TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 30 SUMMER 2022 NO. 2

The Regulation of Force Majeure in the Contract Laws of Gulf States: Private Law as Investment Law

Ilias Bantekas*

Gulf nations have entered into relatively few bilateral investment treaties. Foreign investors and transnational commercial actors therefore rely on a combination of Gulf Cooperation Council (GCC) private laws as well as foreign private laws (including common law) in their contractual relationships with government entities and other private actors; contracts and contract law are hence central to investment protection. Force majeure is regulated by both statute (civil codes), except for Saudi Arabia, as well as an emerging body of case law in the Gulf states. Although the private laws of GCC states were modeled under the Egyptian Civil Code of 1948 and the case law of the Egyptian Court of Cassation is still somewhat evident, although far less than past times, GCC member states have developed a common understanding of force majeure that is consistent with international practice. They all distinguish between unforeseen acts that render performance of at least one party's obligation impossible from those where performance is difficult but certainly possible. A clear consensus has emerged whereby the parties cannot determine by contract situations giving rise to force majeure.

I. INTRODUCTION

Today, private laws exercise a dual function; they regulate contractual relationships within the ambit of the law's authority while at

the same time serve as a choice of law in transnational commercial contracts. The latter function is typically associated with the laws of advanced, sophisticated, jurisdictions, such as English law. A third function concerns the investment dimension of private laws. In the absence of a pertinent bilateral investment treaty (BIT), a foreign investor in its contractual relationship with the host state or private parties, would rely by necessity on the private law of the host state and/or foreign laws.[1] While powerful foreign investors could bypass the application of private laws in poor developing countries by demanding a discreet contract with the host state incorporating investment guarantees and a foreign applicable law, this is not possible, or indeed likely, in developed states, such as those in the GCC.[2] GCC states have ratified relatively few BITs[3] and they generally require investors to abide by their private laws. While some choice of law, other than GCC law, is available in contractual relationships, this is restricted significantly in certain fields, such as construction or natural resources extraction agreements.[4] Indeed, the bulk of foreign direct investment (FDI) in the Gulf is centered around construction and energy.[5] As a result, the private laws of the GCC are reflective not only of domestic regulation, but also international law, particularly in regard to foreign investment and transnational commercial contracts.

---

* © 2022 Ilias Bantekas, LLB (Athens), BA/Dip (Cambridge), PhD (Liverpool). Professor of Transnational Law, Hamad bin Khalifa University (Qatar Foundation) College of Law and Adjunct Professor, Georgetown University, Edmund A Walsh School of Foreign Service. The author would like to express his gratitude to Wafa Trad for her research assistance.

1. *See* Steven R. Ratner, *International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows*, 21 J. WORLD INV. & TRADE 7 (2020); Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473, 1476-77 (2011).

2. One study has shown that the greatest concern for foreign investors from OECD countries investing in the GCC is not the existence of BITs, but rather domestic property rights protection, which are regulated by local private laws. *See* Wasseem Mina, *Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?*, 2 AFR. REV. ECON. & FIN. 1, 26 (2010); Wolfgang Alschner, Dmitriy Skougarevskiy, & Mengyi Wang, *Champions of Protection? A Text-as-Data Analysis of the Bilateral Investment Treaties of GCC Countries*, 5 INT'L REV. L. 1, 12 (2017).

3. *See also International Investment Agreements Navigator*, Qatar, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/171/qatar (last visited May 12, 2022) (noting that Qatar, for example, has signed 60 agreements, but as of Nov. 1, 2021, only 26 are in force).

4. *See* Ruchdi Maalouf, *International LNG Contracts*, 3 OIL, GAS & ENERGY L. INTEL., 1, 16 (2018).

5. It is estimated that construction contracts in the Gulf in 2021 and 2022 are set to be worth 115 billion USD and 112 billion USD respectively. *See also Gulf Construction Sector Tipped to Rebound Following Covid Impact*, ARABIAN BUS. (Sept. 25, 2021).

There are several important reasons as to why the private law of the GCC (which includes Saudi Arabia, UAE, Qatar, Oman, Kuwait, Bahrain, and Yemen) is relevant to a common law professional audience. First, English statutory and common law govern most transnational contracts in the region, either alone or in conjunction with local contract law.[6] This is also true in respect of Islamic finance instruments.[7] As already mentioned, construction agreements equally straddle between the desire of public works authorities to situate them in domestic private law with the resolve of contractors to apply International Federation of Consulting Engineers (FIDIC) rules and common law.[8] Qatari authorities, for example, typically insist on the application of the Qatari Civil Code (CC), whereas in the UAE, there is clear agreement in favor of FIDIC rules, albeit with an equally important role for United Arab Emirates (UAE) private law.[9] Furthermore, GCC states have set up special economic zones (SEZ) to attract high-end financial services multinationals and high-technology innovators.[10] These sophisticated SEZ are equipped with impressive transnational commercial courts[11] and are even viewed as better alternatives to arbitration.[12] The law of these zones reflects a combination of local private law with English common law, albeit with an emphasis on

6. Ilias Bantekas, *The Globalisation of English Contract Law: Three Salient Illustrations*, 137 L.Q.R. 330, 334 (2021).

7. *See* Ilias Bantekas, *Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration*, 12 J. INT'L DISP. SETTLEMENT 1 (2021); *see also The Investment Dar Co. KSSC v. Blom Development Bank S.A.L* [2009] EWHC (Ch) 3545, para. 16 (determining that the designation of English law as the governing law of a *Wakala* agreement was overridden, on the ground that it was not Sharia-compliant with the underlying investment, which the parties had expressly agreed should be so compliant); *see also Sanghi Polyesters Ltd. (India) v. The International Investor (KCFC) (Kuwait)* [2000] EWHC (QB) (holding that in the event of a conflict between English and Islamic law, the more pressing law to the issue at hand, in the present instance an Islamic finance transaction, would prevail).

8. *See* Michael Grose & Ramiz Shlah, *Construction Law in Qatar and the United Arab Emirates: Key Differences*, 1 TURKISH COM. L. REV. 189, 189 (2015).

9. *See* Grose & Shlah, *supra* note 8.

10. *See* Douglas Z. Zeng, *The Past, Present and Future of Special Economic Zones and Their Impact*, 24 J. INT'L ECON. L. 1, 4 (2021).

11. *See Qatar Financial Center Judges*, QATAR INT'L COURT, https://www.qicdrc.gov.qa/courts/court (The Qatar Financial Center is comprised of senior, mostly retired, judges from the English High Court, Court of Appeals, Commercial Court and the United Kingdom Supreme Court, as well as senior judges from other common law jurisdictions); *Abu Dhabi Global Market*, ADGM Courts, Judges, https://www.adgm.com/adgm-courts/judges.

12. *See* Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Center and Dubai International Financial Center: A Comparative Analysis*, 46 H.K.L.J. 529, 555 (2016); Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, 33 PACE INT'L L. REV. 1, 41 (2020); *see generally* INTERNATIONAL COMMERCIAL COURTS: THE FUTURE OF TRANSNATIONAL ADJUDICATION, (GEORGIOS DIMITROPOULOS & STAVROS BREKOULAKIS eds., Cambridge University Press) (Apr. 2022).

the latter,[13] or even a wholesale transplantation of English statutory and common law, with local private law (in the latter case) serving as a public policy guarantor.[14] Even the Qatar Financial Center (QFC) Court, whose statute provides no reference to common law or English law whatsoever, decides a significant portion of its cases almost entirely on the basis of common law as well as English statutory law.[15] The same is true of the DIFC Court.[16] Hence, the interplay between English common and statutory law and GCC private law is far from insignificant, and a combination of both is typical of contracts in the region.

