

# COVID-19 – A COMPARISON OF THE ISSUES AFFECTING PERFORMANCE UNDER ENGLISH AND QATARI LAW

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The COVID-19 crisis has set in train a cascade of events that will impede, delay or prevent performance of many contracts in the coming months, including potentially contracts in the State of Qatar.

Businesses are likely to face pressure from many directions: shortages of materials, shortages of staff and labour, limitations on the movement of personnel, restrictions on conducting operations, other legislative and administrative actions, and the insolvency of contractors, subcontractors and suppliers, to give only a few examples. Through no fault of their own, many will find themselves in a position where it is impractical to perform some or all of their contractual obligations and where they will be forced to seek, by whatever means they can, temporary or permanent relief from performance.

In Qatar, it is common for contracts to be governed by either the laws of the State of Qatar or English law. In this article we consider and compare the legal options that may be available to businesses as a result of the COVID-19 crisis under both English and Qatari law.

## *I. Background*

At a high level, the following options are likely to be available under both English and Qatari law:

- Renegotiate the terms of the contract, including by requesting an agreed moratorium on performance or waivers of contractual conditions and obligations.
- Invoke contractual or legal remedies in order to justify: (1) reducing; (2) suspending; or (3) abandoning future performance obligations.

Each of the options described above raises legal risks, which are addressed in detail below. However, some general observations may be made:

- Broadly speaking, a negotiated solution – if realistic in practice – carries the least legal risks (and often produces the best commercial outcome). However, businesses seeking waivers or amendments should be aware of the need to ensure that any agreed changes can be evidenced if there is a subsequent dispute. They should also comply with any contractual conditions to amendments or waivers. Both should be (relatively) straightforward to achieve.
- The potential contractual and legal remedies available in these circumstances (for example, relying on force majeure clauses or asserting that a contract has been frustrated under English law), are more drastic, and considerably riskier. The gravest risk they pose is that, by indicating a desire to limit the extent of its further performance, a contractor may, under English law, inadvertently repudiate the contract. The financial consequences of this may be extreme. Under English law, if the employer accepts the repudiation as discharging the contract, the default result is that the contractor will become liable to put the employer in the position it would have been had the contract been performed. Such damages can be very substantial. Under Qatari law, a party that incorrectly invokes a force majeure clause or otherwise asserts that it is unable to continue with its obligations will potentially leave itself open to termination and a claim for damages.
- An alternative contractual remedy that is available under both English and Qatari law may be to assert that specific terms of the contract have been severed. This may offer a party an opportunity to preserve the deal but on potentially better terms. Severance operates to excise any clause (or part of a clause) whose performance has become illegal from the contract. While it is difficult to prove, it may in certain circumstances offer a party a less risky means of escaping performance of an obligation than attempting to establish that an event of frustration or force majeure has occurred.

Businesses may also find themselves in a position where they are reacting to actions taken by contractors. They may have to:

- Anticipate and respond to any decision by a counterparty to renegotiate the contract or seek to claim relief from performance.
- If the counterparty suspends or ceases performance, or indicates that it will be doing so, consider whether that amounts to repudiation of the contract, and (if so) elect whether to insist on performance or terminate the contract and claim damages<sup>1</sup>.
- Consider whether there are grounds to terminate the contract due to, for example, the occurrence of a force majeure event, a failure to perform, abandonment of the works or the insolvency of the contractor.

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<sup>1</sup> The risks arising from repudiation fall overwhelmingly on the party seeking to exit a contract, so the possible occurrence of a repudiation could also provide grounds for an opportunistic counterparty to initiate a renegotiation or settlement in its favour.

In all cases, it will be vital to keep accurate documentary records proving the impact of any events on a party's ability to perform its contractual obligations.

We comment below on some of the options that may be available to a business from the perspective of both English and Qatari law, with a focus on construction contracts, although many of the principles discussed will also be applicable to other types of commercial contracts.

## *II. Varying or Amending Contracts*

The impact of the spread of COVID-19 will inevitably result in some parties agreeing to amend their contracts, for example by postponing dates for performance. Others may simply agree to bring the contract to an end.

### **English law**

A variation or amendment to an existing contract is itself a contract and English common law generally imposes no formal requirements for the validity of a simple contract (English common law does impose certain substantive requirements, such as the rule that promises without consideration are generally unenforceable). As a result of the general absence of formal requirements in English law, parties have great flexibility and can easily enter into, or vary, contracts.

However, many contracts contain “No Oral Modification” clauses, which require variations to a contract to be agreed in writing. Recently, the UK Supreme Court held that such clauses are legally effective (*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24). Amendments that do not comply with the conditions imposed by such a clause are therefore not effective.

In some circumstances, no oral modification clauses could lead to injustice: what happens if an oral modification is agreed (despite such a clause) and a party performs the contract as modified? In English law, the safeguard against this sort of injustice is the doctrine of estoppel. The doctrine of estoppel may prevent a party from relying on a no oral modification clause. However, in *Rock Advertising*, the UK Supreme Court indicated that, in order to preclude reliance on such a no oral modification clause, at the very least: (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself. Accordingly, in practical terms, the doctrine of estoppel will often not be available to a party seeking to avoid the effect of a no oral modification clause.

### **Qatari law**

Under Qatari law, Article 171(1) of Law Number 22 of 2004 Regarding Promulgating the Civil Code (“**Civil Code**”) states that the contract is the law of the parties:

*“Pacta sunt servanda i.e., a contract duly and properly concluded between the parties must be kept, and non-fulfilment of the respective obligations is a breach of that contract. Such a contract may be revoked or altered only by mutual consent of the parties or for reasons provided for by law.”*

In accordance with that provision, parties are free to agree on the terms of the contract. Therefore, the parties are free to negotiate any amendments, provided such amendments are made by mutual agreement. A no oral modification clause, under which the parties have agreed the manner in

which a contract may be modified, would therefore be enforceable. This is confirmed by Article 94 of the Civil Code, which states that<sup>2</sup>:

*“Where the law or the agreement requires a particular form for concluding the contract, such form shall be observed in the promise contract thereof and the subsequent agreed amendments, but not in the supplementary conditions which do not contradict its contents, unless otherwise stipulated by law.”*

Having said that, if an oral modification was agreed between the parties (despite such a no oral modification clause existing in their contract), and the parties performed the contract as modified, then a court or tribunal considering whether to uphold the oral agreement may still have regard to the parties’ overriding obligation to carry out contractual obligations in good faith, as described in Article 172(1) of the Civil Code:

*“A contract shall be performed in accordance with its provisions and in such manner consistent with the requirements of good faith.”*

The general requirements for the formation of an ordinary contract are set out at Article 64 of the Civil Code:

*“Without prejudice to any special formalities that may be required by law for the conclusion of certain contracts, a contract shall be concluded from the moment an offer and its subsequent acceptance have been exchanged if the subject-matter and cause of such contract are deemed legal.”*

A contract therefore needs an offer and acceptance, and acceptance does not need to be in any specific form<sup>3</sup>. Article 65 of the Civil code provides that a party’s willingness to be bound to an agreement can (subject to agreement to the contrary) be expressed *“orally or in writing, by a commonly used sign, by actual consensual exchange, and also by conduct that, in the circumstances, leaves no doubt as to its true meaning. A declaration of intention may be implied when neither the law, nor the agreement, nor the nature of the transaction requires that such declaration be expressed.”*

### **III. Force Majeure**

#### **English law**

The common law doctrine of frustration (discussed below) and contractual force majeure clauses are different responses to the same question: when should a contracting party which, through no fault of its own, can no longer perform its obligations be relieved of the obligations or of liability for not performing them?

