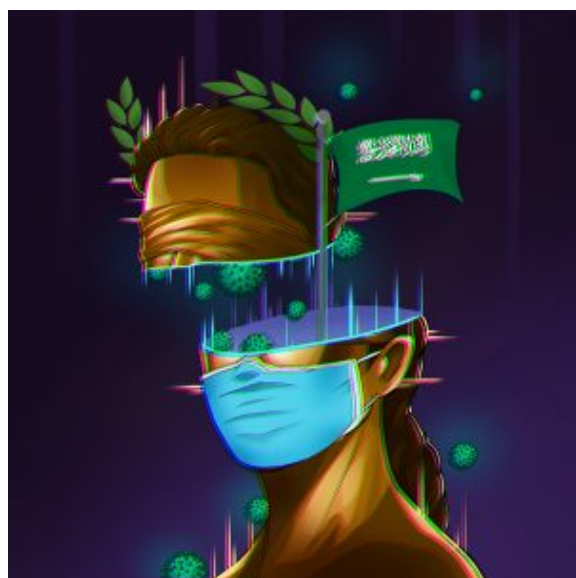


COVID-19: Force Majeure under Saudi law and Shari'ah

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Introduction

Decisions taken by governments around the world to address the COVID-19 pandemic will have profound legal and financial impacts on every sector of the economy.

In circumstances where whole sectors of the economy have been subject to near total closure (as is the case with entertainment, food/beverage and educational services) or were severely impaired (as in almost every other sector) it is only to be expected that businesses will want to assess their contractual positions and understand how they can mitigate risks, seek remedies for losses and recalibrate their positions for the future.

This article will:

- explain how the concept of Force Majeure and related concepts such as “emergency circumstances” are treated under Saudi law;
- consider some specific examples of where Saudi laws address the issues;
- provide a survey of reported Saudi case law on the issues; and
- suggest practical strategies for addressing contractual disputes arising in the current circumstances. However, before we look, in more detail, at these issues, a brief overview of the unique character of the Saudi legal system is necessary to provide context for what follows.

Saudi legal context

Saudi law is based on the application of Shari'ah law. The Shari'ah is a collection of principles derived from

different sources, but principally the Holy Qur'an and the Sunnah (the witnessed sayings and actions of the Prophet Mohammed recorded as hadith). The Shari'ah rules relating to contracts are not codified in KSA in the manner known in many other jurisdictions. The general principles of contract under Shari'ah law apply to all contracts, including those where there is also relevant legislation (such as the laws and regulations applicable to force majeure as surveyed below).

The principle of sanctity of contract is very well established under Shari'ah law. The Holy Qur'an imposes upon Muslims the duty to faithfully observe their obligations. Prophet Mohammed is reported to have said *"Muslims are bound by their stipulations, except a stipulation which makes lawful that which is unlawful."* The binding force of contracts is asserted by jurists of all schools of Islamic jurisprudence. Under Shari'ah law, contracts which are not expressly prohibited by the Holy Qur'an or the Sunnah are permitted as binding and valid.

The principle of freedom of contract, which applies to both the substance as well as the form of contract, is well established under Shari'ah law. Shari'ah law recognises the maxim "the contract is the law of the parties": in effect, so long as something is not forbidden by the Shari'ah (or otherwise regulated by statute) it is permitted. Accordingly, parties to a contract have significant flexibility to agree the detailed terms of their engagement and this extends to the treatment of supervening events, including force majeure.

One of the challenges of conducting business in KSA is, however, that there is no principle of binding precedent under the law, so judicial decisions are based on the unique facts of any given case (including the conduct of the parties). What is important, therefore, is that the parties record their agreement very clearly and adhere to all applicable regulations.