Force majeure is generally treated as part of a broader umbrella of so-called "unforeseen circumstances"[17] affecting performance in contractual relationships. While a particular circumstance may certainly render performance impossible, this is not true of all unforeseen circumstances.[18] Most unforeseen circumstances simply render an existing obligation more difficult or costlier to perform (also known as "hardship").[19] In practice, the distinction between impossibility to perform and hardship is not free from contention. English law treats both under a single heading of "frustration" (of contract). Even so, English courts have

---

13. *See also* Jayanth Krishnan & Priya Purohit, *A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, 26 AM. REV. INT'L ARB. 497, 497-98 (2015) (noting that while the DIFC founding law (Law No 9 of 2004) is silent on the application of English or common law, Art 8(2)(5) of Law No 3 of 2004 Law on the Application of Civil and Commercial Laws in the DIFC ranks "the laws of England and Wales" fifth in descending order, at the apex of which are DIFC laws).

14. *See Abu Dhabi Global Market*, APPLICATION OF ENGLISH LAW REGULATIONS 2015, https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_14585_VER121020.Application_of_English_Law_Regulations_2015.pdf.pdf (Art 1(1) of the ADGM's 2015 Application of English Law Regulations renders English common law, including the principles and rules of equity, as "part of the law of the ADGM").

15. *See* Sharar & Khulaif, *supra* note 12, at 533-34.

16. *See* Chedid & Associates Qatar LLC v. Said Bou Ayash [2014] QIC (F) 3, para. 3 (The QFC Court made an important statement on the persuasive value of the common law on QFC law. It held that the reasoning in non-QFC judgments, such as from common law courts, which concern principles, expressions or concepts similar to those in QFC laws have persuasive value in interpreting and applying QFC laws, including the QFC Contract Regulations. Even where the governing law of a contract is not English law, the QFC Court still relies on English contract law to flesh out general principles); *see also* Obayashi Qatar LLC v. Qatar First Bank LLC [2020] QIC (F) 5, para. 90 (The court held that Qatari law was the contract's governing law. Yet, the court relied predominantly on the English law of demand guarantees, as well as the fraud exception therein, as a condition freeing the debtor from its obligation).

17. *See* Philip Ridder & Marc P. Weller, *Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Law*, 22 EUR. REV. PRIV. L. 371, 372-73 (2014).

18. *See* James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 AM. J. COMP. L. 513, 529-30 (2004) (suggesting that impossibility should not deprive the obligor from all remedies).

19. Gordley, *supra* note 18, at 528-29.

traditionally exhibited a reluctance to satisfy claims of frustration,[20] other than on the basis of absolute impossibility to perform.[21] Other jurisdictions, however, as is the case with the GCC states analyzed in this Article and the vast majority of civil law states, have opted for a distinction between absolute impossibility to perform and hardship.[22] The common law position straddles between impossibility of performance and frustration of purpose (or uselessness or worthlessness of purpose).[23] This position is well reflected in *Krell v. Henry*. Henry had hired a room to watch the coronation of King Edward VII, who subsequently fell ill, causing the coronation to be postponed.[24] When the lessor demanded payment, the court found the contract to have been frustrated on the ground that the coronation was the root of the contract and essential to its performance.[25] Therefore, the room was useless to Krell. English law, however, allows the parties to waive the legal rules on frustration as these are considered default rules.[26] English courts have long moved away from the so-called "implied term" theory of frustration and are instead happy to infer frustration from the nature and circumstances of the contract.[27] Such circumstances include: a) the destruction of the contract's subject matter;[28] b) non-occurrence of an event crucial to the contract, as was the case with *Krell v. Henry*;[29] c) impossibility to offer a personal service because of

20. Davis Contractors Ltd. v. Fareham Urban District Council [1956] AC 696 (HL) 5 (appeal taken from Eng.) (holding that frustration does not occur when circumstances become more onerous for one party, but certainly not impossible); *see* J. Lauritzen A.S. v. Wijsmuller B.V. [1990] EWCA (Civ) 6, [1989] 1 Lloyd's Rep. 1 [8] (listing the conclusions set out by Bingham LJ).

21. *See* Tsakiroglou and Co. v. Noblee Thorl Gmbh [1962] AC 93 (HL) (appeal taken from Eng.).

22. Mhd Syahnan, *Force Majeure in the Islamic Law of Transactions: A Comparative Study of the Civil Codes of Islamic Countries*, 9 JURNAL TSAQAFAH 1, 8-9 (2013).

23. *See also* James J. White, *Allocation of Scarce Goods Under Section 2-615 of the Uniform Commercial Code: A Comparison of Some Rival Models*, 12 U. MICH. J. L. REFORM 503, 503 (1979) (noting that Section 2-615 of the US Uniform Commercial Code (UCC) authorizes a contract seller to allocate goods in short supply when full performance has become commercially impracticable).

24. Krell v. Henry [1903] 2 KB 740.

25. *Id.*

26. *See* Fengming Liu, *The Doctrine of Frustration: An Overview of English Law*, 19 J. MAR. L. & COM. 261, 267 (1988).

27. C. Grunfeld, *Frustration—Decline of the Implied Term Theory*, 19 MOD. L. R. 696, 696-97 (1956).

28. Sale of Goods Act 1979, c. 54, § 7.

29. *Krell*, [1903] 2 KB 740.

death or incapacity;[30] d) requisition of ships;[31] and e) change in the law.[32] It is now generally agreed that a contract is frustrated where a "radical change in the obligation" has occurred.[33] At its core, the doctrine of frustration is concerned with the incidence of risk.[34] A risk is not considered frustrating where: a) it was expressly provided in the contract;[35] b) was foreseeable;[36] c) prevention of performance was undertaken in a manner intended by one party;[37] d) delay was caused;[38] and e) inflation unexpectedly occurred.[39] Unlike other parts of the common law pertaining to contracts, frustration is now regulated by statute in several common law or mixed jurisdictions, including the English Frustrated Contracts Act of 1943.[40] This Act has effectively consolidated existing common law and amended previous common law rules on the complete or partial return of pre-payments in situations where a contract was deemed to have been frustrated.[41]

The Article is intentionally brief, chiefly because there is very little scholarly work or judgments on force majeure in the majority of GCC states, apart from those mentioned here. A lengthier analysis would force the author to assume or speculate how the law might be understood or applied in future circumstances despite the absence of a consistent line of precedent. That is certainly not the aim of this Article. This Article aims to

---

30. Stubbs v. Holywell Railway Co. [1867] L.R. 2 Exh. 311; *see also* Marshall v. Harland & Wolff Ltd. [1972] 1 WLR 899 (NIRC) at 903 (holding that frustration can be inferred when performance becomes impossible or an obligation becomes radically different from that initially undertaken).

