is prevented due to a Force Majeure event, the UAE Civil Code law provides for the automatic cancellation of a contract.

Art. 273(1): *"In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled".*

² Federal Law No. 5 of 1985, as amended by Federal Law No 1 of 1987

In circumstances where performance is only partially affected by a Force Majeure event, the UAE Civil Code also allows for the part of the contract which has become impossible to perform as a result, to be cancelled.

Art. 273(2): *"In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided the obligee is so aware."*

The Union Supreme Court explains that *"the effect of the general rule in Article 472 of the UAE Civil Code is that an obligation will cease to exist if it becomes impossible to perform it through an extraneous cause, and 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 pursuant to article 273 of the Civil Code, by operation of law."*³

Generally, and subject to certain restrictions, a party that is successful in establishing Force Majeure will also be released from any liability for which it would have otherwise been responsible.

There is no prescribed definition under UAE law of what constitutes Force Majeure. Rather, it is left to the court to determine whether or not it applies, based on the facts of the particular case.

The Dubai Court of Cassation explains that *"[i]t is a prerequisite for being allowed to rely on Force Majeure that it should be the result of an unforeseen event that could not have been averted, namely that the results thereof could not have been guarded against or prevented, in such a way as to make performance of the obligation impossible. The assessment of whether the facts alleged amount to a Force Majeure is a matter for the trial court"*⁴.

Accordingly, parties claiming Force Majeure will have to prove that the event:

- was unforeseeable
- arises out of an extraneous cause beyond the control of the party
- was insurmountable, such that it renders the performance of the contract or obligation, either wholly or partly, impossible

It follows that a party claiming to be released from their contractual obligations for Force Majeure reasons, carries the burden of proving that the above circumstances apply.

Other Avenues for Relief

There are other avenues for relief under the UAE Civil Code, available to parties unable to successfully argue that Force Majeure applies.

Articles 249 of the UAE Civil Code grants the Judges a wide discretionary power to alleviate and, possibly, amend parties' obligations where unforeseeable exceptional circumstances of a public nature render the performance of a contractual obligation so oppressive to the obligor that the obligor would only be able to complete its performance by suffering a 'grave loss'.

Art. 249: *"If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the Judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void."*

³ Union Supreme Court, 827/Judicial Year 24 dated 21 February 2006

⁴ Dubai Court of Cassation Case No 188 of 2009, dated 18 October 2009

Article 249 of the UAE Civil Code is mandatory in nature and will override any agreement to the contrary.

Similarly, the Judge is also granted a wide discretionary power to alleviate, the extent of damages which would otherwise be due, if a party can prove that any losses resulted from “*extraneous causes*” (including Force Majeure events and acts of third parties):

Art. 287: *“If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, 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.”*

DIFC

Force Majeure is also recognized under DIFC Contract Law⁵. However, there is no prescribed definition as to what circumstances constitute a Force Majeure event.

Art 82(1): *“Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”*

DIFC contract law provides that a party may claim non-performance of its obligations under contract (other than an obligation to pay), if⁶:

- non-performance is due to an impediment beyond its control
- the obligor could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences

The Force Majeure provisions under DIFC Law also account for circumstances where the impediment to performance is temporary, providing that relief will have effect “*for such period as is reasonable having regard to the effect of the impediment on performance of the contract*”⁷.

Whilst parties will still be entitled to exercise their usual rights to terminate the contract, to withhold performance or request interest on money following a Force Majeure event⁸, a successful application of the Force Majeure provisions of the DIFC Contract law means that the non-performance by that party is 'excused':

Art 82(1): *“Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”*

Termination can be effected through the contractual terms and/or the termination provisions set out in DIFC Contract Law on the basis that failure of the other party to perform an obligation under the contract amounts to a 'fundamental non-performance'⁹.