There are several principles of the Shari'ah which are common to all contracts. The charging of interest is haram (forbidden) and provisions relating to interest (usury/riba) will not be enforced, however there appears to be some flexibility with the application of liquidated damages where the parties agree in the contract for specific remedies due to late and/or defective performance of services. Shari'ah law places an emphasis on certainty of contract and any provision which includes a high level of uncertainty (Gharar/Jahalal) will not be enforceable. Critically, for any discussion of force majeure, indirect losses (including economic loss) are typically not recoverable, the accepted Shari'ah position being that only actually incurred quantifiable direct losses are recoverable

The broad and general nature of Shari'ah law means that Saudi courts can be expected to apply a combination of discretionary powers and established legal principles in the review and interpretation of business documents. This flexibility, combined with the absence of legal precedent which is binding on the courts and the wide discretionary powers of the court, can make it difficult to predict, with a high degree of assurance, the correct interpretation and ultimately the enforceability of contracts. Fortunately, there is a strong tradition and experience of addressing supervening events within the Saudi legal system: drawing deeply on Shari'ah principles.

Force majeure under Saudi law

Contracts and obligations affected by the COVID-19 pandemic will be governed by the relevant Saudi laws, the provisions of such contracts and Shari'ah principles. Therefore, we will address the most prominent Saudi laws that address force majeure and emergency circumstances. Then we will examine the position of Shari'ah law on these concepts respectively.

The most prominent Saudi laws that deal with force majeure and emergency circumstances

There are many Saudi laws that include provisions related to the concept of force majeure and emergency circumstances. The most prominent of these laws are the following:

1. Government Tenders and Procurement Law (1440H) 2019G, stipulates in article (74) that:

Extension of the contract or exemption from fine shall be in the following cases: (3) If the delay is because of the government entity or emergency circumstances."

2. E-Commerce Law (1440 H) 2019G, stipulates in article (14) that:

"Unless the service provider and the consumer agree upon another term for handover of the asset, subject of contract, or its execution, the consumer may revoke the contract if the service provider delays the handover or the execution for a period exceeding fifteen (15) days of the date of conclusion of contract or the agreed upon date. The consumer may redeem the amount paid under the contract against the product or the service or the other costs resulted from this delay, unless the delay is caused by a force majeure".

3. Commercial Court Law, (1350H) 1931G which stipulates in article (24):

"The agent, trustee and packer shall guarantee delivery of the goods handed over within the period stated in the consignment list, and any damage resulting from his delay shall be guaranteed by him, unless due to force majeure that cannot be evaded".

4. Saudi Labour Law, (1426H) 2005G which stipulates in Article 74 that the force majeure is one of the cases for termination of employment contracts.
5. Saudi Professional League Statute: This statute defines the force majeure as *"the event that cannot be controlled or anticipated"*.
6. Commercial Maritime Law for the year (1440 H) 2019 G: This law addresses the consequences of a supervening event for a variety of parties.

It is apparent from the above that the Saudi legal system has not comprehensively tackled the doctrine of force majeure and does so only in certain limited and exceptional circumstances. However, the absence of a systematic codified approach certainly does not mean that the Saudi Courts do not recognise the issue. Indeed, the absence of a codified position gives Saudi judges wide discretion to investigate and determine the issues and apply the principles of the Shari'ah.

The concept of force majeure and emergency circumstances under Shari'ah laws.

One of the most prominent principles governing contracts in Shari'ah law is that a contract is binding, so that both parties are obliged to meet their contractual obligations unless the parties agree to set the contract aside or a valid excuse not to perform can be sustained. The Saudi courts, when considering any contractual dispute, will refer to the contract that governs the dispute in the first instance. Most well drafted contracts contain provisions that cater for supervening events. Absent such provisions (or other laws) the Saudi courts will apply Shari'ah principles. It should be noted that even if a contract does address force majeure, where the result infringes basic Shari'ah precepts of equity, the court will be at liberty to set aside the offending provision.

