

# KHOSHAIM & ASSOCIATES

COVID-19 Impacts on Contracts: a summary of principles issued by the General Committee of the Supreme Court

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28 February 2021



## Introduction

The General Committee of the Saudi Arabian Supreme Court (the “GCSC”) issued decision no. 45/M clarifying the principles that must be complied with by Saudi Arabian courts under the Ministry of Justice when dealing with the impact on contracts as a result of the Covid-19 pandemic and its related government measures (“Covid-19”).

Generally, such principles are binding on the courts under the Ministry of Justice as per Article 13 of the Law of the Judiciary. If a circuit in the Supreme Court or a circuit of an Appeal Court considers that such principles shall not be followed in a particular case, such matter shall be raised to the GCSC to settle the concern.

### **Covid-19 (and the related government measures) constitute a Calamity (*ja’ihah*) under Saudi Arabian law**

As we explained in our *Contracting under COVID-19: Frustration and Force Majeure under Saudi Arabian Law*’ bulletin (the “K&A COVID-19 Bulletin”)<sup>1</sup>, under Saudi Arabian Law, other than specific references in certain regulations, there is no commercial code, civil code or other general regulation dealing with the effect of force majeure events on contracts or defining a legal theory on the frustration of contracts.

Islamic scholars have usually assessed events or changed circumstances allowing termination or adjustment of contracts under the legal concepts of calamity (*java’ib*).

The GCSC confirmed that events and circumstances like Covid-19 constitute a calamity (*ja’ihah*) under Saudi Arabian law if they fulfil the following conditions:

- (i) the event or circumstance and its impact are unavoidable;
- (ii) the event or circumstance has a direct effect on the performance of any obligations (including contractual undertakings);
- (iii) the affected party is not already in breach of its obligations (this would be the case, for example, if a contractor which was already late in its performance of a contract and which is then affected by a calamity, that contractor would not be able to claim excuse due to a calamity at least in relation to delays attributed to its fault);
- (iv) the affected party has not waived its right to claim for calamity (*ja’ihah*);
- (v) the affected contract has been entered into prior to the relevant event or circumstance and remains in effect after the occurrence of the event or circumstance;
- (vi) if the relevant contract is a service contract or a construction contract, the event or circumstance has:
  - a. prevented the party from performing its obligations, or
  - b. rendered the performance of the contracted services impossible without an unusual loss; and

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<sup>1</sup> <http://www.khoshaim.com/wp-content/uploads/2020/03/Client-Bulletin-Covid-19-FM-and-Frustration.pdf>

- (vii) the impact of this event or circumstance has not been dealt with by any specific regulation or decision of a relevant authority.

For more information on “*Jawa’ib*” please refer to our K&A COVID-19 Bulletin.

### **Effects on Contracts of the Covid-19**

If the performance of a contract is still possible, but such performance is significantly more onerous on any of the contracting parties as a result of the Covid-19, the GCSC instructs the courts under the Ministry of Justice to adjust the terms of that contract in order to fairly allocate the impact of that calamity (*ja’ibah*) between the parties.

Further to such general principle, the GCSC clarifies specific rules regarding lease agreements and service/supply contracts.

For lease agreements:

- (i) if a lessee cannot benefit from a leased property either fully or partially as a result of Covid-19, the GCSC instructs the courts to reduce the rent due by such lessee in proportion to the reduction in the usual benefit by that lessee of that leased property.
- (ii) The GCSC considers that a landlord should not have the right to terminate a lease agreement for non-payment of rent if the delay in payment relates to the period during which the lessee was not able to benefit from the leased property either fully or partially as a result of Covid-19.

For service or supply agreements, the GCSC provides for the following rules:

- (i) if Covid-19 results in an increase of costs or prices of materials, manpower or operation, the relevant court may increase the contract price accordingly, for the part which exceeds any usual increase of prices or costs;
- (ii) if the relevant court increases the contract price as indicated above, the other party has the right to request the termination of the relevant contract;
- (iii) if the increase of costs or materials resulting from Covid-19 is only temporary, the relevant court may only suspend the performance of the relevant contract during the relevant period;
- (iv) if Covid-19 renders impossible the performance of the relevant contract (or part thereof), the relevant court, at the request of a party to it, shall terminate that contract (or the relevant part thereof);
- (v) if Covid-19 causes the completion of the work to be delayed, the relevant court may suspend the relevant contract (and exclude the application of any liquidated damages, penalty or step-in right) but if this suspension results into the other party sustaining unusual damages, that party shall be allowed to request from the court the termination of the contract;
- (vi) for supply agreements, if Covid-19 results in a shortage of supplies in the market, then the court may reduce the quantity to be supplied as necessary to lift any unusual harm on the supplier; and

- (vii) for supply agreements, if Covid-19 results in a temporary complete lack (and not just shortage) of the relevant supplies in the market, the court may temporarily suspend the contract, provided that such suspension does not inflict unusual harm on the other party. If the other party suffers unusual harm as a result of this suspension, that party shall have the right to request the termination of the contract.

The GCSC has also instructed the courts, when taking any decision regarding the impact of Covid-19 on a contract:

- (i) to consider the extent of the negative impact of this calamity, its duration, and the unusual character of that impact;
- (ii) to limit their assessment of the damages to the duration of the impact of Covid-19 on the relevant contract;
- (iii) to refer to experts to assess the impact of Covid-19 on a contract; and
- (iv) for lease agreements, if the value of the benefit derived from the leased property is generally the same during the whole duration of the lease, the rent shall be reduced in proportion to the duration impact from Covid-19. If, however, the benefits derived from the leased property varies during the year (such as properties that rely on seasons, e.g., hotels) then the rent reduction shall be proportioned to the rent duration based on the level of benefit for each duration (i.e., seasons would be assigned a higher rent value).

Finally, GCSC confirms the position already stated in our K&A COVID-19 Bulletin according to which even if an excuse clause in a contract (like a force majeure clause) excludes any of the principles set forth above, the courts may still apply the above principles.

We hope you found this document useful. For more information on the matters discussed herein, please send emails to our COVID-19 Pandemic Legal Response Team at [Covid19@khoshaim.com](mailto:Covid19@khoshaim.com).

## About the Firm

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Capital Markets – Band 1

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Banking – Tier 1  
Capital Markets – Tier 1  
M&A – Tier 1  
Project Development – Tier 1

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