In general, parties to a contract are likely to be more satisfied by the answers given by their force majeure clauses than by the doctrine of frustration. The latter is an unwieldy, and unpredictable, instrument of the law. In general, and as detailed further below, it is exceptionally challenging to

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<sup>2</sup> Further, the Qatari Court of Cassation in Judgment 114 of judicial year 2009 said *“[i]t is established jurisdiction of this Court, and in line with the provisions of section 171(1) of the Civil Law, that the contract is the law of the parties. It is considered as the law in respect of such parties, a law that is peculiar to them although it emanates from their agreement. Neither party may unilaterally rescind, amend or waive such contract except as allowed by the agreement or provided by law”*.

<sup>3</sup> More specific requirements are set out in under Articles 69 to 80 of the Civil Code. Unlike English law, consideration is not required.

show that a frustrating event has occurred. Even if that hurdle is overcome, the effects of the application of the doctrine of frustration are drastic. They are also rarely fair or commercially satisfactory to either party.

By contrast, force majeure clauses are likely to offer considered and commercially realistic solutions to the problem of impeded performance. They also generally set a lower threshold to the availability of relief. As to their effects, they tend to be more predictable and to achieve a more proportionate and sophisticated allocation of the losses resulting from the supervening event, which is in both parties' interests. Parties should therefore generally look to their force majeure clauses before considering invoking the doctrine of frustration.

### Force Majeure clauses

"Force majeure" (literally, "greater force") is not a term of art in English law, and it has no particular significance in common law systems<sup>4</sup>. Rather, it is a label used to describe exceptional events that commercial contracts commonly identify as entitling affected parties to escape liability for non-performance. The clauses specifying the relevant events and the required effect on the parties' obligations are known as "force majeure clauses".

Because it is a creature of agreement and not of any overarching legal principle, the effect of a force majeure clause depends entirely on the terms in which it is drafted and the commercial context of the broader contract<sup>5</sup>. However, drafting practices have converged over time, and most force majeure clauses require a similar set of conditions to be met before relief can be claimed. Generally, they require the party invoking them to prove four things:

- ***The occurrence of an exceptional event.*** The relevant "force majeure". The precise nature of the event can vary broadly. In many construction contracts, a broad concept of force majeure generally prevails. Relevant events are generally defined by their effect rather than their nature. However, it is common in other contexts to find a more prescriptive approach, in which (for instance) force majeure is limited to industrial action, military conflicts or natural disasters such as earthquakes<sup>6</sup>.
- ***That the force majeure event has impeded a party's ability to perform to the necessary degree.*** The precise degree of interference required varies according to the wording of the clause. For instance, many contracts stipulate that the force majeure event must "prevent" performance, whereas others require no more than "hindrance" or "delay". Such distinctions can be very important in practice. An embargo of ports in a country affected by the virus could, by way of example, affect a contractor's obligation to deliver materials very differently depending on which standard applies. If the applicable contractual regime requires prevention as a condition to relief, the contractor would generally be required to restructure its supply chain to source the materials from elsewhere

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<sup>4</sup> The term originates in the French Civil Code, which through various iterations has treated "force majeure" as a defence to a claim for damages.

<sup>5</sup> Accordingly, the issue of "force majeure certificates", such as those issued by Chinese government bodies to many Chinese companies following the initial outbreak of COVID-19, is unlikely to be determinative of whether a force majeure event, as described in a contract governed by English law, has actually occurred.

<sup>6</sup> Further, attempts to widen the scope of a list with "catch-all" wording may not be successful because English law interprets such wording within the context of the entire clause (*Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40).

(potentially at great cost). By contrast, a contractor subject to a “hindrance” condition might be entitled to suspend its obligations entirely, avoiding major financial damage.

- ***A sufficiently close causal relationship between the force majeure event and the impediment to performance.*** Again, the causal proximity between the event and the impeded performance varies according to the contractual terms. An affected party may have to prove that the event of force majeure is the sole operative cause of the impediment. Alternatively, it may be enough for the event merely to be among the concurrent causes<sup>7</sup>. Commentators have traditionally considered the latter to be the default position in the absence of words to the contrary, but recent case law may cast doubt on this<sup>8</sup>.
- ***That the occurrence of the event and its effect on performance were beyond the party’s control.*** This generally means control both at the time of contracting and at the time of the event. As to the former, if the event was sufficiently predictable to enable a sensible contractor to take precautions in place at the time of agreement, that will generally prevent the clause from operating. As to the latter, if the affected party can reasonably be expected to take sufficient measures to preserve its ability to perform notwithstanding the event, it will not usually be permitted to rely on the force majeure clause.

The English Courts traditionally interpret force majeure clauses restrictively, and the burden of proof is on the party seeking to rely on the clause. Invoking a force majeure clause therefore requires particularly careful factual investigation and contractual analysis. It is not to be done lightly, particularly as the consequence of an invalid reliance upon a force majeure clause may be to repudiate the agreement.

Where a particular event is within the scope of a force majeure clause, the terms of the clause are likely to exclude any frustration claim. Thus, the broader and more general the definition of force majeure event, the more likely the clause is to govern the consequences of frustrating events exclusively. That is particularly relevant in the context of construction contracts, whose standard forms adopt very broad definitions of force majeure.

#### Force majeure under the FIDIC contracts

We summarise below some of the key force majeure provisions under the FIDIC<sup>9</sup> suite of contracts, which are widely used in Qatar.

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<sup>7</sup> The affected party may also have to establish that it would have been able to carry out the relevant obligations before the occurrence of the force majeure event (*Intertradedex S.A. v Lesieur-Tourteaux S.A.R.L.* [1978] 2 Lloyd's Rep. 509).

<sup>8</sup> *Bremer Handelsgesellschaft v Vanden Avenne* [1978] 2 Lloyd's Report 109; *Bremer Handelsgesellschaft v Westzucker* [1981] 2 Lloyd's Reports 130. The level of causal proximity required may turn on whether the force majeure is drafted so as to operate as an exemption clause, relieving a party from the consequences of breach, or whether it prevents a breach from occurring in the first place (the approach adopted in many standard form construction contracts). Arguably, on the latter approach, there is no need to show that force majeure is the sole operative cause of prevention. As always, the position will ultimately depend on a detailed investigation of the specific terms of the clause and the commercial context in which it operates.

<sup>9</sup> Force majeure is addressed in clause 19 of the first edition of the FIDIC Silver Book published in 1999. In the second edition, which was published in 2017, the term “force majeure” has been replaced with “exceptional event” and the relevant provision is now clause 18, although the substance of the provision remains largely unchanged. However, as the first edition of the FIDIC Silver Book remains in wide use, this article refers to clause 19 of the first edition and retains the term “force majeure”.

