

Client Alert

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COVID-19: Legal Issues and Considerations for Businesses in Saudi Arabia

Government rolls out measures and initiatives to support private sector businesses in the Kingdom during COVID-19.

In response to the COVID-19 pandemic, the government of the Kingdom of Saudi Arabia (the Kingdom) implemented a series of measures to limit the spread of COVID-19, including imposing nationwide curfews (reaching 24 hours in certain cities); suspending outbound, inbound, and in-Kingdom travel; and prohibiting physical attendance by employees at workplaces in both the private and public sectors (with certain exempted sectors). Acknowledging the inevitable negative impacts of such measures on the private sector, the government of the Kingdom announced a number of supporting initiatives in an effort to reduce such impacts, particularly on businesses most affected by the outbreak. These initiatives included a financial stimulus package exceeding SAR120 billion, consisting of more than SAR70 billion in exemptions and extensions for payments due to the government and SAR50 billion to support the banking sector, financial institutions, and SMEs.

This *Client Alert* summarises the legal issues and practical considerations for those operating businesses in the Kingdom in light of the government measures implemented to date.

Commercial Contracts

Commercial contracts in the Kingdom are generally governed by the principles of Shari'ah, which are often expressed in general terms and provide Saudi Arabian adjudicatory bodies with considerable discretion in respect of the application of such principles. The predominant Shari'ah principle governing contracts in the Kingdom is that the parties to a contract must abide by their contractual obligations unless such obligations are waived by the counterparty, excused for a legitimate reason under Shari'ah, or found to be contradictory to Shari'ah principles, enacted legislation, or public policy.

Existing Contracts

In order to determine the impact of COVID-19 on existing contractual obligations in the Kingdom, the parties to a given contract would need to examine the provisions of the relevant contract, and, in particular, provisions relating to force majeure, material adverse change, and termination. Whether any such provisions would be applicable in relation to COVID-19 (or the measures the government has taken in response to it) would highly depend on the nature of the contract, the parties to the contract, and the

specific drafting of those provisions. Below are the main issues for businesses to consider when assessing the applicability of such provisions in relation to COVID-19.

Force Majeure: To the extent that a contract includes a force majeure clause, the parties should check whether the definition of “force majeure” expressly refers to pandemics, infectious diseases, or otherwise refers to government intervention or action, change in framework, acts of God, or other catch-all wording such as “actions beyond the parties’ control”. Depending on the wording of the clause and existing circumstances, the parties should carefully consider whether the clause would apply in relation to COVID-19 (or the measures the government has taken in response to it). To the extent that the clause does apply, the parties should then consider, among other factors, the scope and effect of protection under the clause and the notices necessary to be provided to obtain protection under the clause.

Material Adverse Change: To the extent that a contract includes a Material Adverse Change (MAC) clause, the parties should consider, among other factors, the scope of the MAC clause (e.g., whether a MAC would need to affect a party’s operations, revenues, or future prospects), as well as any carve-outs that may allocate certain risks (such as pandemics or government actions) to one of the parties. The applicability of a MAC clause in relation to COVID-19 (or the measures the government has taken in response to it) will be highly dependent on the specific drafting of the MAC clause and the circumstances existing at the time of application.

Termination: The parties to a contract should consider whether the termination events set out under the contract include the occurrence of a force majeure event, a MAC event, or the non-performance by a party of its material obligations under the contract (including delays in payments). It would also be important to consider any necessary carve-outs under such provisions, as well as the notices or grace periods required be served or exhausted before such events may form the basis for termination.

Force Majeure and Emergency Events Under Shari’ah

In the absence of express provisions under a contract in relation to force majeure (or other provisions providing the basis for non-performance or termination), the general principles of Shari’ah would be applied. While there is not an established concept of force majeure under Shari’ah, similar concepts are recognised and may form the basis for excusing a party from performance of certain contractual obligations. These concepts include:

- *Al-Uthur* (العذر), which means “excuse” and generally refers to the inability of a party to a contract to perform its contractual obligation(s) due to a valid excuse. This concept was historically applied in lease contracts and contracts of *Almuzara’ah* and *Almusaqah* (المزارعة والمساقاة), which are forms of partnership contracts between farmers under which the performance of certain contractual obligations was excused based on valid excuses.
- *Al-Jawa’ih* (الجوائح), which means “calamity” and generally refers to damaging, unavoidable, and external circumstances that are beyond the control of the contracting parties. This concept was historically applied in contracts for the sale of goods, in which prices were modified based on the existence of certain circumstances that were classified as *Jawa’ih*.