It is a widely accepted tenet of Islamic jurisprudence (or 'fiqh') that *"there should be neither harming nor reciprocation"* and that *"damage should be removed"*. The Shari'ah concept of an excusing supervening event is focused on "contingent excuses on occurrence of calamities" ('Jawaih - plural'). Islamic scholars consider a calamity (Ja'ihah - singular) as any event that:

- is out of the control of a party (not having been caused by their own negligence); and

- makes the satisfaction of a covenant or promise (including obligations arising under contract) either impossible or unduly burdensome.

There is a rich and extensive vein of hadith on supervening causes and their implications which can be invoked before the courts. These include locusts, war, drought, state action but this list is not exhaustive. The courts would have clear ability and duty to apply Shari'ah principles to any given set of facts, and this would include COVID-19.

Moreover, the International Islamic Fiqh Academy has concluded that if circumstances change in a way that materially increase the burden of one party and such change in circumstances was not caused by the negligence of that party, then the judge has authority to: (a) rebalance the obligations; (b) set-aside the contract entirely; or (c) grant the affected party a grace period if the circumstances can be reasonably expected to be short-lived.

A brief survey of some reported cases

Given the primacy and independence of the Saudi courts in the application of Shari'ah principles to force majeure type events it is certainly instructive to sample a cross section of reported judgments in this regard. It should, however, be noted that each judge is empowered to reach his own decision based on the facts of any case, without being bound by any reference to precedence.

1. Judgment on financial rebalancing between parties: the Shari'ah and legal principles compiled by the Board of Grievance, the decision No 3/T/1401, hearing No 4/1/1401, case No J/2/291 for the year 1395 H (1975G), which stated the following:

"The concept of emergency circumstances means that some emergency conditions have occurred during the implementation of the contract or events that were not anticipated or foreseen at the time of execution of the contract, have severely affected the conditions of the contract and caused huge loss to the plaintiff, exceeding the normal and customarily loss that the plaintiff may bear. In such circumstances the grieved plaintiff has the right to request that the damages caused by such events to be shared with the defendant and to participate and share the loss with him and to compensate him partially."

1. Judgment on financial rebalancing between parties relieving the burdensome obligation (as a result of a government decision) to the reasonable limit: the judgment issued by the Court of First Instance in the Lawsuit No J/1/2246 for the year 1414 H (1993G) and No J/1/1554 for the year 1415 H (1995G), (Judgment No D/15 for the year 1416, affirmed by the Appeal Commission No 1/T/5 for the year 1417 H (1997G), ruled that the court may lessen the burdensome obligation to a reasonable limit to relieve or reduce the damage to the affected party. The facts of the case are summarised in the fact that the Ministry of Public Works ("the Ministry") in the Kingdom of Saudi Arabia had contracted with a German company (the 'Plaintiff') to build an Islamic centre in the State of Guinea. After the execution of the contract, a law was issued in Guinea which increased the wages of the labourers and this law applied retroactively, resulting unforeseen, additional costs to the Plaintiff. The Plaintiff filed a claim requesting relief damages and rebalancing the contract, as exceptional emergency general circumstances had occurred, which effectively represented an increase in the already calculated minimum level of salaries and wages of the employees and workers by the Guinea government and that this supervening event, that the Plaintiff had not expected, made its obligations burdensome. The Court considered the decision issued by the State of Guinea for increasing the minimum salary after the conclusion of the contract, was not expected and could not be anticipated and therefore constituted an exceptional emergency event. The Court agreed with the Plaintiff that such event resulted in an additional burden by the contractor on the Plaintiff. Therefore, *"the Circuit may lessen the burdensome obligation to a reasonable limit to relieve or reduce the damage of the affected party"*.
2. Judgment related to invalidating a delay penalty: in many cases the Saudi Courts invalidate a delay penalty resulting from the delay of the contractor to execute its obligations in cases where it is proven

that the delay was caused by emergency circumstances beyond the control of the plaintiff. In the preliminary judgment No 3/A/D/9, year 1417 H (1997G), affirmed by the Appeal Commission Decision No 1/T/199 year 1417 H, the Court invalidated the delay penalty imposed by the defendant and judged that the Plaintiff deserved an extension to the contract for a satisfactory period.