- **Summary**
  - Force majeure is broadly defined, although it will only relieve a party from performance where performance is “prevented” by the relevant event.
  - This imports a high level of disruption with a close causal relationship with the event. The threshold is therefore high. Nonetheless, it is likely to be met in at least some contracts during the course of the present crisis.
  - Relief from performance is initially temporary but can entitle the affected party to terminate the contract if the disruption lasts long enough.
  - If the contract is terminated, an engineer is appointed to attribute a value to works and materials that have been delivered but not yet paid for, and otherwise to allocate the losses resulting from termination.
- **Demonstrating the occurrence of Force Majeure**
  - Clause 19 of the FIDIC Red, Yellow and Silver Books define “Force Majeure”. The definition is expressed in general terms and illustrated by a non-exhaustive (and, importantly, non-limiting) series of examples. The FIDIC definitions do not include epidemics or government actions. In contrast, these terms are used in the description of potentially relevant events for the purpose of extension of time claims in the FIDIC 2017 Editions<sup>10</sup>.
  - “Force Majeure” occurs where four criteria are met:
    - (i) an “*exceptional event or circumstance*” beyond the affected party’s control must have occurred;
    - (ii) the event must be of such a nature that the affected party could not reasonably have provided against it before entering into the contract;
    - (iii) the party relying on the event as relieving it from performance could not reasonably have avoided or overcome the event or circumstance once it arose; and
    - (iv) the event or circumstance is not substantially the result of an act or omission by the counterparty.
  - Assuming that there are one or more events of Force Majeure, the contractor must show that it “is or will” thereby be “prevented” from performing “any” of its obligations (and notify that fact to the employer within 14 days of becoming aware of the problem).
  - Since the virus’ consequences include so many potential events of force majeure, and since the notice must, in broad terms at least, state the link between the force majeure event and the prevention of performance, it is advisable to identify as many events of force majeure as is credibly possible at this stage.

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<sup>10</sup> For example, sub-clause 8.5(c) of the FIDIC Silver Book 2017 edition and sub-clause 8.5(d) of the Red and Yellow Books (2017 Editions). See below for more detail on extension of time claims.

- Showing prevention (as opposed, for example, to hindrance, delay or increased cost) is generally challenging, but in the context of so extreme a crisis as the present, it is likely to be possible in some contracts.
- **Relief**
  - The FIDIC regime provides for a graduated approach to relief in which the relief becomes more generous as the disruption worsens.
  - The general rule established by clause 19.4 of the FIDIC Silver Book is that the relief available to the affected party following force majeure is limited to an extension of the time for performing the affected obligations (corresponding to the period of time for which it is unable to perform those obligations). In practice, that is usually the full extent of the available relief. It does not cancel the affected obligations. Nor is it an opportunity to rewrite or escape from a difficult contract. It also does not involve compensation for the affected party for any additional costs which it may incur, save in certain circumstances described in clause 19.4(b) (which have to do with the examples of Force Majeure given in clause 19.1 and are thus unlikely to be relevant to contractors affected by the coronavirus crisis).
  - However, if performance is continuously prevented for 84 days (or intermittently for a total of 140 days in aggregate), the Contractor may terminate. The termination right is not bilateral. It is of course to be hoped that the disruption caused by the present crisis is not extensive enough to engage these termination provisions, but the possibility cannot be excluded. Current government strategy may produce intermittent waves of disruption to construction contracts. Over time, it is possible that these will exceed the 140-day period after which the affected party may terminate. Both contractors and employers would be well advised to monitor such disruptions and their causes closely, keeping written records wherever possible.
- **A suggested checklist for evaluating the applicability of a force majeure clause is set out below:**
  - **Focus on the wording of the clause.** Avoid the trap of assuming that extraordinary circumstances and extraordinary financial hardship are enough to amount to force majeure without more. In every case, the question depends on close and careful analysis of the terms of the provision, drawing where relevant on guidance in case law (but bearing in mind that the circumstances of every contract, and every case, will be different).
  - **Consider whether an event of force majeure has occurred.** Again, this starts with the definition of force majeure. How broad is it? Does it require the occurrence of a specified event from a list, or is the definition more general (as in many standard forms)? Also, remember that “unlikely” is not the same as “unexpected” or “could not reasonably have been anticipated”.
  - **Establish the exact cause of the impediment to performance.** It may be tempting to think of every element of the response to the epidemic of governments, companies, and other organisations as facets of the epidemic itself, but that assumption is liable to produce a flawed analysis. What, exactly, causes the impediment to performance? Is it government quarantine measures that render

performance illegal? Is it the knock-on effect of a border closure? Is it employees' unavailability to work on site? Which such event is the sole operative cause, if it is possible to identify one? Once the causative event has been established, ask: does that event qualify as force majeure as defined in the clause, and why?

- ***Does the event impede performance to the necessary degree?*** Does the contract require prevention, hindrance, or delay to performance for relief to become available?
- ***Consider what the parties could reasonably have done to plan for or mitigate the event at the time of contracting.*** Was the event foreseeable at the time of contracting, and could something have been done to avert its effects? Consider seeking subject matter expert advice.
- ***Consider alternative means of performance.*** If the impediment arises from the unavailability of workers in a particular area, is it possible to recruit from a nearby region? If there is any chance that it is possible, attempting alternative performance is advisable. The existence of alternative means of performance would tend to suggest that there has not been sufficient impediment to performance enlivening a force majeure clause.
- ***Prepare evidence.*** The burden of proof is on the party asserting force majeure. Ensure that detailed records are taken and retained. Minute meetings in which the effect is discussed.
- ***Give notice.*** Force majeure clauses are effective only on their terms and are strictly construed. Notice provisions must therefore be complied with scrupulously, with particular attention paid to time limits, which are generally enforced by English courts.

## **Qatari law**

### Force majeure

The parties to a contract are free to allocate the risk of force majeure events between themselves, as stated in Article 258 of the Civil Code:

*“The parties may agree that the obligor shall bear liability for force majeure or unforeseen incident.”*

Where there is no allocation (for example, because there is no force majeure clause), or the force majeure clause is not applicable in the circumstances<sup>11</sup>, Article 188 of the Civil Code may be relevant following the occurrence of a force majeure type event. However, whilst this Article specifically uses the term “*force majeure*”, the circumstances in which it applies, and its consequences, are more closely related to the English law concept of frustration (described below) than force majeure as that term is used in most standard form construction contracts<sup>12</sup>. Article 188(1) of the Civil Code provides that:

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<sup>11</sup> If there is a clause that already addresses the same circumstances, then Article 188 may be excluded.

<sup>12</sup> For example, the FIDIC contracts do not cancel the affected obligations or result in the immediate termination of the contract.

*“In contracts binding on both parties, where performance of an obligation by one party is extinguished by reason of impossibility of performance due to force majeure, beyond the control of the obligor, such obligation and correlative obligations shall also be extinguished and the contract deemed rescinded ipso facto.”*

In accordance with Article 188(1) of the Civil Code, if obligations that are critical to the overall performance of a contract become **impossible** to perform due to an external cause beyond a party’s control<sup>13</sup>, the contract may be deemed to have been rescinded<sup>14</sup>.