31. FA Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. [1916] 2 AC 397 (HL) (appeal taken from Eng.).

32. Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] EWHC (QB) 728 at 772 (Staughton J).

33. Davis Contractors Ltd. [1956] AC 696 (HL) 13. William Sindall PLC v. Cambridgeshire County Council [1993] EWCA (Civ) 14, [1994] 1 WLR 1016 [1039] (Eng.) (confirming that a contract is frustrated when a radical change in the obligation occurs); *see* National Carriers Ltd v. Panalpina (Northern) Ltd. [1981] AC 675 (HL) 700 (Lord Simon of Glaisdale) (appeal taken from Eng.).

34. *See* John C. Smith, *Contracts: Mistake, Frustration and Implied Terms*, 110 L.Q.R. 400 (1994).

35. Bank Line Ltd. v Arthur Capel & Co. [1919] All ER 504 at 517-18.

36. *Id.* at 509.

37. Blackburn Bobbin Co. Ltd. v. TW Allen & Sons Ltd. [1918] 2 KB 467; *see* CTI Group Inc. v. Transclear SA (The Mary Nour) [2008] EWCA (Civ) 856, [2009] 2 All ER (Comm) 25.

38. Bank Line Ltd. v Arthur Capel & Co. [1919] All ER at 514.

39. Staffordshire Area Health Authority v. South Staffordshire Waterworks Co. [1978] 1 WLR 1387 (EWCA (Civ)).

40. LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943, 6 & 7 GEO. 6 C. 40, § 1, (ENG.).

41. *See* United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3.

examine the relevant position in Qatar, KSA, UAE, Oman, Kuwait, and Bahrain. Yemen is excluded from this Article because its legal system and institutions have been destroyed or wholly incapacitated as a result of the country's long-standing and ongoing civil war.

II. THE RELEVANCE OF ISLAMIC LAW

While a big part of the audience not accustomed to Muslim-majority nations might be inclined to think that the private law of Gulf states is predicated on Islam, this is, in fact, not the case.[42] The Sharia, no doubt, becomes a primary source of law in interpreting a dispute where Islamic law is the governing law of the parties' contract,[43] or where the subject matter of the dispute concerns a contractual type predicated on Islamic law.[44] The consistent practice in the GCC is that in interpreting such contracts, the courts are not bound to accept the parties' stipulations that the contract is in conformity with the Sharia; rather, the courts have authority to undertake an objective analysis of said conformity.[45] With the exception of the Kingdom of Saudi Arabia (KSA), all other civil codes (CC) are secular in both their outlook and the sources by which they are to be interpreted,[46] with the Sharia given little, if any, practical significance.[47]

Even so, Islamic ethics have played a role in the shaping and codification of force majeure in the post-World War II Egyptian CC, and this in turn has significantly influenced all subsequent codifications of GCC civil codes,[48] even if not always mentioned or attributed in the codes

---

42. Although slightly outdated, this is still an accurate account. *See* William Ballantyne, *The States of the GCC: Sources of Law, the Shari'a and the Extent to Which it Applies*, 1 ARAB L.Q. 3, 17-18 (1985).

43. *See generally* ILIAS BANTEKAS, JONATHAN ERCANBRACK, UMAR OSENI, & IIKRAM ULLAH, ISLAMIC CONTRACT LAW (forthcoming in 2023) (setting out a detailed analysis of Islamic Contract law, which ultimately corresponds with only a few countries' legal systems).

44. *See* Qatari Cassation Court, Judgment 94/2013 (Although the Court of Cassation rarely refers to the Sharia in contractual disputes, it sometimes does refer to it as the origin of a rule).

45. *See* Dubai Cassation Court, Judgment 898-927/2019 (concluding that for a *murabaha* contract to be Sharia-compliant, it must satisfy the criteria of the Maliki school and that a certificate of compliance from an Islamic bank or financial institution is insufficient).

46. *See generally* ILLIAS BANTEKAS & AHMED AL-AHMED, CONTRACT LAW OF QATAR, ch. 6 (forthcoming in 2023) (exhibiting the progressive character of the Qatari CC, where the absence of Islamic law is glaring).

47. *See* Law No. (22) of 2004 Regarding Promulgating the Civil Code art. 1(2) (providing a hierarchy of sources, with statute at the apex, followed by the Sharia "if any," customary practices and finally "rules of justice"); *see also* Qatari Court of Cassation, Judgment 122/2013 (emphasizing that the limitations of justice as a rule is trumped by the mutual intention of the parties); *see* Qatari Court of Cassation, Judgment 26/2015.

48. Syahnan, *supra* note 22, at 8.

themselves. Hence, a brief account of the Sharia on this issue is instructive. In Islam, meeting contractual obligations is a religious duty. This was made clear in verse 1 of Surah Al Mā'idah, which states that "O you who have believed, fulfill [all] contracts."[49] Yet, despite its religious significance, Islam has also permitted complete or partial non-performance where circumstances change (*nazariyyah al-hawâdits al-dhâri'ah*).[50] The primary sources are as follows:

> "There should be neither harming (darar) nor reciprocating harm (dirar)[51] . . . damage shall be removed."[52]

And the Prophetic Hadith whereby:

> If You sell fruits to your brother . . . and these is a stricken with Calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification?[53]

It is clear that Islamic law recognizes the impact of unforeseen circumstances on ongoing contracts and allows for the qadi's (judge) intervention to achieve fairness. Such intervention may arise by adjusting the "excessively onerous" contract or by invalidating it.[54]

Under classic Islamic contract law, where the article is lost before its possession by the buyer, liability rests with the seller.[55] This also applies to the price agreed, particularly where the object of the contract is a specific article such as a specified gold coin. However, where the price is an agreed amount and not a specifically identified object, the seller can accept its substitute and the contract will go ahead.[56] Where the entirety of the commodity is destroyed due to a cause attributed to heavenly grounds, its loss shall burden the seller and the contract shall be rescinded. This conclusion is based on Prophet Mohamed's proscription of profiting with something that has not be guaranteed.[57] The effect of such contract is that it shall be rescinded and the price shall return to the buyer due to the

---

49. Quran, *Surat Al- Ma'idah*, verse 1.

50. A AL-RAZZAQ AL-SANHURI, MASAÂDIR AL-HAQQ FÎ AL-FIQH AL-ISLAÂMÎ, DIRAÂSAH MUQAÂRANAH BI AL-FIQH AL-GHARBÎ at 95 (vol. 6 1954-59).

51. AN-NAWAWI'S FORTY HADITH, *Hadith* 32.

52. *Id.*

53. Waiving Payment in the Case of Blight, *The Book of Musaqah*.

54. *See* Sue E. Rayner, *A Note on Force Majeure in Islamic Law*, 6 ARAB L.Q. 86, 89 (1991).

55. Muhammad Al-Abdarī, *Al-Tāj wa al-Iklīl li Mukhtaṣara al-Khalīl*, (Dar al-Fikr, 1978) 4:3.

56. Al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, 2:78, 320; Ibn Qudāmah, *al-Mughnī*, 5:251; Illīsh, *Minaḥ al-Jalīl*, 4:434.