While judicial precedents in the Kingdom in this respect are limited and generally not binding, notably, in relying on the aforementioned principles, the concept of force majeure was recognised in a number of judicial precedents¹ as well as in Resolution No. 23 (5/7) of the Islamic Fiqh Council. However, based on these limited precedents, the authors understand that:

- In order for an event to be classified as a “force majeure event”, it must be: (i) unforeseeable at the time of executing the contract; (ii) exceptional in nature; (iii) general in nature and impacting everyone; (iv) unavoidable by the affected party; (v) outside of the affected party’s control; and (vi) rendering the affected party incapable of performing the contract.
- To the extent that an event renders the performance of a contract burdensome (but not impossible), such event would likely to be classified as an “emergency event” as opposed to a “force majeure event”, which would generally provide a weaker argument for non-performance of contractual obligations (in comparison with force majeure events).

Future Contracts

For future contracts that are currently being contemplated, the parties must carefully consider issues that may arise under such contracts in the event of a pandemic or the spread of an infectious disease, and include explicit provisions relating to the effect of such events on the parties’ contractual obligations.

Government Contracts

Contracts with government entities in the Kingdom are governed by the Government Tenders and Procurement Law (the GTPL).² Under the GTPL, contractors are liable for delay and/or non-performance penalties if the contractor has caused the delay or defaults in performance.³ Delay penalties are capped at 6% of the contract value for supply contracts and 20% of the contract value for all other contracts.⁴

Contractors may, however, be excused from delay penalties, and the contract duration may be extended, when the delay is caused by (among other events): (i) the government authority; (ii) a state of emergency, including situations in which there is a serious and unexpected threat to public safety, public security, or public health; (iii) reasons beyond the contractor’s control; or (iv) a suspension order issued by the government authority for reasons unrelated to the contractor.⁵

Accordingly, and depending on the sector and region in which it operates, a government contractor whose works are delayed directly as a result of COVID-19 (or the measures the government has taken in response to it) may be able to obtain extensions for performance or be excused from delay penalties under the GPTL.

Employment

In an effort to limit the negative impacts of COVID-19 on the labour market in the Kingdom and to support Saudization, a Royal Order was issued on 3 April 2020 approving the following measures:

- Exempting Saudi employees in private sector entities that have been impacted by COVID-19 from certain provisions of the Unemployment Insurance Regulation (SANED)
- Payment of 60% of the registered wage of such employees for a total duration of three months (commencing in April 2020), up to a maximum amount of SAR9,000 monthly, and with a total value of SAR9 billion

According to later statements issued by the government, compensation would cover 100% of Saudi employees in entities with five Saudi employees or less and 70% of Saudi employees in entities with more than five Saudi employees. The government also confirmed that employers: (i) would be exempted from payment of the monthly wages of such employees; and (ii) may not force employees to work during the said three-month period. In addition, the statements confirmed that the majority of private sector

entities would benefit from these exemptions, with the exception of those entities operating in sectors that have not been materially impacted by COVID-19, including entities operating in the financial sector (those licensed by SAMA and the Capital Market Authority), telecom operators, and supermarkets.

In addition, while the Labor Law permits the termination of employment contracts at the occurrence of a force majeure event, the Ministry of Human Resources and Social Development (the MHRSD) recently issued a Ministerial Resolution amending the Implementing Regulations of the Labor Law to add a provision that aims to regulate the employment relationship in circumstances that may be classified as force majeure events, as described under the Labor Law (the Amendment). The Amendment provides that, if the government implements certain procedures that require the reduction of working hours or takes precautionary measures to limit the effect of exacerbating events that may be classified as force majeure events, an employer may, during the six-month period following the implementation of such procedures or measures, agree any of the following arrangements with its employees:

- Reducing the employee's wage in proportion to the actual number of working hours
- Granting the employee a paid leave to be deducted from his/her accumulated annual leave days
- Permitting the employee to take unpaid leave

The Amendment further provides that, to the extent an employer has benefited from government support in relation to the relevant force majeure event, such employer may not terminate the employees at the conclusion of the above arrangements on the basis of the Labor Law provision permitting termination of employment contracts at the occurrence of a force majeure event. In addition, while the Labor Law does not define what constitutes a force majeure event, it may be inferred from the timing and language of the Amendment that the government deems the COVID-19 outbreak to be a force majeure event for purposes of the Labor Law. In addition, in a later statement, the MHRSD clarified that, for purposes of the Labor Law, a force majeure event includes any event that prevents the fulfillment of the obligations under the Labor Law, its Implementing Regulations, or the relevant employment contract, which, depending on the sector in which an employer is operating, may be interpreted to cover COVID-19.