⁵ DIFC Law No. 6 of 2004

⁶ DIFC Law No. 6 of 2004, Article 82(1)

⁷ DIFC Law No. 6 of 2004, Article 82(2)

⁸ DIFC Law No. 6 of 2004, Article 82(4)

⁹ DIFC Law No. 6 of 2004, Article 86(1)

DIFC Contract Law requires a party to exercise its termination right by way of notice to the other party. Careful consideration also needs to be given to the general notification provisions within the relevant contract which are likely to specify the manner and format of any notification which is given. If the notice is not received by the other party, or indeed no such notice is served, within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, the party who fails to perform will likely be liable for damages resulting from such non-receipt.

DIFC contract law provides that where a contract is terminated pursuant to the provisions set out in law, a party is entitled to claim restitution which attempts to put each party back to their pre-contractual positions as to what they have supplied and received. DIFC law provides that where restitution in kind is not possible, monetary compensation should be made where reasonable to do so. However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.¹⁰

A claim for damages in contract under DIFC law is subject to:

- a duty to mitigate loss¹¹ so consideration should be given as to what reasonable steps can be taken by the aggrieved party to mitigate loss arising from the non-performance caused by the Force Majeure event
- the requirement to serve notice

Alternative Avenues for Relief

The contract might expressly allow a party to terminate a contract by reason of a material adverse change provision. The validity of termination will depend on the drafting of the clause.

Jordan

COVID19 claims

Jordan is the only jurisdiction in the region to have declared martial law, with its enactment of the Defence Law. This is of particular relevance in the context of Force Majeure claims because Article 11 of the Defence Law expressly states that (a) contractual obligations are automatically suspended while the law is enacted, and (b) any failure to perform contractual obligations as a result of the enactment of this law will not be construed as a breach on the part of such party.

Art. 11: *"If it is impossible to implement any contract or obligation due to the observance of the provisions of this law or any order, mandate or instructions issued pursuant to it or due to compliance with these provisions, the person associated with this contract shall not be considered in breach of its terms, but the contract is considered to be suspended to the extent that the implementation of the contract is impossible and is considered a defence in any lawsuit brought or will be brought against that person, or any measures taken against him as a result of not implementing the contract or obligation thereof."*

For completeness, an overview of Force Majeure and Emergency Circumstances under Jordanian law, is provided below.

Force Majeure

Force Majeure is a recognized concept under Jordanian Law, specifically, the Jordanian Civil Code¹². However, there is no prescribed definition under Jordanian law of what constitutes Force Majeure.

¹⁰ DIFC Law No. 6 of 2004, Article 90

¹¹ DIFC Law No. 7 of 2005, Article 16

¹² Jordanian Civil Code, No. 43 of 1976

Rather, it is left to the court to determine whether or not it applies, based on the facts of the particular case.

Jurisprudence from the Jordanian Court of Cassation provides some guidance in defining Force Majeure; specifically, that a Force Majeure event is generally “*an unforeseeable event which is impossible to evade*”¹³, and that in order for an event to constitute Force Majeure, it must be “*...unforeseeable, impossible to evade and beyond one's control*”¹⁴.

Determining whether an event is indeed a Force Majeure event is a matter determined by the local Courts¹⁵.

In Jordan, relief in the face of impossibility of performance is codified in Article 448 of Jordanian Civil Code¹⁶, as follows:

Art. 448: *“An obligation shall be discharged if the debtor proves that the performance of such obligation has become impossible as a result of an external/foreign reason beyond its control.”*

When a party's performance is prevented due to a Force Majeure event, the Jordanian Civil Code law provides for the automatic cancellation of a contract. In circumstances where performance is only partially affected by a Force Majeure event, it also allows for the part of the contract which has become impossible to perform as a result, to be cancelled.

Art. 247: *“If in bilateral contracts, a force majeure arises, thereby rendering an obligation impossible to perform, the corresponding obligation shall elapse and the contract shall be automatically discharged and if performance is only partially impossible, then such corresponding obligation to that which is partially impossible to perform shall also elapse. Partially impossible to perform shall be equivalent to temporarily impossible to perform in ongoing contract and in both cases the creditor may terminate the contract provided that the debtor is served notice of such intention to terminate.”*

Accordingly, parties claiming Force Majeure will have to prove that the event:

- was unforeseeable
- arises out of an extraneous cause beyond the control of the party
- was insurmountable, such that it renders the performance of the contract or obligation, either wholly or partly, impossible

It follows that a party claiming to be released from their contractual obligations for Force Majeure reasons, (a) carries the burden of proving that the above circumstances apply, and (b) will have evidence that the contended Force Majeure event is not limited by Force Majeure provisions in its contract, if any. In addition, a party intending to terminate – or pursue a claim to terminate - the contract for Force Majeure, is required to serve notice to that effect, on its counterparty.