3. Judgment regarding revocation of lease contract and refund of given rental amount: this precedent indicates that it is applicable in the Saudi Court that whoever rents an asset and an event outside his or her control prevents him or her from enjoyment of the leased asset for a reason that is not related to the lessee, he or she shall pay only the part of rental amount based on his or her use. In this context we cite, as an example, judgment No. 3450435, dated 30/02/1434 H in the lawsuit No. 33442221, affirmed by the appeal judgment No 34208836, dated 07/05/1434 H, in which the Court ruled in favour of the plaintiff as the Court terminated the contract and refunded the given rental amount, because the lessee was prevented from enjoyment of the leased asset by virtue of an event outside the control of the parties to the contract.

COVID-19 legal strategies

Mandatory directives issued by the government of the Kingdom of Saudi Arabia to address the COVID-19 pandemic should be considered as extraordinary supervening events. Routes to relief, rebalancing or termination are available under the Saudi legal system (in the circumstances described above) and, more importantly, under generally applicable principles of Shari'ah law.

Nevertheless, the most effective solutions in such cases are direct negotiation between the parties with the aim of reaching an amicable settlement by which the parties willingly revoke the contract or agree to renegotiate, amend the terms and conditions of the contract in a manner that satisfies the interests of all parties.

If the contract contains provisions regulating the case of force majeure or emergency circumstances and states the mechanism available for relieving the damage resulting from such calamities, the affected party may seek relief from such damage or to reduce it according to the conditions and mechanisms provided for in the contract. It should also be noted that mediation is becoming an increasingly attractive option in Saudi Arabia and internationally, and provides a constructive framework for the resolution of disputes^[1]. The ratification of the Singapore Convention on Mediation Agreements is addressed elsewhere in Law Update.^[2]

An amicable solution will not always be achievable and therefore, generally as a last resort, the affected party may commence judicial action in order to secure a remedy. There are likely to be two potential routes open to an aggrieved party depending the nature and severity of the case.

Requesting legal termination of the contract because of the impossibility of its enforcement

The spread of COVID-19 and government decisions taken to fight this pandemic may be considered as force majeure in the case of some contracts due to the impossibility of performing the obligations set out in the contract. The parties to any contract, affected by such circumstances, can apply to the court requesting the termination of the contract due to the impossibility of its execution. The judge has absolute discretionary power to consider whether the impossibility resulting from COVID-19 is partial or temporary according to the nature of the contract, its consequences and its degree of impact. The judge will accordingly order the suspension of the contract for a certain period without termination or the termination of the contract partially if the obligation in question is divisible from the remainder of the contract.

Requesting financial rebalancing of the contract

It is clear also that the spread of COVID-19 and government decisions taken to face it, may be considered emergency circumstances that have resulted in making the interests of parties to contracts imbalanced, therefore making the execution of obligations burdensome or threatening significant loss in excess of what might be considered normal. In such cases, the combined principles of Islamic Sharia'h and the provisions of the Saudi law, enable the affected party to seek a judicial remedy.

Conclusion

It is clear from the above, that Saudi law and Shari'ah principles recognise the concept of force majeure and emergency circumstances. The Saudi judiciary has wide and absolute discretionary power to assess whether COVID-19 should be treated as a force majeure or emergency event and will do so having regard to the nature of each contract, the relevant circumstances and the degree and duration of the impact of the pandemic. However, a judgment finding that COVID-19 is a force majeure event for a specific contract does not mean that this judgment will be applicable to all other similar contracts, even if these contracts are by their nature similar. Each contract is unique. Each judge has his own arguments, reasons and understanding of the Shari'ah and other legal principles on which his judgments are based and, as already stated, there is no concept of binding judicial precedent.

¹ <https://www.tamimi.com/law-update-articles/ksa-leads-on-singapore-convention/>

² <https://www.tamimi.com/law-update-articles/saudi-arabia-ratifies-the-singapore-convention-on-mediation/>

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