Where only some obligations under a contract become impossible, and they are not critical to the overall performance of a contract, then Article 188(2) of the Civil Code allows the party that has the benefit of the obligations to choose between either enforcing the balance of the contract or demanding the termination of the whole contract:

*“Where such impossibility is partial, the obligee may either enforce the contract to the extent such part of the obligation that can be performed or demand termination of the contract.”*

### Unforeseen events

A more readily available, and less drastic, alternative to invoking force majeure under Article 188 of the Civil Code is available under Article 171(2) of the Civil Code, which provides that:

*“Where, however, as a result of exceptional, general and unforeseeable events, the fulfilment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level.”*

This is a mandatory provision which is implied into all contracts that are governed by Qatari law (including contracts that also include a force majeure clause) and cannot be excluded. To qualify as an unforeseen event under Article 171(2), the following three criteria must be satisfied:

- **An exceptional, general event must have occurred.** Whilst the Qatari legislator does not define the term ‘exceptional event’, Egyptian jurisprudence (which may be persuasive in Qatar) has narrowed the definition by stating that such an event must be public, meaning that the event should not affect only the obligor, rather, it must affect a wide group of people<sup>15</sup>. Further, such an event must be rare. For example, if a country experiences annual floods, such an event would not be considered as rare.
- **The event must not have been foreseeable.** The second element is that the event must have been unforeseeable. The Qatari Court of Cassation has stated that the event must be truly unforeseeable in nature and noted that commercial business involves an element of risk and an uncertain future, and that both parties should take into consideration the possibility of future events<sup>16</sup>. In practice, the Qatari courts take a subjective approach as to whether an event is truly unforeseeable. Again, one can look to Egyptian jurisprudence for some potential guidance (which may or may not be applied by the Qatari Courts), and Al Sanhoury specifically highlights exceptional general rare events such as war, earthquakes and, relevantly, pandemics as falling under the remit of the term unforeseen events. Al

<sup>13</sup> Note that this does not require the external cause to be beyond the control of both parties.

<sup>14</sup> Article 187 of the Civil Code contains a broadly similar provision in relation to contracts under which only one party has obligations.

<sup>15</sup> Al Sanhoury, Chapter 1, Sources of Obligations.

<sup>16</sup> Court of Cassation judgement hearing 5 May 2018, Cassation No. 257 Year 2018 Commercial Cassation.

Sanhoury also highlights that Egyptian courts will adopt a firm view on what is classified as a truly unforeseen event by stating that such an event is one which cannot be prevented or reasonably predicted. For example, Al Sanhoury specifically refers to the flooding of the River Nile, fluctuations in currency, worker's strikes or bankruptcy as examples of events which can be reasonably predicted<sup>17</sup>. Of course, the predictability of certain events may differ as between Qatar and Egypt.

- ***Performance must have become excessively onerous in such a way as to threaten the obligor with exorbitant loss.*** The third element of the test for unforeseen events is that of hardship. Specifically, the performance of the obligation must have become excessively onerous so as to threaten the obligor with exorbitant loss. Again, Al Sanhoury has illustrated how the Egyptian courts approach the hardship test by stating that performance of the obligation causes hardship where it causes imbalance to the economic status that was common at the time of entering into the contract and that such an obligation is exhausting, but not impossible<sup>18</sup>.

Under Article 171(2) of the Civil Code, the court or tribunal has broad power to provide relief for unforeseen events by reducing the hardship placed on the obligor, stopping short of exempting the obligor from its obligations in their entirety. For example, a court or arbitral tribunal may amend the agreement by changing the value of the contract, granting additional time for performance or suspending the performance of certain obligations until the event ends.

The key differences between force majeure (under Article 188(1) of the Civil Code) and unforeseen events (under Article 171(2) of the Civil Code)

In its judgement in *Hearing 5 May 2018, Cassation No. 257, Year 2018, Commercial Cassation*, the Qatari Court of Cassation held that Article 188(1) of the Civil Code only results in the rescission of mutual agreements if an external cause renders performance of the agreement absolutely impossible. Notably, the burden of proof falls on the obligor.

In the same judgement, the Court of Cassation found that an unforeseen event occurs when the performance of an agreement is merely more onerous. Where an unforeseen event has occurred, the judge can balance the parties' interests taking into consideration the circumstances of the matter to reduce the hardship to a reasonable limit in accordance with Article 171(2) of the Civil Code.

Qatari courts have therefore set out a clear distinction between Articles 188(1) and 171(2) of the Civil Code. While both contain similar elements, the critical difference is that:

- For Article 188(1) to apply, a force majeure event must render the performance of the agreement entirely impossible. Where it applies, Article 188(1) provides for the immediate rescission of the contractual obligations.
- For Article 171(2) to apply, an unforeseen event must render the performance of an obligation merely more onerous. Where it applies, Article 171(2) of the Civil Code provides that the court may change the terms of the contract.

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

#### *IV. Frustration*

##### **English law**

The doctrine of frustration operates to discharge a contract when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract<sup>19</sup>.

This apparently straightforward summary belies the exceptional difficulties facing a party seeking to prove that a contract has been frustrated. In general, performance must be genuinely impossible. For instance, it might be that a law has been passed making it wholly illegal to deliver the works in question, or the physical object to be sold or hired might have been irreplaceably destroyed. It is not enough that performance would merely inflict extreme, even ruinous, hardship on the performing party. If there is a way of performing the contract in something approaching the manner originally contemplated by the parties, that must be done, irrespective of the burden.

In accordance with the Law Reform (Frustrated Contracts) Act 1943 and common law, a frustrating event is an event which:

- occurs after the contract has been formed;
- is so fundamental as to be regarded by the law both as striking at the root of the contract and as entirely beyond what was contemplated by the parties when they entered into the contract;
- is not due to the fault of either party; and
- renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract.

The case of *Davis Contractors Ltd v Fareham Urban District Council*<sup>20</sup> illustrates that hardship, financial loss, and even delay will likely be insufficient to frustrate a contract. In that case, the parties entered into a contract whereby Davis Contractors was to construct 78 houses over an 8-month period for a set price. Due to shortages in the market of skilled labour (as well as shortages of materials), the construction took 22 months and the cost far exceeded the contract price. Davis Contractors argued that the contract was frustrated and that it was therefore entitled to payment on a *quantum meruit* basis for the works undertaken. In that case the House of Lords held that the contract was not frustrated and that the work becoming more onerous and expensive was not grounds for an award of frustration. Lord Reid stated, “*the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.*”

Indeed, the English courts have been vigilant to keep the doctrine within tight bounds, ruling that it “*must not be lightly invoked and must be kept within very narrow limits*”<sup>21</sup> and “*ought not to be extended*”. This strictness reflects the principle, sometimes referred to as “*sanctity of contract*”<sup>22</sup>, that contracts

<sup>19</sup> Chitty on Contracts, 33rd ed. 23-001.

<sup>20</sup> [1956] UKHL 3.

<sup>21</sup> *J Lauritzen AS v. Wijsmuller BV, The "Super Servant Two 29"* [1990] 1 Lloyd's LR 1 at 8.

<sup>22</sup> Or by the latin maxim: “*pacta sunt servanda*”.

must be adhered to. In English contract law, this means that parties must either perform their obligations or render their financial equivalent in damages. It is only in the most extraordinary circumstances that exceptions are made to this rule.

