

## Client Alert: Covid-19 and its Implications for Commercial Contracts in the MENA-Region

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*This Alert discusses the impact of the Covid-19 pandemic on commercial contracts in the MENA Region. As a general matter, the pandemic may constitute a “force majeure” event, but each case will need to be examined on its own facts.*

### Introduction

The Covid-19 outbreak is first and foremost a human tragedy. It will also have far-reaching implications for the economies of the MENA region. In the long term, it may pose questions for existing global supply chain arrangements and mobility. As China has become a significant economic player in the MENA region over recent years, in the medium term, the slowdown of the global economy in general and the Chinese economy in particular will affect exports, hit the tourism sector and affect ongoing investments. In the short term, restrictions on travel, the lock down of public life and the suspension of the work of the judiciary have already had a tangible and immediate effect on commercial contracts.

From a legal perspective, questions of “*force majeure*” or “hardship” may arise.

### *Force Majeure and Hardship*

When dealing with events which are unforeseen and unforeseeable at the time the contract was concluded, the law distinguishes between “hardship” and “*force majeure*”. Legislation across the MENA region is based on very similar concepts but with some differences in the detail. The basic principles are as follows:

Hardship occurs when, after concluding a contract, exceptional and unpredictable events of a general nature occur which render performance of the contract *onerous*. The hardship event must have occurred after signing the contract. The event is exceptional if its occurrence is rare and thus not ordinary (seasonal floods for instance are not exceptional). Moreover, the event must have been unforeseeable at the time the contract was entered into.

*Force majeure* is an event which occurs after concluding the contract, which was unforeseeable at the time the contract was entered into, which cannot be overcome and which renders the performance of the contract *impossible*.

Both *force majeure* and hardship are thus triggered by extraneous events which are beyond a contracting party’s control. The event must have been unforeseeable at the time the contract was

made. In the case of hardship – as opposed to *force majeure* – the extraneous event must be of a general character.

The main difference between a *force majeure* event and a hardship event is that – in case of the latter – performance of the contract remains possible but becomes onerous. A *force majeure* event renders performance impossible. Impossibility here means “objective impossibility” i.e. that the contract cannot be performed by any other party.

### **Outbreak of Covid-19 as *Force Majeure*/Hardship Event**

Outbreaks of an epidemic are recognized by Arab legal scholars as a potential *force majeure* or hardship event.

The outbreak of Covid-19 is certainly an extraneous event beyond a party’s control in a commercial contract. It is also – at least for contracts concluded before January/February 2020 – an unforeseen event.

Whether the outbreak of Covid-19 in any particular case will constitute *force majeure* or a hardship event depends, however, primarily on its effects on performance of the contract i.e. whether the Covid-19 outbreak renders performance of the contract (i) impossible or (ii) onerous (yet possible).

A party invoking *force majeure* or hardship must demonstrate and prove the specific effects of the relevant event with regard to the relevant contractual obligations. An abstract reference to the circumstances caused by the outbreak of Covid-19 will probably not be sufficient. Our recommendation is to clearly document the specific effects of the outbreak on the project or contract.

### **Legal Consequence of *Force Majeure* and Hardship**

The effect of a permanent *force majeure* event is to release the affected party from its contractual obligations and, consequently, also the other party from its corresponding obligations, with the effect that the contract is deemed dissolved or rescinded. If the *force majeure* event is of a temporary nature only, the contract becomes “frozen” until the *force majeure* event ceases, with the effect that the affected party is entitled to suspend performance of the contract. This must be examined on a case by case basis.

The occurrence of a hardship event, on the other hand, entitles the affected party to request judicial adjustment of its obligations under the contract to the extent deemed reasonable by the court.

### **Contractual *Force Majeure* Clauses**

Most international contracts include clauses that define *force majeure* and list non-exhaustive examples of events recognized by the parties as constituting a *force majeure* event. These may also cover the outbreak of Covid-19.

Examples of language that might be included are “acts of God”, “diseases”, “epidemics” or “acts of government”. The contract would usually include certain obligations with regard to the notification of *force majeure* and regulate the consequences of the *force majeure* event.

The first step is therefore to carefully review the contract and the relevant *force majeure* provisions, while paying particular attention to the notification requirements and timelines.

The right of a party to request judicial adjustment of the contract event is mandatory in most of the MENA region countries. Subject to that, the contracting parties are free to agree on the implications of the occurrence of a *force majeure* event as they wish.