To date, there are no precedents under Jordanian Law addressing global pandemics either generally, or in a Force Majeure context.

¹³ Court of Cassation Decision No. 2490/2019, dated 05/09/2019 and Court of Cassation Decision No. 928/1997, dated 16/08/1997

¹⁴ Court of Cassation Decision No. 964/2019, dated 13/03/2019.

¹⁵ Court of Cassation Decision No. 2750/2015, dated 10/02/2016.

¹⁶ Jordanian Civil Code, No. 43 of 1976

Other Avenues for Relief

There are other avenues for relief under the Jordanian Civil Code, available to parties unable to successfully argue that Force Majeure applies.

Article 205 of the Jordanian Civil Code grants Judges a wide discretionary power to alleviate and, possibly, amend parties' obligations where unforeseeable exceptional circumstance of a public nature render the performance of a contractual obligation so oppressive to the obligor that the obligor would only be able to complete its performance by suffering a 'grave loss'.

Art. 205: *"If a general¹⁷ exceptional and unforeseeable event takes place and, as a result, the execution/performance of a contractual obligation becomes, if not impossible, burdensome on the debtor thereby threatening serious loss, the court may, in light of the circumstances and after balancing both parties' interest, reduce the burdensome obligation to the extent possible if so prescribed by equity and, any agreement to the contrary shall be deemed void."*

This is known as the concept of 'Emergency Circumstance'. The events that constitute an Emergency, whilst could be similar to those that constitute a Force Majeure, impact the ability of performing contractual obligations differently. Force Majeure renders contractual performance impossible, whilst Emergency Circumstance renders this performance burdensome on the obligor. Accordingly, when such circumstance arise, and a court is satisfied that these are indeed Emergency Circumstances, the Jordanian Civil Code grants the Judges a wide discretionary power to alleviate and, possibly, amend parties' obligations, on an application of Article 205.

Article 205 of the Jordanian Civil Code is mandatory in nature and will override any agreement to the contrary.

Similarly, the Judge is also granted a wide discretionary power to alleviate, the extent of damages which would otherwise be due, if a party can prove that any losses resulted from "extraneous causes" (including Force Majeure events and acts of third parties):

Art. 261: *"If a person proves that the damage had occurred as a result of an external / foreign reason beyond its control, such as an act of God, sudden accident, force majeure, act of third party or act of the injured party then such person shall not be liable for damages unless otherwise stated in law or in contract."*

Iraq

The Iraqi Civil Code¹⁸ regulates the general framework in relation to Force Majeure and emergency circumstances.

Whether the Coronavirus (COVID-19) outbreak qualifies as a Force Majeure event significantly depends on the Force Majeure clause as drafted in the contract. Most contracts define Force Majeure as an event that is beyond the control of the contracting parties, and some contracts also include an exhaustive list of Force Majeure events. Such clauses commonly include the term "epidemic" which will most likely qualify, and encompass, the Coronavirus (COVID-19) outbreak as a Force Majeure event.

Party agreement as to the risk allocation of Force Majeure events are recognized and enforced, on an application of Article 259(1) of the Iraqi Civil Code.

Art. 259(1): *"It may be agreed that the debtor will bear the consequences of an unforeseen act and of force majeure."*

¹⁷ Whilst the word "general" is commonly used in existing translations of the Jordanian Civil Code for "عامّة", an accurate translation of Article 205 would read "If public exception and unforeseeable (...)".