57. JAMI` AT-TIRMIDHI, *Hadith* no. 1234; AL-NASĀ'Ī, *Hadith* no. 4629. AHMAD IN HIS MUSNAD, *Hadith* no. 6738.

impossibility of execution. According to the Hanafis, the same rule also applies where the seller destroys the commodity.[58] Adherents of the Shāfi'is have differed among themselves.[59] While the preferred opinion within the school is that the contract shall be terminated just like where its subject matter was destroyed due to a heavenly cause, the other stream maintains that the buyer shall have the option of either rescinding the contract or taking back the price paid; as well as concluding the contract and accepting the value of the damaged product.[60] In the Hanbali School, destruction of the contract's purpose by the seller is the same as destruction by a third party.[61] Jurists have also agreed that if the commodity is damaged by the action of the buyer, the contract is deemed to have been concluded and the buyer is obliged to pay the price; and such destruction is presumed to be the receipt of the subject matter of the contract.[62]

In ijārah too, loss of the subject matter of ijārah shall lead to termination of the contract (infisākh).[63] This arises where the contract is frustrated and cannot be performed whether by the choice of its parties or not. Other instances where a contract's termination is referred to infisākh due to impossibility of its performance include:

a) Where Jurists have agreed that a leased animal for a particular purpose dies or the house is destroyed, the contract shall be terminated.[64]

b) Where the leased property is usurped in the hands of the lessee, the contract of lease terminates due to inability to enjoy the fruits of the lease. This is the position among Hanafis and Malikis. The Shāfi'is and Hanbalis are of the view that the contract does not terminate by default but through the exercise of option by the lessee.[65]

---

58. Ali Haidar Khawajah Amin Afandī, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām*, (Fahmī al-Ḥusaini tra, Dar al-Jīl, Beirut, 1411H/1991), 1:275; Ibn Rushd, *Bidāyat al-Mujtahid*, 4:60.

59. Abubakr Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Dar al-Kutub al-'Ilmiyah, 1986) 5:308.

60. Muhammad bin Ahmad al-Khaṭīb Al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj*, (Dar al-Kutub al-Ilmiyah, 1415H/1994), 2:457.

61. Qudāmah, *supra* note 56, at 4:83.

62. Ṣaleh AbdulSamī' al-Ābī al-Azharī, Jawāhir al-Iklīl, (Al-Maktabah al-Thaqāfiyyah, Beirut) 2:53; Mughnī al-Muḥtāj, 2:485; Qudāmah, *supra* note 56, at 4:84.

63. Al-Kāsānī, *Badā'i' al-Sanā'i,'* 4:233; Al-Sarakhsī, *Al-Mabsūṭ*, 16:2; Ahmad bin Muhammad al-Khalwati al-Ṣāwī al-Mālikī, *Bulghat al-Sālik li Aqrab al-Masālik*, (Dar al-Ma'ārif), 4:51-52.

64. Abidīn, *Radd al-Muhtār*, 5:52; Al-Ṣāwī, *Bulghat al-Sālik*, 4:49; Shamsuddīn Muhammad bin Abi al-Abbas Ahmad bin Hamza Shihābuddīn al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, (Dar al-Fikr, Beirut, 1404H/1984), 5:300, 318; Qudāmah, *supra* note 56, at 4:304.

65. Uthman bin Ali bin Miḥjan al-Bāri'ī Fakhruddīn Al-Zaila'ī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq*, (Al-Matba'a al-Kubrā al-Amīriyyah, Cairo, 1313H), 5:108; Ibn Abidīn, *Radd al-*

c) Contracts of partnership, muḍārabah, muzāra'ah and musāqāt (crop sharing) are repudiated upon the death of a party, because such contracts require continued commitment by both parties.[66]

d) A contract of lease is rescinded by the death of a party, or both according to the Hanafis.[67]

In the Arab world, the impact of unforeseen circumstances in private law has gone through two distinct stages: the pre-Sanhuri codes era and the post-Sanhuri era.[68] In the former, the courts emphasized that they were absolutely prevented from intervening in the parties' contracts, whereas following the enactment of the Sanhuri-inspired Egyptian civil code, this stance vanished.[69] Sanhuri drafted the first modern Arab CC, namely the Egyptian CC, which has greatly influenced the development of private law throughout the Middle East and North Africa (MENA), as well as the GCC.[70] In attempting to find the historical origins of fundamental change of circumstances, Sanhuri made use of the Islamic theory of legal necessity, as well as justice.[71] The Egyptian Explanatory Memorandum of the Civil Code notes that the force majeure provision in article 608 of the CC is predicated on the doctrine of intervening contingencies as originally developed in Islamic law.[72]

A. Qatar

The Qatari CC distinguishes between various types of hardship. Yet, not all of these allow the debtor to terminate or rescind the contract or its effects.[73] Article 258 CC makes it clear that the parties may well agree that

---

Muḥtār alā al-Durr al-Mukhtār, (Dar al-Fikr, Beirut, 1412H/1992), 5:620; Abu al-Abbās Ahmad bin Muhammad al-Khalwatī al-Ṣāwī al-Mālikī, *Bulghat al-Sālik li Aqrab al-Masālik*, (Dar al-Ma'ārif), 4:49; Shihābuddīn al-Ramlī, *supra* note 64, at 5:318; Qudāmah, *supra* note 56, at 5:251.

66. Mustafa Ahmad Al-Zarqā, *al-Madkhal al-Fiqhī al-'āmm*, (Dar al-Qalam, Damascus, 1425H/2004), 596.

67. Al-Kāsānī, *Badā'I,'* 4:222.

68. *See* GUY BENCHOR, THE SANHURI CODE AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932-1949), at 2-3 (rev. ed. 2007).

69. *See* BENCHOR, *supra* note 68, at 177-78.

70. *See* Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 ARAB L.Q. 161, 161 (1993) (Sanhuri's students later drafted other MENA and GCC civil codes on the basis of his philosophy and ideals).

71. AL-SANHURI, *supra* note 50.

72. Syahnan, *supra* note 22, at 8.

73. *See* Qatari Court of Appeal, Judgment 523/2018 (This case is a poignant example that does not neatly fall into the following subsections arose in a case where the parties had inserted an arbitration clause in their contract that designated as its seat a place that did not exist at the time of the contract. The Court of Appeal held that the possibility of its existence in the future is sufficient

the obligor shall be liable for performance or indemnity in the event of force majeure or unforeseen incidents.[74] Hence, in the first instance, the regulation of force majeure is a matter of agreement.[75] Nonetheless, even though the parties may waive rescission under articles 187 and 188 CC, this is not possible in the context of adhesion contracts.

The CC distinguishes between force majeure arising in contracts binding on one party and in respect of contracts binding on both parties. Force majeure in contracts where an obligation burdens one party only is defined in article 187(1) CC as *impossibility* of performance "beyond the control" of the obligor.[76] Unlike the civil law tradition, this provision stipulates that force majeure in contracts imposing performance obligations on only one party serves to terminate the contract automatically and hence the obligation will be deemed extinguished.[77] Where the impossibility is partial, the debtor may enforce those part(s) of the obligation that can be performed by the obligor.[78]

In the event of contracts imposing obligations on both parties, where the obligor's obligation (but not also the obligee's) is extinguished by reason of force majeure (impossibility to perform critical obligations beyond the obligor's control) the contract is considered rescinded *ipso facto* for both parties. This is clearly stipulated in article 188(1) CC.[79] The Court of Cassation has held that the rescission of a contract by virtue of article 188(1) CC is possible only where the external cause has resulted in "absolute impossibility to perform," in which case the burden of proof falls on the debtor.[80] It is for these reasons that the classical position on force

---

as long as it is not an absolute impossibility, and relative impossibility does not prevent the obligation from being established under articles 148 and 149 Civil Code).