### Legislation addressing Hardship and *Force Majeure* (impossibility)

Below we list the relevant provisions of the civil codes of the key countries in the MENA region which address hardship and *force majeure*. We note that contracts with governments pertaining to public services and infrastructure (“administrative contracts”) may be subject to special rules.

	Hardship	Force Majeure
<b>Algeria</b>	Article 107 of Ordinance no. 75-58 of 26 September 1975	Articles 121 and 307 of Ordinance no. 75-58 of 26 September 1975
<b>Bahrain</b>	Article 130 of Law 19/2001	Article 145a) and 364 of Law 19/2001
<b>Egypt</b>	Article 147 (2) of Law 131/1948	Articles 159 and 373 of Law 131/1948
<b>Iraq</b>	Article 146 (2) of Law 40/1951	Articles 168 and 425 of Law 40/1951
<b>Kuwait</b>	Article 198 of Law 67/1980	Article 215 and 437 of Law 67/1980
<b>Libya</b>	Article 147 (2) Civil Code (1953 as amended by Law 6/2016)	Articles 161 and 360 Civil Code (1953 as amended by Law 6/2016)
<b>Oman</b>	Article 159 of Law 29/2003	Articles 172 and 339 of Law 29/2013
<b>Palestine</b>	Article 151 of Law 4/2012	Articles 172 and 409 of Law 4/2012
<b>Qatar</b>	Article 171 (2) of Law 22/2004	Article 188 (1) and 402 of Law 2/2004
<b>UAE</b>	Article 249 of Law 5/1985	Articles 273 and of Law 5/1985

### Current Situation in Numbers<sup>1</sup>

Particularly high numbers of infections are registered in **Qatar** (439) and **Bahrain** (236), followed by **Egypt** (166), **Iraq** (154), **Saudi Arabia** (133), **Kuwait** (130), **Lebanon** (120), **UAE** (98) and **Algeria** (60).

Fewer cases were reported in **Palestine** (40), **Morocco** (38), **Jordan** (35), **Oman** (24), **Tunisia** (24), and **Sudan** (1), while no cases reported from **Libya**, **Syria** and **Yemen**.

Death tolls are led by **Iraq** (10) and followed by **Algeria** (5), **Egypt** (4), **Lebanon** (3), **Morocco** (2), **Bahrain** and **Sudan** (each 1).

<sup>1</sup> <https://www.worldometers.info/coronavirus/> (17 March 2020 – 05:00 PM CET).

## State Measures

So far, *force majeure* or hardship is often based more on the state measures enacted in response to the pandemic than the pandemic itself. The situation, of course, continues to be in flux.

## Travel Restrictions

Regarding travel restrictions, **Saudi Arabia**<sup>2</sup> and **Kuwait**<sup>3</sup> have taken the most severe measures by implementing a full ban on all international commercial flights to and from their countries. In Saudi Arabia, the ban is provisionally limited to two weeks, starting from 15 March. **Jordan**<sup>4</sup> followed with a suspension of all incoming and outgoing air travel starting March 17 until further notice, with the exception of air cargo. **Lebanon**<sup>5</sup> also closed its only international airport until 29 March. **Qatar**<sup>6</sup> and **Oman**<sup>7</sup> announced a ban on the entry of non-GCC citizens from 17 March. The **UAE**<sup>8</sup> announced a temporary suspension of all entry visas from 17 March, except diplomatic passports and those issued already before 17 March. However, there are several countries exempted from the suspension, among them most European countries, including Germany. **Egypt**<sup>9</sup> will temporarily halt flights to its airports starting from 19 March until 31 March.

## Judicial System

Also, the judicial system is affected: **Oman**<sup>10</sup> and **Libya**<sup>11</sup> limit from March 15 and March 5 respectively court attendance for 30 days to only those involved in the case, whereas **Egypt**<sup>12</sup> suspended court proceedings for two weeks starting from 16 March, while administrative work at judicial institutions continues. **Saudi Arabia**<sup>13</sup> stopped all government operations for 16 days (except in the health and security sectors). Non-urgent judicial hearings are postponed indefinitely. **Jordan**<sup>14</sup> decided to postpone all court sessions in all of the Kingdom's courts for a month until April 16. It indicated that the courts will continue to consider only urgent cases that cannot be delayed. **Palestine** declared that all hearings shall be suspended amid Coronavirus crisis until 26 March except for interim relief orders and individual's releases and/or any urgent cases. In the **UAE**<sup>15</sup>, Dubai International Finance Centre (DIFC) courts have announced that they will conduct all hearings via teleconference from 17 March until 26 April or further notice.