The Courts' reluctance to find in favour of a party relying upon frustration also reflects an awareness that it is a blunt instrument whose results are often drastic, unpredictable, and unfair. Frustration operates to "*kill the contract*"<sup>23</sup>. All of the parties are discharged from further performance of all of their obligations<sup>24</sup>. The losses that inevitably result do not, however, always lie where they fall. The Law Reform (Frustrated Contracts) Act 1943 provides as follows:

- Any sums paid before the frustrating event are to be repaid.
- Money due before the frustrating event, but not in fact paid, ceases to be payable.
- The Court has a discretion:
  - to permit a party that has incurred expenses to deduct the value of the expenses out of any sums they were paid by the other party before the frustrating event;
  - if a sum was due to a party at the time of the frustrating event, to permit that party to claim its expenses from that sum; and/or
  - to require a party which received valuable benefit pursuant to the contract before the occurrence of the frustrating event to pay a "just" sum.

As is clear from this summary, these provisions are dependent on the exercise of a discretion by a judge, who is necessarily relatively remote from the commercial reality of the contract and relationship. Their operation is therefore unpredictable.

In practice, construction contracts tend to be particularly unforgiving to parties seeking to allege frustration. This is because most construction contracts contain relatively broad force majeure clauses. Such clauses often have the incidental effect of shutting out arguments that an event within the clause's scope has frustrated the contract. In the eyes of an English Court, parties who agree to a force majeure clause have – by definition – considered the circumstances in which supervening events should entitle them to cease performance. As such, they have established a contractual code covering, or at least heavily encroaching on, the same ground as the common law doctrine. In effect, they have sought to contract out of frustration, and the Courts have no hesitation in permitting them to do so. Faced with a choice between giving effect to the parties' (albeit presumed) intentions and the blunt instrument of frustration, they will choose the former. Freedom of contract trumps the policies underpinning the doctrine of frustration.

The current circumstances in which businesses may find themselves as a result of COVID-19 are unprecedented. However, on review of those cases where English courts have found the doctrine of frustration to have been successfully made out by a party, there are some circumstances which may be of relevance, which we note below:

- Changes in law which result in the performance of a party's obligations becoming illegal may be a frustrating event in certain circumstances, however it is also common for

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<sup>23</sup> *J Lauritzen AS v. Wijsmuller BV, The "Super Servant Two 29"* [1990] 1 Lloyd's LR 1 at 8.

<sup>24</sup> Except governing law, jurisdiction, and arbitration agreements.

contracts to expressly address this risk by way of “Change of Law” clauses in their contract. Where a contract contains a change of law clause, parties will not be permitted to rely on a frustration argument.

- Related to this, government prohibitions of, or restrictions on, building operations during wartime have been held to frustrate construction contracts in certain circumstances<sup>25</sup>.
- Requisition of materials by a foreign government has been found to be a frustrating event in exceptional circumstances<sup>26</sup>.
- In certain circumstances, the cancellation or postponement of anticipated events (upon which performance a contract relied or was predicated) may frustrate a contract<sup>27</sup>. As we have already seen, the coronavirus pandemic is already causing unprecedented cancellations in the entertainment and sporting industries worldwide, so parties to contracts with such a connection might consider their options.
- In exceptional circumstances, delay to performance of a contract can be a frustrating event. However, the delay must be abnormal (in cause, effect or expected duration) so that it falls outside what the parties could reasonably have contemplated at the time of contracting, “... it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations ‘radically different’ ... from that which was undertaken by the contract”<sup>28</sup>.

## **Qatari law**

Whilst there is no specific concept of frustration (in the English law sense) under Qatari law, Article 188(1) of the Civil Code (unless excluded) applies in broadly similar circumstances and may have the effect of rescinding the contract.

As identified above, Article 188(1) of the Civil Code provides that where obligations that are critical to the overall performance of a contract become impossible to perform due to a cause beyond a party’s control, the contract will be deemed to have been rescinded.

Article 185 of the Civil Code states that, where a contract is rescinded the parties are (where possible) to be reinstated to the position they were in before the contract was concluded:

*“When a contract is rescinded, the contracting parties shall be reinstated to the position they were in prior to the date of the conclusion of the contract. If reinstatement is impossible, the court may grant indemnity.”*

Further, Article 704 of the Civil Code (which is included in the section of the Civil Code that specifically relates to “*contracts of works*”<sup>29</sup>) provides that such a contract may be extinguished when performance becomes impossible due to an event beyond the control of either party:

*“A contract of works will be extinguished when performance of the agreed work becomes impossible due to some cause not of either party’s making, at which point the contractor will have the right to demand from*

<sup>25</sup> *Federal Steam Navigation Co Ltd v Dixon & Co Ltd* (1919) 64 S.J. 67, HL

<sup>26</sup> *Re Shipton Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676.

<sup>27</sup> *Krell v Henry* [1903] 2 KB 740.

<sup>28</sup> *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] AC 724.

<sup>29</sup> As defined, this would include construction contracts.

*the employer such expenses as he has incurred and any fee that is due to him, within the limits of any benefit that has accrued to the employer.”*

As stated in Article 704, the contractor will (where that Article applies) be entitled to payment for the work already performed, providing that the employer has benefited from that work.

## V. *Extension of Time*

### English law

Where invoking force majeure or frustration is not available or appropriate, an alternative may be for a contractor to claim an extension of time.

Whether an extension of time will be available will depend on the wording of the contract but it ought to be remembered that: (1) the events giving entitlement to a potential extension of time are likely to be different to those applicable to force majeure; (2) it may be easier to claim an extension of time than force majeure (in particular, an extension of time claim may not require the contractor to have been prevented from performing its obligations); and (3) the consequence of asserting force majeure and making an extension of time claim may in practice be the same (i.e. an extension of time for the contractor).

#### Extension of time under FIDIC contracts

The FIDIC Silver Book 2017 edition, clause 8.5(c), provides that a contractor shall be entitled to an extension of time:

*“if and to the extent that completion for the purposes of Sub-Clause 10.1...is or will be delayed by any one of the following causes:*

...

*(c) any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personnel, or the Employer’s other contractors on the Site (or any **Unforeseeable shortages in the availability of Employer-Supplied Materials, if any, caused by epidemic or governmental actions**)”.*

(Emphasis added).

Under the Silver book, this is likely to be a niche point because it would only apply to shortages in the availability of *Employer-Supplied Materials*, however, the specific use of the words “epidemic” and “governmental actions” is notable (and might be contrasted with the force majeure clause that is described above).

Further, other FIDIC contracts do not include the same restriction to Employer Supplied Materials. For example, clause 8.4(d) of the FIDIC Red Book (1999 Edition)<sup>30</sup> states that the contractor shall (subject to compliance with the notice requirements at clause 20.1) be entitled to an extension of time<sup>31</sup>:

<sup>30</sup> For building and engineering works designed by the employer.

<sup>31</sup> In each of these contracts, Unforeseeable means “*not reasonably foreseeable by an experienced contractor at the base date*”.

*“if and to the extent that completion for the purposes of Sub-Clause 10.1...is or will be delayed by any of the following causes:*

...

*“(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions”.*

(Emphasis added).