¹⁸ Iraqi Civil Code No. (40) of (1951)

Whilst the Iraqi Civil Code does not provide a precise nor exhaustive definition of Force Majeure, case law has clarified that in order to qualify as a Force Majeure event, an event must:

- be unforeseeable
- arise out of an extraneous cause beyond the control of the party
- be insurmountable such as to render the performance of the contract impossible

Otherwise, the Iraqi Civil Code generally does recognize the concept of the impossibility to perform contractual obligations, whether due to extraneous circumstances or Force Majeure.

Specifically, Article 425 of the Iraqi Civil Code provides that a contract shall be deemed cancelled or terminated if the execution of the contract becomes impossible due to extraneous factors which cannot be attributed to the debtor.

Art. 425: *"An obligation on debtor is extinguished if the debtor establishes that its performance has become impossible due to causes beyond the debtor's control."*

In addition to the above, Iraqi Civil Code Article 211 also allows for a party to be exempt from liability in such circumstances, where the liability would have otherwise been due.

Art. 211: *"A person who has established that the injury had arisen from a cause beyond his control such as by an Act of God, an accident, a force majeure, the act of a third party or the default of the injured himself shall not be liable to damages unless there is a provision of law or an agreement otherwise."*

Other Avenues for Relief

There are other avenues for relief under Iraqi Law which remain open to parties which are unsuccessful in claiming Force Majeure, namely, a claim of exceptional and unpredictable 'Emergency Circumstances'.

Unlike in the event of impossible performance, Emergency Circumstances do not result in an immediate lapse or termination of the parties' obligations.

In the event of Emergency Circumstances, the Civil Law permits the court to interfere to reduce the debtor's obligations to a reasonable limit as required by the principles of justice.

Art. 146(2): *"If public exceptional and unpredictable circumstances arise, and their occurrence renders the contracted obligation burdensome, if not impossible, to perform by the debtor and in such a manner as to threaten him with heavy loss, the court may, by comparing the interests of both parties, reduce the burdensome obligation to reasonable limits, if justice so requires. Any agreement to the contrary is void."*

To date, Iraqi caselaw indicates that court interference, which is prompted by the request of a party, may include an extension to the contract's duration, suspension of penalties (if there is a provision in the contract triggering penalties in the event of a delay), and/or the suspension of some or all of the obligations.

By way of example, Case No. (230) dated 20 June 2007 applies Article 146(2) reinforces the principle that if exceptional events occur that were not anticipated at the time that the contract was made, but make the performance of the debtor's obligations substantially more onerous (rather than impossible) and threaten a substantial loss to debtor, the court has the right to reduce the obligation to a reasonable level under Article (146)(2) after balancing the interests of both parties. It is possible for a claimant to seek this remedy either before or after the contract is performed/finished, although in practice, most claimants will seek the court's relief before the contract performance is finished.

An application for relief under Article 146(2) may also be supplemented by a claim under Article 211, for relief from damages.

Under the present circumstances, it is certainly possible to envisage Emergency Circumstances claims, if not Force Majeure, in the pipeline as a result of COVID19. In all cases, whether a claim for Force Majeure or Emergency Circumstances, in the absence of a clear definition of either principles, determining whether an event qualifies as either remains within the wide discretionary powers of the Iraqi Courts.

Qatar

In line with neighbouring jurisdictions, the concept of Force Majeure is recognized in the Qatari Civil Code¹⁹ and is generally defined as a foreign cause beyond the control of the concerned party for which it made the performance of its obligation impossible.

The Qatari Civil Code codifies the principle of Force Majeure under Qatari Law, as follows:

Art. 402: *"An obligation is extinguished if the debtor establishes that its performance has become impossible by reason of causes beyond his control."*

It has the effect of rendering an obligation extinguished for being impossible to be performed for external reasons beyond the control of the obligor. In addition, a party may also apply for exemption from the damages for which it would otherwise have been liable, if not for the Force Majeure event:

Art. 204: *"If the person proves that the damage originated from an extraneous cause out of his control, such as a force majeure, surprise accident, an error from the affected person, or an error from a third party, he shall not be committed to pay compensation for such damage unless otherwise prescribed."*

It follows, that this will be subject to the parties' agreement – if any – as to the risk allocation for Force Majeure events. Where an agreement contains a Force Majeure clause which specifies the exclusive events that constitute Force Majeure, then such Force Majeure clause will be valid, binding and enforceable between the parties to that agreement and no such party will be entitled to seek relief in respect of any event that does not fall within the exclusive definition of Force Majeure contained in that document.

