

Coronavirus (COVID-19): Emirati and Sharia law on pandemics and hardship events

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With the disruption to global business and trade due to the Coronavirus pandemic, parties may look to argue hardship events under the law to alleviate extraneous obligations (such as an extraneous increase of cost in concluding the obligation).

Hardship events are occurrences that result in changing the equilibrium of a contract creating an extreme burden on one of the parties to the contract.

Contracts may provide for provisions that address hardship events, and therein include pandemics as an example of a hardship event – but if parties have entered into a contract that lacks a hardship event provision, can they rely on UAE legislation to argue that the Coronavirus pandemic makes their obligation extraneous and seek remedy from the Courts (or an arbitration tribunal)?

Hardship events are addressed under Article 249 of the UAE Federal Law No. 5/1985 on Civil Transactions.

Notably; pandemics are also addressed in one provision under Emirati law; that is Article 587 of the Civil Transactions Law. Article 587 explicitly addresses pandemics that affect fruit sales, and the obligations on the buyer and seller when the fruits sold are affected by a pandemic.

What is relevant in Article 587 is the Sharia jurisprudence that leads to its drafting before coming into promulgation in 1985, and how that jurisprudence can apply in disputes that

occur between parties over hardship events that have occurred or will manifest due to the Coronavirus pandemic.

Article 249 on Hardship Events

Article 249 of the UAE Civil Transactions Law allows that when as a result of general exceptional and unpredictable events, the performance of a contractual obligation, without being impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, a judge may reduce the obligation that has become excessive to reasonable limits.

In light of no particular event being referenced or given as an example to qualify as a hardship event in Article 249, or in Article 893 which indirectly addresses force majeure events, it is necessary to rely on other provisions in the law to confirm whether pandemics qualify as hardship events and the strength of such arguments before the judiciary.

Sharia Origin of Article 587 on Pandemics

In the implementation of the directives of the late Sheikh Zayed bin Sultan Al Nahyan (may God have mercy upon him), the founding father of the United Arab Emirates, to apply the provisions of Islamic Sharia in the UAE, the Council of Ministers issued decision No. 50/26 in 1978 to form a supreme committee for Islamic legislation and delegated His Excellency the Minister of Justice to form two subcommittees, one for criminal laws and the other for civil, commercial, maritime and civil procedure laws, in order for these committees to prepare and review laws in accordance with the provisions of Islamic Sharia.

The supreme committee reviewed civil transaction laws, and – for example – theories of individual will as a source of commitment, contracts of adhesion and their origin in Sharia as ‘contracts of trust’, and other theories and principles that became codified in UAE law.

Amongst the matters addressed by the supreme committee, and most relevant to the Coronavirus pandemic, was the theory of hardship events and their origin in Shariah law as 'pandemic theory'.

The rule of 'pandemic theory' finds its basis in Islamic jurisprudence in the principle of 'excuses' in the Hanafi jurisprudence and 'pandemic' in Maliki and Hanbali jurisprudence with a difference in the provisions and in the fairness between the two parties to the contract and justice in general.

Not only is the codification of hardship events derived from 'pandemic theory' in Sharia law, but scholarly jurisprudence has found that in light of the principle of pandemic theory applying to contractual relations in relation to fruit trade, the same principle can arguably be applied to other contractual transactions such as industry, construction, and general trade contracts where a pandemic causes a hardship event.

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