Depending on the circumstances, a claim for an extension of time may therefore be an easier (and less risky) proposition for a contractor than invoking either force majeure or frustration.

### **Qatari law**

In accordance with the principle that the contract is the law of the parties (Article 171(1) of the Civil Code), extension of time clauses are generally enforceable under Qatari law, although there may be differences with English law as to how an extension of time is assessed. For example, where there are concurrent delays the usual practice in the Qatari courts is to try to apportion the delays between the parties, rather than to award the contractor an extension of time but not the loss caused by the delay (as would likely be the case under English law<sup>32</sup>).

As noted above, a contractor may also be able to request that a court or arbitral tribunal grant it additional time or suspend the works in accordance with the ‘unforeseen event’ criteria at Article 171(2) of the Civil Code.

## ***VI. Illegality and Severance***

### **English law**

This is another alternative to invoking force majeure or frustration. The doctrine of severance operates to save a contract whose performance has become partially illegal. When engaged, it causes any specific terms of a contract whose performance becomes illegal to lose effect. The other terms are not affected. It is also possible for illegality as to performance to result in the suspension of the obligation to perform the contract more generally (whether by operation of the doctrine of frustration or of a force majeure clause).

In practice, businesses should note that severance (on the one hand) and force majeure and frustration (on the other) are different points on the same spectrum. The broader the impact of legislative action on a contract as a whole, the more likely the latter are to apply. Where legislative action is relatively limited in its impacts, severance may have a part to play. Each possibility should be considered in any situation in which the legal and administrative response to the coronavirus affects contractual performance.

COVID-19 may result in the performance of certain obligations becoming illegal as a result of new regulations, for example those relating to public health. In these circumstances, English law may allow the objectionable term to be severed from the rest of the contract, with the result that the remainder of a contract is enforceable. There are three requirements for severance to operate:

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<sup>32</sup> *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32.

- **The “blue-pencil” test:** can the unenforceable provision be removed without the necessity of adding or modifying the wording of what remains?
- **Adequacy of consideration of remaining terms:** are the remaining terms supported by adequate consideration?
- **Impact of removal of unenforceable provision on character of contract:** Does the removal of the unenforceable provision change the character of the contract so that it becomes ‘*not the sort of contract that the parties entered into at all?*’

Although these general requirements will determine whether a term is severable, each case (and each contract) will need to be analysed carefully to achieve the correct result.

### **Qatari law**

Where a contract contains a severability clause, Qatari law will give effect to its terms. Where there is no severability clause, a party may still be relieved from performing specific obligations that are invalid or illegal, or that have become impossible.

For example, Article 166 of the Civil Code states that:

*“Where any provision of the contract is invalid or voidable, such provision only shall be revoked, unless it is evident that the contract would not have been concluded without such provision, in which event the contract shall be revoked in full.”*

A party must therefore perform its other obligations under the contract unless the contract would not have been concluded in the absence of such a provision. Where part of an agreement is severed under Article 166, that part is treated as having been void *ab initio*.

Article 154 of the Civil Code (described above) is similar:

*“(1)The contract may include any provision agreed to by the contracting parties, unless such provision is prohibited by law or in breach of the public order or morality.  
(2) Where a provision in the contract is illegal, however, such provision shall be invalid, even if the contract is valid, unless either party proves that it would not have agreed to enter into the contract without such provision, in which event the contract shall be revoked.”*

Again, Article 154(2) results in the illegal provision being treated as having been void *ab initio*.

As noted above, the contract may also be rescinded under Article 188(1) of the Civil Code if obligations that are critical to the performance of a contract become impossible. If only some (non-critical) obligations become impossible (i.e. the obligations were not invalid or illegal when the contract was entered into, but later became impossible), then the party that has the benefit of the obligations that have become impossible may choose between enforcing the balance of the contract or demanding the rescission of the whole contract (Article 188(2)).

## *VII. Repudiation and Termination*

### **English law**

#### Repudiation

The perils of repudiation loom large over any party considering claiming frustration or force majeure. It is likely to come into play in the coming months and years as contractors struggle to perform their contractual obligations.

Repudiation is the common law doctrine that provides for the consequences of a party's refusal to deliver the contracted-for performance. The innocent party has the choice either to demand performance (thereby "affirming" the contract) or accept that the contract is at an end and claim its lost value (thereby "accepting" the repudiatory breach).

Repudiatory breach and frustration/force majeure often present themselves as binary alternatives. If a contractor has no practical choice but to cease performance of its key obligations, it can either seek relief from its obligations by alleging frustration or force majeure or face the consequences of having repudiated.

Repudiation can occur in two ways. First, a party may fail to perform its contractual obligations when due. Alternatively, a party may indicate by words or conduct that it does not intend to be bound by an obligation that has yet to fall due for performance (often referred to as "anticipatory repudiatory breach"). This may arise inadvertently, including when a party is, in good faith, seeking to exercise a right which it believes it has but does not. For example, a notice stating that it will be impossible to carry out certain contractual obligations due to force majeure is a statement by the party issuing the notice that it does not intend to carry out the obligations in question. If the grounds for the force majeure claim are not made out, service of the notice may have amounted to an anticipatory repudiatory breach of the contract.

To amount to repudiation, the failure to perform must affect a fundamental element of the bargain, such as (for example) the obligation to pay the contract price. The test for the requisite breach is often described as requiring a refusal to perform an obligation that goes to the "root" or "essence" of the contract. The test is highly fact-sensitive, and whether it is met depends on the construction of the contract and the circumstances of the case. Pertinently in the context of construction contracts, where the time of performance is stipulated to be of the essence, failure to perform will be a repudiatory breach<sup>33</sup>.

Faced with a repudiatory breach, the innocent party may either "accept" or "affirm" the contract.

- In the first scenario, the contract ends. Both parties are discharged from further performance. While drastic, this can be to the considerable advantage of the employer, which becomes free to replace the contractor with a more competent or able entity. Subject to the requirement to mitigate its loss, an employer may also acquire a damages claim.
- Alternatively, the innocent party may insist on performance (and it may also claim damages, albeit on a less generous measure than if it accepts the repudiation, for the loss

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<sup>33</sup> *Bunge Corpn v Tradax SA* [1981] 2 All ER 513.

caused by the breach). In practice, affirming the contract is a viable strategy where there is still a measure of trust and goodwill between the parties. In the course of the present crisis, affirmation may be the logical step in many cases. Employers will, no doubt, often have cause for sympathy for contractors who are unable to perform.

As noted above, repudiation may occur where a party can no longer perform and is unable to invoke frustration or force majeure. It may also prove to be a consequence of the intermittent disruption to the performance of contracts that is likely as the coronavirus crisis unfolds. In particular, English law recognises a form of repudiation that may be termed “repudiatory creep” (or, more formally, “cardinal change”): a situation in which a party does not repudiate the contract all at once but incrementally over time<sup>34</sup>. In this scenario, the party at fault gradually varies the manner of its performance until it is no longer doing what was originally promised.

It is easy to envisage scenarios in which the various pressures caused by the coronavirus will impel a contractor to vary the scope of work, use different materials to those originally contemplated, or delay completion (for example). An employer faced with such conduct can consider asserting a repudiatory breach. While the factual investigation in such a scenario is different to that in a more conventional case, the legal analysis is, in substance, the same. The employer should:

- identify the scope of the performance that was promised by reference to the facts at the time of contracting; and
- establish what has in fact been (or will be) delivered.