74. Law No. (22) of 2004 Regarding Promulgating the Civil Code, art. 1(2) [hereinafter Law No. (22)].

75. *See* Qatari Court of Cassation, Judgment 114/2009 (The Qatari Court of Cassation emphasized the sanctity of party autonomy in consonance with the parties' agreement. This clearly applies to the contractual regulation of force majeure).

76. Law No. (22), art. 187(1).

77. *Id.*

78. *Id.* at 187(2).

79. *See* Qatari Court of the Cassation, Judgment 257/2018; *see also* Qatari Court of Cassation, Judgment 449/2017 (In this case, *force majeure* was referred to *obiter dicta* without much elaboration. The Court argued that if the hacking of bank accounts was beyond the control of the bank, while at the same time not compounded by the account holder's negligence, then the unlawful removal of funds from bank accounts could amount to *force majeure*).

80. *See* Qatari Court of Cassation, Judgment 449/2017. *See also* Qatari Court of Cassation, Judgment 13/2010 (holding that impossibility beyond the control of the obligor arises where the event in question is unpredictable and impossible to avoid and the implementation of the commitment under the contract was impossible for everyone in the debtor's position); *see also* Court of Cassation Judgment 51/2008 (emphasizing the burden of proof in the case at hand).

majeure under Islamic law (*qûwa qãhira*) cannot, and in fact is not, sustained in the CC. The Sharia recognizes any act of God or unforeseen condition as a ground for terminating the conduct,[81] which is not the case with the strict application of force majeure. Although it is not evident if *qûwa qãhira* was the inspiration behind article 171(2) CC (unforeseen circumstances),[82] it is certainly compatible with that provision.

In a leading case, the parties entered into a purchase contract in 2007 of five units located on the seventy-ninth floor of a tower under construction.[83] Delivery was due in 2010. In 2008, construction was suspended due to the economic crisis.[84] Additionally, in 2015, the Civil Aviation Authority issued a decision restricting the height of new buildings.[85] Subsequently, the construction of floor seventy-nine was halted, and so delivery became impossible.[86] The appellant sought remedy for both the delay and the non-performance.[87] More specifically, the appellant requested the substitution of the contracted units by others on a different floor for a lower price.[88] As regards the non-performance claim, the Court of Cassation held that the appellee had no obligation to substitute, and since non-delivery was caused by an external event (i.e., the 2015 regulation), construction was beyond the appellee's control.[89] This was thus a clear case of force majeure and there was no obligation to compensate.[90] The Court distinguished between the Civil Aviation Authority's sudden regulation and the economic crisis.[91] The latter was deemed to be foreseeable, and hence delay based on the economic crisis was held to constitute a breach of the contract warranting appropriate compensation.[92]

An event may be unforeseeable yet not beyond the control of the obligor. In a case where a fire spread from one building to another in the presence of the fire brigade, the Court of Cassation held that while the

81. *See* Rayner, *supra* note 54, at 86-87.
82. Law No. (22), art. 171(2).
83. Qatari Court of Cassation, Judgment 257/2018.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. Rayner, *supra* note 54, at 87; *see generally* Abdullah A. Abdullah, *Coronavirus Pandemic and Contractual Justice: Legal Solutions and Realistic Approaches: A Study in Qatari Civil Law and Comparative Practices*, 35 ARAB L.Q. 1 (2020).
91. Qatari Court of Cassation, Judgment 257/2018.
92. *Id.*

destruction of the adjacent building was unforeseeable, the prevention of the spread of the fire was avoidable.[93] In the same vein, the Court of Appeal has held that since the basis of business is risk and speculation, high prices and economic stagnation are not considered a sudden accident.[94]

Rescission, which is the consequence of force majeure, differs from the termination stipulated in article 187(1) CC. Where the impossibility is partial, the obligee may either enforce the contract to the extent of such part of the obligation that can be performed or demand termination of the contract.[95] This is true also in respect of unilateral obligations that are susceptible to partial fulfilment under article 187(2) CC.[96]

At least one commentator has rightly argued that while article 188(1) CC refers to force majeure, the circumstances in which it is applied and its consequences are more akin to the English (and common law) concept of frustration.[97]

B. Saudi Arabia

Saudi Arabia does not possess a written Civil Code, although it is speculated that codification is imminent.[98] The Kingdom adopts the principles of Islamic Sharia instead,[99] which in large part are equally un-codified. This is chiefly achieved through a consolidated set of principles.[100] Saudi courts and scholarship generally recognize three types of situations that permit hardship-related claims by parties to a contract, with a view to adaptation and/or termination.[101] These are: a) *quwa qahira*,

93. Qatari Court of Cassation, Judgment 134/2015.
94. Qatari Court of Cassation, Judgment 257/2018.
95. Law No. (22), art. 188(2).
96. *Id.* at art. 187(2).
97. James Bremen et al., *COVID-19: A Comparison of the Issues Affecting Performance of Contractual Obligations under English and Qatari Law*, QUINN EMANUEL LLP (Apr. 3, 2020), https://www.quinnemanuel.com/media/z2khcwhg/covid-19-a-comparison-of-the-issues-affecting-performance-of-contractual-obligations-under-english-and-qatari-law.pdf.
98. Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L COMPAR. L. Q. 761, 764 (1989).
99. *Id.*
100. Al Dhabaanand Partners & Eversheds Sutherland, *COVID-19 in Saudi Arabia: Force Majeure or State of Emergency*, 2, 2 (Mar. 25, 2020).
101. Amani Khalifa et al., *Update: How to Succeed with KSA Construction Claims in the Current Climate*, FRESHFIELDS BRUCKHAUS DERINGER (Feb. 16, 2021), https://riskandcompliance.freshfields.com/post/102gr0x/update-how-to-succeed-with-ksa-construction-claims-in-the-current-climate.

which corresponds to force majeure; b) *al dhorouf al tari'a*, which corresponds to hardship; and c) *istihala* or impossibility to perform.[102]

In addition to Islamic law, the Saudi legislature has addressed the concept of force majeure in a number of specialized laws. The first among these is the Competition and Government Procurement Law.[103] Article 74 of this law specifies that contract extension and/or exemption from liquidated damages is allowed where the delay is attributed to the government, or if it is the result of a state of emergency.[104] Article 1 of the same law has defined a "state of emergency" as a situation in which there is a serious and unexpected threat to public safety, security or health.[105] In equal measure, article 14 of the Electronic Commerce Law stipulates that: "Unless the parties agreed otherwise, and where the delivery is delayed for fifteen days, the customer may refund the price paid for the product except in the case of force majeure."[106] Article 74(5) of the KSA Labor Law permits termination in the event of force majeure without itself providing a definition of force majeure.[107] The same is true of other specialist legislation.[108]

Prior to the outbreak of COVID-19, Saudi courts had not exerted any significant effort to define and elaborate at the highest level the various elements of failure to perform on account of serious intervening circumstances. In a case decided in 1997 by the Appeal Commission, the Saudi government had contracted with a German company to construct an Islamic center in Guinea.[109] Once construction commenced, the Guinean government unexpectedly increased labor cost.[110] The German company could not have foreseen this rise in cost and requested the Saudi

---

102. *Id.*

103. Emad Salameh & Abubaker Jeeballah, *Covid-19: Force Majeure under Saudi Law and Shari'ah*, AL TAMIMI & CO (July 2020).