Art. 258: *"It may be agreed that the debtor shall sustain the consequences of surprise accidents or force majeure."*

Other Avenues for Relief

On the other hand if the performance of an obligation becomes not impossible but heavily burdensome due to general exceptional and unforeseen events, then, whilst not automatically terminated, a contract may be altered by a Judge to a reasonable level. In this regard, Qatari Civil Code Article 171(2) reads as follows:

Art. 171(2): *"Nevertheless, should any general exceptional events occur which events could not be foreseen, and as a result of which the performance of the contractual obligation, though not impossible, becomes a heavy burden to the debtor threatening him with excessive loss, the judge may, according to circumstances, and after comparison between the interests of both parties, reduce the onerous obligation to a reasonable extent. Any agreement to the contrary shall be void."*

Parties may also apply for alleviated damages under Article 204 of the Qatari Civil Code, in conjunction.

¹⁹ Qatar Civil Code No. 22 of 2004

Kingdom Of Saudi Arabia²⁰

As commercial contract principles in Saudi Arabi are mainly based in Sharia Law – which aims for justice and equity in contracts. Judges will often rely on the main sources of Islamic Sharia – the Holy Quran Sunna and main Islamic Jurists teachings – when applying legal principles. Sharia Principles are therefore the point of reference for the law used to govern civil and commercial transactions.

Force Majeure

Although not explicitly defined in the Quran or Sunna, the concept of Force Majeure and Emergency Circumstance, specifically arising out of pandemics (“**Gawa'eh**”), was addressed by Holy Prophet Mohammed (PBUH) as follows:

“If you heard of a plague in a country do not enter it, and if you are in a country having plague do not leave it”.

This Sunna, along with the common Sharia principal *“private harm can be borne to avoid public harm”* forms the basis adopted by Sharia jurists in setting the framework for Force Majeure and Emergency Circumstances in their teachings which are, ultimately, adopted by the KSA Judiciary.

Saudi courts will generally only recognize Force Majeure events that render contractual performance impossible. Events that make the contract more expensive or burdensome will not generally be accepted as Force Majeure event, but rather – and possibly – Emergency Circumstances (discussed below).

In the absence of a contractual clause addressing Force Majeure, KSA courts have wide discretionary powers to determine the extent to which an event does indeed satisfy the requirement of Force Majeure or, failing this, Emergency Circumstances. In deciding this, courts will usually consider the following:

- is there a clear and specific policy, law, regulation or contract clause that regulate such a situation?
- does it affect the whole contract or not?
- does it affect the contract before it starts or during its implementation?
- did one of the parties contribute to the increase of the sustained harm?
- is it possible to implement the contract in a different way?
- is it possible to mitigate the harm?

Force Majeure or Emergency Circumstances differ in what these imply of prerequisites. A successful application under Force Majeure will result in the termination of the contract in whole or in part, as appropriate and if the impossible obligation of the contract can be separated from the main contract, with no additional action needed (such as no legal requirement to send a notice nor to file judicial application). Aggrieved parties may apply to the court to claim damages. Comparatively, Emergency Circumstances require the aggrieved party either to send a notice to the other party or to submit an application for the competent court to suspended, delay or terminate the contract affected by the contended event.

Emergency Circumstances

The concept of Emergency Circumstances, commonly referred to as State of Emergency in Saudi, is derived by the Sharia Jurists from the Hanafi School concept of “excuse” in circumstance where the

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fulfilment of a contractual obligation by a party causes a major hardship on that party, caused by unavoidable, unexpected and exceptional circumstances.

This interpretation for the state of emergency was further adopted by Judges in KSA. By way of example²¹, the Rift Valley Fever epidemic was held to be an Emergency Circumstance as a result of which, a Judge held that contractually agreed delay penalties should be waived and refunded.