If there is a fundamental difference between the two, it may be possible to allege a repudiation. Such an allegation may be deployed in various ways and to various ends.

- The innocent party – typically the employer – may make the allegation and reserve its rights to accept the repudiation or affirm the contract while it investigates the situation. This can, in the right conditions, set the scene for a negotiation in which the employer may obtain practical improvements to performance that are sufficient to justify continuing with the contract.
- Alternatively, the employer may simply inform the contractor of its position and state that it will treat the contract as discharged. This may be advantageous where, for instance, the employer wishes to replace the contractor. However, the employer should be careful not thereby to repudiate the contract itself.

#### Termination under the contract

An alternative to accepting a contractor’s repudiation of the contract may be to rely on the termination mechanism in the contract, which may allow termination for reasons that would not amount to a repudiation under common law, such as insolvency or breach of a clause that is not a condition.

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<sup>34</sup> *Sanderson v Simtom* [2019] EWHC 442 (TCC), [2019] All ER (D) 05 (Mar). See also *C & S Associates UK Ltd v Enterprise Insurance Company Plc* [2015] EWHC 3757 (Comm), [2016] All ER (D) 19 (Jan).

For example, the FIDIC Red Book (1999 Edition) includes several grounds for termination that may become available as a consequence of the COVID-19 epidemic. These include termination where the contractor:

- **Article 15.2(b)** – “abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract”;
- **Article 15.2(c)** – “without reasonable excuse fails (i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or (ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it”; and
- **Article 15.2(e)** – “becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events”<sup>35</sup>.

As noted above, termination may also be available as a consequence of the invocation of a force majeure clause.

A party that is contemplating termination under the contract should:

- consider its available rights as soon as they arise. A contractual right to terminate may (like a right to accept repudiation under common law) be lost if there is a delay in asserting that right; and
- examine the contract in detail in order to ascertain what notices are required and if there are any conditions precedent to exercising a termination right. For example, is the innocent party obliged to give its counterpart an opportunity to cure a breach?

English law does not imply an obligation to act in good faith or reasonably when exercising a contractual termination right<sup>36</sup>, although such an obligation may be expressly included in a contract.

## **Qatari law**

There is no concept of repudiation under Qatari law, but a broadly similar provision exists

Repudiation is a common law doctrine that does not exist under Qatari law. Having said that, Article 689 of the Civil Code will allow an employer to seek rescission of a construction contract where (among other things) the contractor indicates that it does not intend to fulfil its obligations:

*“If a contractor is late in starting the work or in completing it, such that he is not at all expected to be able to carry it out as he should within the agreed period or, if he acts as though his intention is not to fulfil his obligation or he does something that makes the obligation impossible to fulfil, the employer may seek rescission of the contract without waiting for the time of delivery.”*

If a contractor incorrectly invokes a contractual force majeure right, or incorrectly asserts that performance of a contract has become impossible, it may have in practice indicated an intention not to carry out its obligations under the contract, thereby giving the employer a right to seek an order from the court for rescission of the contract under Article 689 of the Civil Code.

<sup>35</sup> Termination for contractor insolvency is described in more detail below.

<sup>36</sup> *Financings Ltd v Baldock* [1963] 2 QB 104, page 115. Also see *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472.

Further, a party that fails to perform its obligations under a contract, having incorrectly invoked a force majeure right or asserted impossibility, may be liable in damages. In this regard, Article 256 of the Civil Code provides that:

*“Where the obligor fails to perform the obligation in kind or delays such performance, he shall indemnify any damages suffered by the obligee, unless such non-performance or delay therein was due to a cause beyond his control..”*

Termination and suspension under the contract or where the contractor has failed to progress the works or has abandoned the works

In addition to Article 689 of the Civil Code and the express contractual provisions described above (which will generally be enforceable in accordance with Article 171(1) of the Civil Code, but which must be exercised in accordance with an overriding good faith obligation (see Article 172(1) of the Civil Code)), where the contractor is failing to carry out the works or has abandoned them completely, Qatari law allows an employer to either suspend performance of its own obligations or request an order from the court for the termination of the contract.

The ability to suspend performance (for example, by ceasing to make payments) is described at Article 191 of the Civil Code, which provides that:

*“In contracts binding on both parties, where corresponding obligations are due for performance, either party may decline to perform his obligation if the other party fails to perform his obligation, unless the parties agree otherwise or mutually accepted practice provides otherwise.”*

The ability to request a court order<sup>37</sup> for the termination of the contract is described at Article 183 of the Civil Code, which provides that:

- (1) In contracts binding on both parties and imposing reciprocal obligations, where one of the parties fails to perform his obligation, the other party may, upon formal notice to the former, demand performance of the contract or its rescission, and may claim any damages caused by such failure to perform.*
- (2) The judge may, mutatis mutandis, determine a period of grace within which the obligor shall perform his obligation. The judge may also reject the application for rescission if the obligation not performed is insignificant compared with the obligations considered in their entirety.*

In this regard, the Qatari Court of Cassation has stated that if a party has failed to perform its obligations, the other party has the right to file a claim requesting termination of the agreement, in addition to compensation<sup>38</sup>.

Clearly, exercising either of these rights will be a drastic measure which should only be taken after detailed consideration.

Termination for extended force majeure

As noted above, many standard form construction contracts provide that termination for force majeure may only arise after a prolonged period (e.g. 84 days). Should a force majeure event fall

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<sup>37</sup> It is notable that a court order would be needed to terminate pursuant to Article 183 of the Civil Code. While parties can agree that a court order is not needed in order to terminate a contract (see Article 184 of the Civil Code) a party that is relying on the Civil Code right in the absence of a specific right to terminate under the contract may be required to seek a court order. Parties should also consider whether the court is the correct forum, particularly where the contract contains an arbitration agreement.

<sup>38</sup> Qatar Court of Cassation, Hearing 27 March 2020, Precedent No. 8, Year 2012, Civil Cassation.

within the remit of the agreement, and given the concept that the contract is the law of the parties under Article 171 of the Civil Code, the parties are obliged to adhere to the pre-termination steps set out in the contract.

However, where a party is relying on the Civil Code rather than a contractual force majeure clause then, according to Article 188 of the Civil Code, recession of a contract for force majeure is (like frustration under English law) immediate.

### *VIII. Tortious Claims*

#### **English law**

Under English law, claims relating to construction works are usually made for breach of contract. However, duties of care also arise in tort and tortious claims may be made, particularly where there is no contractual relationship between the claimant and defendant. Further, the consequences of the COVID-19 epidemic are potentially far reaching and desperate claimants may become increasingly willing to resort to inventive tortious claims.

Two examples of tortious claims that may be relevant in these circumstances are described below:

#### Negligence

A negligence claim may arise where, for example, a contractor or professional consultant has made errors as a result of it not having sufficient personnel available, and those errors have caused a third party to suffer loss.

A common law claim for negligence requires a claimant to establish the following:

- the existence of a duty of care to the innocent party;
- that the tortfeasor breached that duty;
- that the breach caused the innocent party to suffer loss; and
- that the loss is recoverable.