104. *Id.*

105. Government Tenders and Procurement Law, art. 1, (July 16, 2019) (Sa.).

106. *See* Electronic Commerce Law, art. 14, (July 26, 2019) (Sa.) [hereinafter E. Com. L.].

107. Kingdom of Saudi Arabia, Labor Law (issued on August 23, 1426) https://hrsd.gov.sa/sites/default/files/LABOR%20LAW.pdf.

108. This is equally the case with Art. 171 of the Maritime Commerce law, which states that "ship leasing contracts shall be terminated and no compensation will be payable neither to the lessor nor to the lessee if the performance becomes impossible due to a force majeure; and/or if the commercial activities are suspended at the country of the port of loading or the port of discharge." Maritime Commerce Law, art. 171, (Dec. 12, 2018) (Sa.) [hereinafter Mar. Com. L.]; *see also*, Mar. Com. L., art. 136 (Sa.) ("[W]here the suspension or the delay of the vessel is caused by a force majeure event, the seafarer (sailor) shall be paid for the days he spent in duty."); Mining Investment Law, art. 28, (June 9, 2020) (Sa.) (providing that the delay caused by a force majeure shall not be considered as negligence) [hereinafter M. Inv. L.].

109. Salameh, *supra* note 103.

110. *Id.*

government to adapt the contract because it was now working at a loss.[111] The court agreed, emphasizing that it must "lessen the burdensome obligation to a reasonable limit to relieve or reduce the damage of the affected party."[112] The Court of Appeal reinforced this line of reasoning in 2020 when several contracts instructed by the Saudi government fell victim to the Rift Valley fever.[113] One claimant argued that the fever forced laborers to abandon construction, which resulted in the delay of performance.[114] As a result, the obligee (i.e., Ministry of Education) deducted a sum of 700.000 Saudi Riyals as liquidated damages.[115] Upon appeal, the Court of Appeal ruled in favor of the contractor, who was able to recover the full amount on the basis that the outbreak of the pandemic constituted a state of emergency beyond its control.[116]

Following the COVID-19 outbreak, several construction and other projects were significantly impacted, and contractors immediately sought to mitigate their exposure with a view to limiting or terminating their obligations.[117] The KSA Royal Court requested guidance and on December 23, 2020 the General Panel of the Supreme Court of KSA rendered a decision on the impact of COVID-19, specifically in relation to construction contracts.[118] The Supreme Court defined force majeure as an unforeseen event beyond the control of the parties, which renders implementation impossible and, in addition, causes them a loss.[119] By way of illustration, impossibility of performance may arise, as stipulated by the Court, by the absence of construction material.[120] Conversely, the Court emphasized that hardship exists in cases where COVID-19 had a direct and unavoidable effect on a party's obligation; the hardship is solely attributable to COVID-19, and; the aggrieved party has not waived or

111. *Id.*

112. Appeal Commission, 1997, 1 of 5, (Sa.) (affirming Judgment D/15 (1996)) [hereinafter A.C.].

113. Court of Appeal, 381 of 2000, (Sa.) [Ct. A.]

114. *Id.*

115. *Id.*

116. *Id.* (iterating that where an unforeseen emergency, outside of one's control, prevents a contracting party from exercising its rights, the underlying contract may be terminated (in the case at hand, a lease contract)); *see* Ct. A., 2014, 34208836, (Sa.).

117. See Tariq Umar, 'The Impact of Covid-19 on the GCC Construction Industry' (2022) 13 IJSSMET 1, *available at* https://www.igi-global.com/gateway/article/full-text-pdf/273617&riu=true.

118. Supreme Court General Assembly Decision, 2020, M of 45, (Sa.) [hereinafter Sup. Ct. Gen. A.].

119. Id.

120. Sup. Ct., n. 78. (Sa.). 11.

settled the obligation pending.[121] In such cases of hardship, the claimant may validly seek additional payment to cover the unforeseen cost, with any other increase to be "reasonably" apportioned among the parties.[122]

C. United Arab Emirates

The UAE CC follows the model set out by its Qatari counterpart.[123] Article 273 of UAE Federal Law Number 5 of 1985, which codifies the country's Civil Code, emphasizes that in respect of contracts binding on both parties, if force majeure supervenes in such a manner rendering performance impossible, the corresponding obligation shall cease, and the contract will automatically be terminated.[124] In the event of partial impossibility, that part of the contract that is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts.[125] In those two cases, it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.[126] The Dubai Court of Cassation has made it clear that force majeure arises where an event is unpredictable, public, and unpreventable.[127] This is in line with article 249 CC, which caters for the event of hardship in the same manner as the CC of Qatar, which has already been examined.[128] It specifically addresses "exceptional circumstances of a public nature which could not have been foreseen."[129] Where as a result performance, "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."[130] Any agreement to the contrary shall be void.[131]

---

121. Supreme Court Decision, *supra* note 118.

122. Khalifa, *supra* note 101.

123. *See generally* JAMES WHELAN, *UAE Civil Code and Ministry of Justice Commentary – 2010* (Thomson Reuters, London) 2011; *see also*, Fareya Azfar, *The Force Majeure Excuse*, 26 ARAB L. Q. 249, 253 (2012) (addressing specifically the UAE courts' handling of force majeure claims arising from the economic recession).

124. Qanun Almueamalat Almadania, art. 273(1) (U.A.E) [hereinafter Qan. A. Alm.].

125. Qan. A. Alm., art. 273(2) (U.A.E).

126. *Id.*

127. Dubai Court of Cassation, Judgment 92/2018 (Civil); *see also* Dubai Court of Cassation Judgment 18/2018 (Real Estate Division).