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<sup>2</sup> <https://www.channelnewsasia.com/news/world/coronavirus-covid-19-saudi-arabia-gulf-states-12542104>

<sup>3</sup> Ibid.

<sup>4</sup> <https://edition.cnn.com/travel/article/coronavirus-travel-bans/index.html>

<sup>5</sup> <https://asiatimes.com/2020/03/lebanon-locks-down-shuts-airport/>

<sup>6</sup> <https://www.channelnewsasia.com/news/world/coronavirus-covid-19-saudi-arabia-gulf-states-12542104>

<http://english.alarabiya.net/en/News/gulf/2020/03/15/Oman-bans-entry-of-non-GCC-citizens-stops-Friday-prayers-public-gatherings.html>

<https://gulfbusiness.com/passengers-from-these-countries-can-travel-to-dubai-despite-entry-visa-suspension/>

<sup>9</sup> <https://gulfnews.com/world/mena/egypt-to-shut-airports-due-to-coronavirus-1.70425412>

<sup>10</sup> <https://gulfbusiness.com/oman-suspends-tourist-visas-halts-sports-activities-for-month/>

<sup>11</sup> Article 1 of Order 32/2020 of the Libyan Supreme Council of the Judiciary dated 5 March 2020.

<sup>12</sup> <http://english.ahram.org.eg/News/365310.aspx>

<sup>13</sup> <https://www.arabnews.com/node/1641841/saudi-arabia>

<sup>14</sup> <https://en.royanews.tv/news/20240/2020-03-15>

<sup>15</sup> <https://www.difccourts.ae/2020/03/17/covid-19-difc-courts-update/>

## Stock Exchange

Fears of economic turmoil and a nosediving stock market have led to rapid reactions: On March 15, the **Kuwaiti**<sup>16</sup> bourse ceased its operations, while **Egypt**<sup>17</sup> temporarily suspended its stock exchange on March 15 for half an hour due to its dropping index. In the **UAE**<sup>18</sup>, Abu Dhabi Securities exchange has closed trading halls until further notice and Dubai/Abu Dhabi Financial Markets issued a prohibition period for trading in public shareholding companies listed in the UAE capital markets, starting from March 17.

Several states have also announced capital infusions to stimulate the economy: **Qatar**<sup>19</sup> announced a package of QAR 75 bn (USD 20 bn), including incentives for the private sector and more state investment in the local bourse. **Egypt**<sup>20</sup> intends to create an EGP 100 bn (USD 6,3 bn) fund to fight the effects of corona. **Saudi Arabia**<sup>21</sup> prepared a SAR 50 bn (USD 13 bn) package to help small and medium-sized enterprises cope with the economic impacts. The **UAE**<sup>22</sup> decided to launch an AED 100 bn (USD 27 bn) economic support package to assist corporate and retail banking clients affected by the impact of coronavirus. The package combines AED 50 bn in zero cost loans to banks operating in the UAE and the freeing up of AED 50 bn from capital buffers.

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<sup>16</sup> <https://www.channelnewsasia.com/news/world/coronavirus-covid-19-saudi-arabia-gulf-states-12542104>

<sup>17</sup> <https://www.reuters.com/article/egypt-stocks/update-1-egypt-trading-suspended-as-shares-plunge-due-to-coronavirus-idUSL8N2B808H>

<sup>18</sup> <https://www.channelnewsasia.com/news/world/coronavirus-covid-19-saudi-arabia-gulf-states-12542104>;

<https://gulfnews.com/living-in-uae/health/coronavirus-everything-the-uae-is-doing-to-keep-the-country-safe-1.1584272966241?slide=4>

<sup>19</sup> <https://www.channelnewsasia.com/news/world/coronavirus-covid-19-saudi-arabia-gulf-states-12542104>

<sup>20</sup> <https://egyptianstreets.com/2020/03/14/egypts-president-shuts-down-schools-and-universities-announces-egp100-billion-coronavirus-fund/>

<sup>21</sup> <https://gulfnews.com/business/coronavirus-saudi-central-bank-announces-50-billion-riyal-package-1.1584209042418>

<sup>22</sup> <https://gulfnews.com/business/banking/uae-central-bank-sets-up-dh100-billion-stimulus-to-offset-coronavirus-impact-1.1584205011660>

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