A duty of care may exist where: (1) the damage was foreseeable; (2) there was a close relationship between the parties; and (3) it is fair, just and reasonable to impose a duty of care<sup>39</sup>. A business may also assume responsibility to exercise reasonable care in respect of a third party<sup>40</sup>, or a duty of care may be established by reference to other similar cases<sup>41</sup>.

The innocent party must also show that the alleged tortfeasor failed to exercise reasonable care, and that the failure to exercise reasonable care caused the loss claimed. In order to be recoverable, the loss must also have been reasonably foreseeable when the failure to exercise reasonable care occurred<sup>42</sup>.

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<sup>39</sup> *Caparo Industries v Dickman* [1990] 1 All ER 568.

<sup>40</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

<sup>41</sup> *Murphy v Brentwood District Council* [1991] UKHL 2.

<sup>42</sup> *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388.

### Private nuisance

Private nuisance occurs when something done on land violates the property rights of a neighbour (for example by causing damage to the neighbour's land or interfering with the neighbour's ability to enjoy its land).

It is possible that claims in private nuisance could arise where, for example, a landowner fails to maintain a construction site while works have been suspended, or fails to progress the works for an extended period, impacting a neighbour's ability to enjoy its land<sup>43</sup>.

Whilst it is possible to claim damages for losses incurred, the most common remedy for nuisance is likely to be an injunction.

### **Qatari law**

Qatari law provides for tortious liability for actions or omissions. Article 199 of the Civil Code states that *"Any person who commits an act that causes damage to another party shall be liable to indemnify such damage."*

Under Qatari law, the requirements for a tortious claim are relatively similar to the requirements for a negligence claim under English common law. For tortious claims to be established, there must have been:

- 1 - a mistake<sup>44</sup>;
- 2 - damage; and
- 3 - a causal link between the mistake and damage.

These elements are required for all tort cases regardless of the nature of the tort. With respect to causation, only harm flowing directly from the mistake can be recovered.

Articles 204 and 256 of the Civil Code (described below) also provide that, if a party can demonstrate that the default in performance was due to causes not attributable to it, it will not be liable for damages.

- Article 204 provides that<sup>45</sup>:

*"Where a person proves that damages have arisen from a cause beyond his control, such as force majeure, unforeseen incident or the fault of the victim or a third party, such person shall not be liable for such damages, unless there is a provision to the contrary."*

- Article 256 provides that

*"Where the obligor fails to perform the obligation in kind or delays such performance, he shall indemnify any damages suffered by the obligee, unless such non-performance or delay therein was due to a cause beyond his control."*

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<sup>43</sup> In *Jones and another v Ruth and another* [2010] EWHC 1538 (TCC) a neighbour was successful in a nuisance claim against a builder that had taken 4 years to renovate a house.

<sup>44</sup> What constitutes "mistake" is not resolved. This could be a breach of any obligation or duty whilst others suggest this is any deviation from the conduct of an ordinary person. Mistake could be intentional or non-intentional and it covers all levels of mistake ( negligence / reckless / gross / marginal).

<sup>45</sup> Article 204 applies to tortious claims rather than claims for breach of contract.

## ***IX. Main Contractor Insolvency and Impact on the Supply Chain***

The COVID-19 outbreak is likely to result in payment delays, a reduction in contractors' profitability, and indeed, force some contractors into financial difficulty. Where the main contractor becomes insolvent, employers will usually have a termination right under the contract. Whether or not they exercise this right, however, the project is likely to encounter delays to completion and cost increases. Further, where the main contractor has sub-contracted part of the works, the employer may have to identify the subcontractors it wishes to retain and (depending on the provisions of the main contract and subcontract) either arrange for the novation of the subcontract to the employer (or replacement contractor) or negotiate and agree a new subcontract for the remaining works.

### **English law**

#### Termination for insolvency

There is no right at common law to terminate a construction contract for insolvency of the main contractor<sup>46</sup>. However, most standard form construction contracts (such as the FIDIC suite) expressly entitle both the employer and the contractor to immediately terminate the contract in the event of the other party becoming insolvent.

By way of example, the FIDIC Yellow Book (1999 Edition) permits the Employer to terminate the Contract in circumstances where the Contractor "*becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events*"<sup>47</sup>. The FIDIC Yellow Book also permits the employer to engage a third party to complete the works. A similar right for the contractor to terminate for employer insolvency events is included at Sub-Clause 16.2.

Under section 123 of the *Insolvency Act 1986* (UK), insolvency under English law means that a company:

- is "*unable to pay its debts as they fall due*" – this is commonly cited as the cash-flow test; or
- has liabilities in excess of its assets – this is commonly cited as the balance-sheet test.

It is important that an employer considering terminating for contractor insolvency takes careful steps to ensure that the relevant contractual termination criteria are satisfied, as it is the contractual framework (rather than the statutory definition) that governs whether the trigger for termination is available to the employer. Further, employers should ensure that any contractual formalities, such as notice provisions, are strictly followed.

#### Further considerations for employers

In addition to the right to terminate on grounds of insolvency, employers should be mindful of other provisions in their contracts which might assist them in completing their projects. For example:

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<sup>46</sup> *Perar BV v General Surety and Guarantee Co Ltd* (1994) 66 BLR 72.

<sup>47</sup> Article 15.2(e).

- Has the main contractor provided security in the form of a performance bond, a retention bond or parent company guarantee? If so, what are the terms of the bonds (i.e. are they “on demand”) and what is the financial status of the parent?
- Who owns the goods and materials that have already been delivered to the site or purchased (and paid for by the employer) but not yet delivered? Does the main contract contain any retention of title provisions?
- Does the main contract require the contractor to have procured collateral warranties from subcontractors, and if so, do these include step-in rights for the employer?
- Where the project is funded by a bank or there are other stakeholders, what rights do those stakeholders have in the event of contractor insolvency?
- Does the main contract require assignment or novation of subcontracts to the employer or another nominated party in the event of termination, and has that right been reflected in the subcontracts?
- Has the main contractor provided all necessary drawings and construction documents? If not, how can these be obtained?

#### Impact on supply chain

The impact of the main contractor’s insolvency on the entire supply chain should not be underestimated. It is frequently the case that a main contractor that is experiencing financial difficulties will have already delayed payments to subcontractors and suppliers before the employer exercises its termination right. Such subcontractors and suppliers may (particularly where there is not an automatic right for the employer or its nominee to step in or take an assignment of a subcontract) require payment from the employer (who may have already paid the main contractor for the same work) as a condition precedent to continuing their work under a replacement contractor. The employer will then be required to take a commercial view regarding the importance of that subcontractor and the form that any payment might take.

#### **Qatari law**

Under Qatari law, the parties have relative freedom to agree on the terms of their contracts and the majority of construction contracts include a right to terminate in the event of a contractor’s insolvency. Qatari law will generally give effect to such clauses.

In the absence of an express right, the ability to terminate for insolvency is not implied under Qatari law. However, as noted above, the failure of a party to perform its obligations under a contract (which is likely to occur if it is insolvent) may entitle the innocent party to either suspend its own obligations (under Article 191 of the Civil Code) or request an order from the court for the termination of the contract (under Article 183 of the Civil Code).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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