128. Qan. A. Alm., art. 249. (U.A.E.).

129. *Id.*

130. *Id.*

131. *Id.*

The Dubai Court of Cassation has shown significant reluctance in accepting the existence of unforeseen circumstances beyond the parties' control. In one case, the respondent had claimed that the global financial crisis that had affected the real estate sector in Dubai was an unforeseen event.[132] This crisis had also caused a delay in the licensing process by the official authorities.[133] The Court of Cassation held that this claim contradicted the fact that licenses (and permissions) are issued before bringing the housing units onto the market.[134] Consequently, the Court concluded that any impact arising from the delay of the government was avoidable.[135] The Court further rejected force majeure on the basis that market stagnation and recovery are events foreseeable to real estate developers and companies.[136] In another recent case, the parties had a carriage agreement to carry goods from Jebel Ali to Afghanistan through Pakistan.[137] However, the goods were retained in Pakistan after the closure of the border between Pakistan and Afghanistan.[138] As a result, the appellee refused to pay the outstanding amount on the basis that the carriage fees exceeded the value of the goods, and that she no longer needed the goods.[139] The appellant claimed that the closure of the border was due to U.S. military maneuvers in the region and, therefore, it constituted a state of emergency that exempted her from any responsibility.[140] Further, the appellant made reference to article 275 of the Maritime Trade Law, which lists a number of exceptional situations that are "beyond the carrier's control."[141] The Court of Cassation held that military maneuvers were common in that area. Therefore, they were foreseeable to the appellant and, hence, did not qualify as a state of emergency.[142]

The Dubai Court of Cassation has treated the force majeure provision in the CC as possessing a mandatory character and has refused to accept

132. Dubai Court of Cassation, Judgment 207/2012.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. Dubai Court of Cassation, Judgment 337/2018.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

the validity of contractual provisions modifying what may or may not count as an unforeseen circumstance.[143]

D. Oman

Articles 159 and 172 of the Omani Civil Code[144] codify force majeure and hardship. Article 172, dealing with force majeure, states that: "in binding contracts, if force majeure occurs rendering the performance of the obligation impossible to complete, the corresponding obligation shall cease, and the contract shall automatically be revoked."[145] The same article also provides (in the case of partial impossibility) that the part of the contract which is impossible to perform shall be extinguished.[146] 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 that the obligee is so aware.[147] Hence, just like its counterpart in Qatar and the UAE, unforeseen events that fully inhibit one of the parties from fulfilling its contractual obligations effectively terminate said obligation. This much was true even prior to the enactment of the CC in 2013.[148]

Article 159 CC deals with hardship in much the same way as its other counterparts in the GCC.[149] It stipulates that "where unforeseen exceptional general events" occur, and where such an event makes performance—though not impossible—exhausting to the obligor and causing severe loss, the courts may reduce the exhausting obligation to a reasonable extent, based on the circumstances and after balancing the interests of all parties.[150] In fact, any agreement to the contrary shall be null and void.[151]

Even so, article 172 CC does not define the various elements comprising impossibility to perform.[152] This seems to have been set out in a recent judgment rendered by the Administrative Appeal Court.[153] This

143. Dubai Court of Cassation, Judgment 509/2016; *see also* Omar H. Al-Hyari, *Applicability of the 2017 FIDIC Red Book in Civil Law Jurisdictions*, 35 ARAB L. Q. 1, 13 (2020).

144. The Civil Transactions Law, Royal Decree No. 29/2013, (Om.) [hereinafter Civil Transactions Law].

145. Civil Transactions Law, ch. 8, art. 172 (Om.).

146. *Id.*

147. *Id.*

148. Oman Court of Appeal, Judgment 436/2006.

149. Civil Transactions Law, ch. 8, art. 159 (Om.).

150. *Id.*

151. *Id.*

152. Civil Transactions Law, *supra* note 145.

153. Oman Administrative Appeal Court, Judgment 51/2016.

Court revoked a force majeure clause in a contract, arguing its inconsistency with article 172 of the Omani CC.[154] The parties to the contract had agreed that force majeure could only be invoked if four conditions were met.[155] Namely: a) the event being beyond the parties' control; the claimant must have failed to take reasonable measures before the contract's conclusion; c) the claimant was unable to avoid or overcome the event after its occurrence and; d) the situation cannot be attributed to the other party.[156] The parties' clause also provided a number of other circumstances considered as force majeure, namely: earthquakes, tropical cyclones, typhoons, and volcano eruptions.[157] The Court countered the clause's validity by effectively setting out the definition and boundaries of force majeure under Omani law.[158] It held that force majeure must relate to: 1) an unforeseeable event and; 2) this must be unavoidable. As a result, it found that the parties' definition was not lawful.[159] The same court has further held that the emergency must take place after the contract comes into being and before it expires or is otherwise terminated.[160]

E. Kuwait

Kuwait follows the tradition of its other GGC counterparts, with the language and context being almost identical.[161] Article 215 of the Kuwaiti Civil Code (Law No 67 of 1980) provides that "in contracts binding on both parties, where the performance of an obligation by one party becomes impossible due to an external cause that it is beyond its control, such obligation shall be extinguished and the contract shall be automatically revoked."[162] However, where such impossibility is partial, the obligee may either enforce the contract to the extent that part of the obligation can be performed or demand termination of the contract.[163] In one case, a party had an obligation to deliver frozen fish, but in the course of carriage, the fish were damaged.[164] The breaching party (i.e., the carrier) claimed that

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. Oman Administrative Appeal Court, Judgment 651/2016.
161. *See generally*, Isa A. Huneidi, *Twenty-Five Years of Civil Law System in Kuwait*, 2 ARAB L. Q. 216, 216 (1986).
162. *See also*, Kuwaiti Civil Code art. 435 (KW) (stipulating that the impugned event should be unpredictable and impossible to avoid) [hereinafter Civ. C.].
163. *Id.*
164. Kuwait Court of Cassation, Judgment 608/2013.

the damage was the result of force majeure.[165] The Court of Cassation held that a contract of carriage imposes on the carrier the obligation to preserve and deliver the goods safely to their destination.[166] Failure to do so entails its responsibility. It emphasized that the carrier is free from performance where: the damage was not caused by him (the carrier) or his employees, or where the damage was the result of an unforeseen event that was impossible to avoid, thus giving rise to a valid force majeure claim.[167]

Article 293 CC goes on to spell out the consequences arising from a party's impossibility to perform.[168] It stipulates that: "where the execution of a contract becomes impossible or is delayed in such a way that causes harm to one party, compensation must be provided except where such delay or non-performance is beyond a party's control."[169] The Court of Cassation has been at pains to stress that the competent court shall have the discretion to decide whether there are sufficient grounds for contract avoidance and termination, including (implicitly) on the basis of force majeure.[170]

Article 233 CC takes this further by providing more details about the nature of the "external event."[171] According to this provision: "if a person proves that the damage was caused by an external event that is beyond his control—such as a force majeure, a sudden event, the wrongful acts of the aggrieved party or of a third party—he has no obligation to compensate unless otherwise agreed."[172] This default provision seems to conflate a number of otherwise disparate circumstances. The "wrongful acts of a third party" do not count as unforeseen events giving rise to force majeure claims, and the same is true of most sudden events; at least those that are deemed foreseeable.[173] In any event, the ability of the claimant to either anticipate or mitigate, even partially, the effects of the external event will be crucial.[174]

---

165. *Id.*
166. *Id.*
167. *Id.*
168. Civ. C. art. 293 (KW).
169. *Id.*
170. Kuwait Court of Cassation, Judgment 756/2013; Kuwait Court of Cassation, Judgment 1479/2013; Kuwait Court of Cassation, Judgment 1490/2013.
171. Civ. C. art. 233 (KW).
172. *Id.*
173. *Id.*
174. *See* Kuwait Court of Cassation, Judgment 1933/2012 (emphasizing the role of good faith in its assessment of the parties' claims, which implicitly encompasses force majeure claims).