Whilst the First Valley Fever is relatively minor compared to the current COVID19 pandemic, it could be seen as a good indication of how it may be interpreted by the local courts in Saudi. That is, particularly in light of the King's televised speech, on the evening of 19 March 2020, in which the unprecedented difficulty of the current circumstances were acknowledged.

There are some definitions of Force Majeure and Emergency Circumstances in different subject-specific Saudi laws. However, these only apply on the contracts governed by these laws.

For instance, the Government Tender and Procurement Law ("GTPL")²² addresses the effect of both Force Majeure and Emergency Circumstances, but it does not define Force Majeure. The GTPL defines Emergency Circumstances as:

*"A situation at which there is a serious and unexpected threat to the public safety, security or health; or a disturbing situation which threatens lives or properties that cannot be dealt with through the normal procedure of the tender"*²³.

Articles 68 and 69 of the GTPL provided that a contract price can be decreased, by an amount not exceeding 20%, if during the performance of the contract a financial hardship took place which could not have been anticipated. The Executive Regulation further elaborates that if the hardship exceeds 20% of the value of the contract, the aggrieved party may file a claim before the Administrative Court to claim additional reduction.

Article 74 of the GTPL grants the governmental entity the right to extend the duration of the contract or waive the prescribed penalty for delay in the event of Emergency Circumstances. Articles 125 and 126 of the Executive Regulation define the scope and procedures for applying article 74 of the GTPL.

Article 133 of the Executive Regulation, grants the governmental entity the right to terminate the contract if the performance of the contract is impossible due to the occurrence of force majeure.

Parties seeking relief under Force Majeure or Emergency Circumstances bear the burden of proof; this will include an expectation to show efforts exerted to mitigate – if not avoid – the impact of COVID-19.

²¹ Case number 1885/1/Q of the year 1425H and appealed under appellate number (381/AS/1)

²² Government Tender and Procurement Law ("GTPL") issued by virtue of the Royal Decree number M/128 on 13/11/1440H and its executive regulation ("Executive Regulation")

²³ GTPL, Article 1

4. Eversheds Sutherland in the Middle East

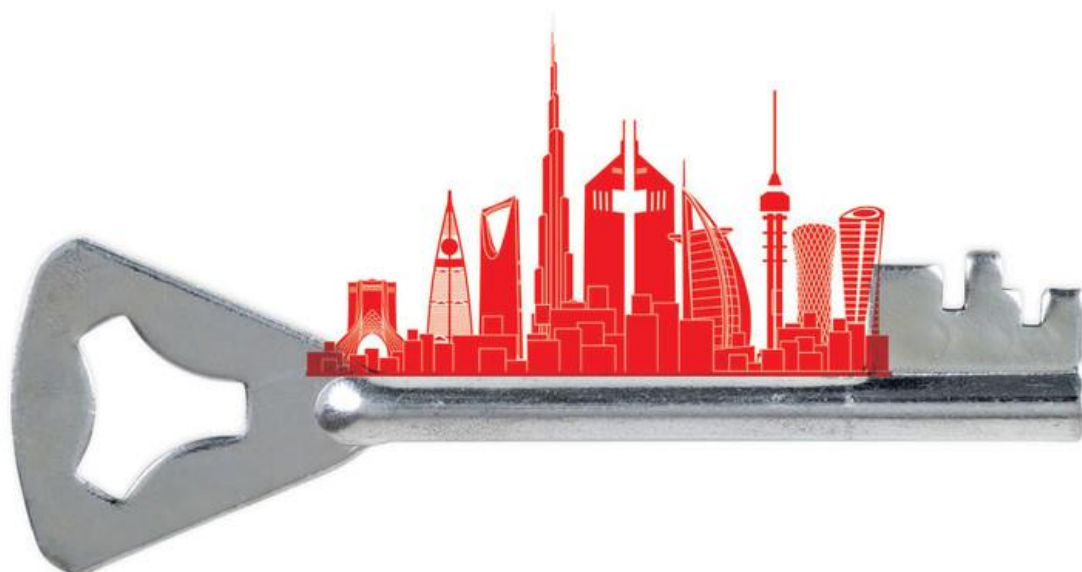
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