Finally, employers should consider the following key takeaways when making decisions about employees in light of the measures the government has taken in response to COVID-19:

- The employee's consent is required for purposes of implementing any of the arrangements set out in the Amendment.
- An employer who has benefited from the government initiative supporting Saudi employees during the COVID-19 outbreak may not terminate its Saudi employees after implementing the arrangements set out in the Amendment on the basis of the Labor Law provision permitting termination of employment contracts at the occurrence of a force majeure event.
- The provisions of the Amendment apply only to sectors which have been impacted by COVID-19.
- None of the above points should be interpreted to restrict employers from terminating employees in accordance with the general grounds available under the Labor Law.

Capital Market Transactions

The Capital Market Authority (the CMA) and the Saudi Stock Exchange (Tadawul) announced a series of measures aimed at limiting the negative effects of COVID-19 on market participants and trading activities, including:

- Tadawul temporarily reduced trading hours for all listed securities by two hours, from 10 a.m. to 1 p.m., starting from 26 March 2020 and, as a result, issuers will now be able to make their disclosures on Tadawul's website at market close, starting from 1:20 p.m.
- The CMA temporarily suspended holding in-person general assembly meetings for publicly listed companies. Attendance of such meetings and e-voting on agenda items are now made available by the Securities Depository Center (Edaa) through its online system (Tadawulaty).
- The CMA temporarily suspended freezing of investment accounts pursuant to the Investment Accounts Instructions, which effectively removes any restrictions on money transfers from investment accounts or utilisation of their balances.
- The CMA directed all market institutions under its supervision to activate their business continuity plans and utilise all available technologies to ensure continuity of trading activities remotely.
- The CMA extended the disclosure deadlines for listed companies, Real Estate Investment Trusts (REITs), and Exchange Traded Funds (ETFs), without suspending trading of their securities, as follows:
 - The deadline for listed companies, REITs, and ETFs to disclose their annual financial information for the financial year ended 31 December 2019 has been extended for an additional 29-day period, to 29 April 2020 for listed companies and REITs, and 6 May 2020 for ETFs.
 - The deadline for listed companies to disclose their interim financial information for their accounting period ended 29/07/1441H. (corresponding to 24 March 2020), 29 February 2020 or 31 March 2020 has been extended for an additional 20-day period, to be disclosed within 50 days from the end of such financial reporting period.
 - The deadline for listed companies with financial years ending on 31 December 2019 to disclose their board annual reports has been extended for an additional 30-day period, to 30 April 2020.
 - The deadline for public and private investment funds to disclose their annual reports has been extended for an additional 20-day period, to be disclosed within 90 days from the end of the period covered by such annual reports.

The aim of such measures is to protect market participants against the effects of COVID-19 and to ensure the continuation of trading activities, which would ultimately support the Kingdom's economy during these exceptional times.

Litigation

The Ministry of Justice (the MoJ) announced a number of initiatives to minimise the effects of COVID-19 on the courts' system and MoJ's services in general, including:

- Using *Taradhi* or the "Digital Settlement Platform", which enables parties to agree settlement terms virtually and to record such terms with the MoJ, following which an enforceable settlement deed would be issued. This service can be utilised by filing a request through and following the instructions available on taradhi.moj.gov.sa.
- Enabling the exchange of court briefings and the issuance of court judgements electronically.
- Continuing MoJ's online services, including in relation to filings of new cases and requests for appeal and Notary Public services (such as issuance of powers of attorney) through MoJ's website and, in relation to Notary Public services, *Al-Tawthiq* system.

Future Outlook

With the difficult financial challenges prompted by COVID-19, businesses in the Kingdom should continue to assess the impact of the outbreak on their existing and future transactions and operations and should maximise the initiatives rolled out by the government in support of the private sector.

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Endnotes

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- ¹ For example, Administrative Court case number 1885/1/3 for the year of 1425H.
 - ² Promulgated by Royal Decree number M/128 dated 16 July 2019.
 - ³ Arts. 72 and 73 of GTPL.
 - ⁴ Art. 72 of GTPL.
 - ⁵ Art. 74 of GTPL.