F. Bahrain

There is a uniqueness about the place of force majeure in the Civil Code of Bahrain. Although it generally follows the mold of its other GCC counterparts, the term "force majeure" is mentioned an incredible nine times in the CC, thus demonstrating the legislature's emphasis.[175] Article 54 CC states that "if impossibility to perform the obligations resulting from the contract is due to force majeure, earnest money shall be returned to the payer."[176] It is, however, article 165 CC that defines this concept in much the same way as all other GCC statutes.[177] It notes that a person does not incur liability, nor is further obliged to perform if the injury to the other contracting party arises "from a cause beyond his control, force majeure, the fault of the victim or of a third party".[178] This clearly echoes the wording in article 233 of the Kuwaiti CC. It seems that force majeure is given the same significance as other unforeseen events disabling a party's performance. This conflation is also evident in article 175(1) CC, which stipulates that: "Whoever is in charge of a thing whose supervision requires special care for preventing injury, is liable for damage caused by such thing, unless he shows that the damage was due to a cause beyond his control due to a force majeure, sudden accident, act of the injured person or act of a third party."[179]

The CC does provide some indication as to when an otherwise unforeseen event may not be considered detrimental on the claimant's ability to perform, whether fully or partially. Article 579 CC stipulates that the borrower is responsible for the loss of the thing lent, even in the existence of a force majeure: "if it was possible for him to avoid such loss by using his own property, or if he could only preserve his own property or the thing lent and he preferred to preserve his own property."[180] Articles 592 and 593 CC suggest that, despite the existence of force majeure, the parties may validly agree to ignore its effects as regards the fulfillment of their mutual obligations.[181] Hence, Article 592 CC stipulates that "if an item is destroyed or damaged because of a sudden accident or force majeure before its hand over to the employer, the contractor shall not

175. Bahrain Civil Code (Bahr.) [hereinafter Civ. C.].

176. Civ. C. art. 54 (Bahr).

177. Civ. C. art. 165 (Bahr).

178. *Id.*

179. *See* Civ. C. art. 218 (Bahr) (providing that "the debtor may by agreement accept liability for unforeseen events and for cases of force majeure or sudden accident").

180. Civ. C. art. 579 (Bahr).

181. *See* Mohmed A. Hamid, *Mutual Assent in Formation of Contracts in Islamic Law*, 7 J. ISLAMIC & COMPAR. L. 51 (1997).

demand the agreed consideration nor the refund of the costs thereof unless the employer commit at the time of destruction or damage a breach of his obligation to be handed over the work."[182] In the same manner, article 593 CC suggests that:

> If the materials are supplied by the employer and the item or property is destroyed or damaged because of a sudden accident or force majeure, he shall not be entitled to demand the contractor to pay the value thereof unless the contractor has committed at the time of destruction or damage a breach of his obligation to hand over the work and has not proved that the item could have been damaged if he has effected the handover without breach of his obligation.[183]

III. CONCLUSION

GCC contract law is a mix of some elements of Islamic law and mid-twentieth century modernization.[184] What is generally omitted from the regulation of force majeure in the civil codes of GCC states is the autonomy of parties to exclude the application of force majeure from their contracts. This would, after all, be consistent with the general principle of party autonomy. Even so, the laws and courts of GCC states are reluctant to relegate their applicable force majeure provisions to default, as opposed to mandatory, rules.[185] This is understandable given the Islamic underpinnings of these states and the need to not only provide a sensible balance to the duties of parties, but also to avoid excessive obligations based on circumstances over which the obligor had absolutely no control. Hence, although the parties' choice of governing law is crucial, it is not always certain that courts in the GCC would entertain a foreign law circumventing mandatory provision of their domestic legal order.[186]

---

182. Civ. C. art. 592 (Bahr).

183. *See also* Civ. C., art. 638 (Bahr) (addressing the termination of service contracts on the basis of force majeure); Civ. C. art. 738 (Bahr) (concerning the impact of force majeure on fire insurance agreements); *see also*, Labor Laws for the Private Sector, 2012, (art. 22) (Bahr.) (stipulating that the advent of force majeure entitles the employer to take emergency, yet temporary, measures).

184. Nicholas P. Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 9 COLUM. J. TRANS NAT'L L. 384, 433-35 (1989).

185. This conclusion is liberally drawn by the author. *See* Amin Dawwas & Tareq Kameel, *Applicability of the UNIDROIT Principles as the Law Governing the Merits of Arbitration of the Gulf Cooperation Council Countries*, 35 ARAB LQ 466 (2020).

186. *See* Kuwait Court of Cassation Judgment 226/2012 (determining that according to Art. 38 of the Kuwaiti Civil Code, a foreign law, even if chosen by the parties, shall not be applied if it is in conflict with Qatari public order and morals).

As a general rule, the CCs examined in this article distinguish between two types of circumstances, namely: a) impossibility of performance; and b) situations where performance places a significant burden on the obligor. While the former results in contract termination (partially or entirely), the latter results in the court's interference to restore the financial imbalance between the parties. At a strict textual level, one is certainly able to observe the different phrases and words used in the various codes by which to refer to force majeure. More specifically, while the CC of the UAE, Oman, and Bahrain explicitly use the expression force majeure, their Qatari and Kuwaiti counterparts refer to it by employing its various definitional elements (i.e., external cause beyond his control).

The various codifications further exhibit a distinction related to the consequence of partial impossibility.[187] This is because while the UAE and Omani CCs provide that partial impossibility entitles the aggrieved party to cancel the specific (i.e., impossible part) contractual obligation, the Qatari (article 188) and Kuwaiti CCs (article 215) suggest that partial impossibility to perform may produce two legal impacts.[188] Namely: a) performance to the extent possible; and b) a demand that the contract be terminated. The latter alternative raises the question of whether termination refers only to the impossible part of the obligation to the contract, or the contract in its entirety.

A further distinction is evident from the analysis. The Qatari, Kuwaiti, and Bahraini CCs introduce a rather controversial provision that allows the parties to agree to waive the force majeure exception.[189] This development is in sharp contrast with the case law of higher Omani courts,[190] which have rejected the parties' agreement to define force majeure in a way that is inconsistent with Omani Law.[191]

It is also worth mentioning that the courts effectively determine which unforeseen events and impossibility of performance fall within the ambit of force majeure. In the pertinent UAE and Omani cases, both claimants invoked force majeure on the basis of global economic instability (financial crisis versus the drop in oil prices).[192] While both claims were rejected, the courts provided different grounds for rejecting

187. *See supra* notes 50, 78, 95-96, 125, and 146.
188. Civil Code, art. 188 (Qatar) [hereinafter Qatar Civil]; Civ. C., art. 215 (KW).
189. Qatar Civil, art. 204; Civ. C., art. 233 (KW); Civ. C., art. 165 (Bahr).
190. Oman Administrative Appeal Court Judgment 51/2016.
191. *Id.*
192. *See* Ilias Bantekas, *Termination of Contracts under Qatari Law and its Islamic Law Influences*, 20 UCLA J. ISLAMIC & NEAR E. L. (forthcoming 2022).

force majeure (i.e., lapse of the contractual term versus economic fluctuations).[193]

Finally, a more specific observation regarding force majeure in the context of Qatar is noteworthy. While the Qatari CC recognizes that partial impossibility can lead to the termination of the contract, the Court of Cassation has consistently held that the obligor may not be held hostage to the agreement where the impossibility to perform is absolute.[194]

193. Oman Administrative Appeal Court Judgment 51/2016.
194. Qatar Court of Cassation, Judgment 257/2018.