COVID-19 and legal issues in Saudi Arabia

The impact of the COVID-19 pandemic is being felt around the world. In this article we consider legal issues which are likely to be relevant to those doing business, particularly in relation to construction projects, in the Kingdom of Saudi Arabia ("**KSA**"). We compare the position in respect of particular legal issues in the KSA with that in England, and New York, USA.

The KSA is in a period of massive economic and social development. It is reported that more than USD 1.6 trillion in construction projects are underway in the KSA.[1] A number of multi-billion dollar 'giga projects' are underway in the KSA, including the Red Sea Development and NEOM. The pandemic poses particular risks in the KSA given the volume and complexity of work underway and planned.

I. The COVID 19 crisis

Governments around the world are imposing strict measures to limit the spread of the virus. The KSA's reaction to COVID-19 has been prompt. The first case of the virus in the KSA was confirmed on 2 March 2020. Prior to the announcement of any confirmed cases, the KSA government had already temporarily suspended entry for persons wanting to perform pilgrimage as well as tourists.

As with many other impacted countries, the response to COVID-19 has evolved from advisory to compulsory requirements. This includes:

- a nightly curfew between 7pm and 6am for at least a 3 week period;
- dissemination of health information (including by SMS);
- travel restrictions (inbound, outbound and domestic);
- quarantine recommendations for those who may have arrived from particular countries;
- public sector workers are directed to stay at home for at least 16 days (subject to exceptions for health, security and military workers);[2] and
- compulsory labor guidelines for private sector companies with exceptions for those responsible for vital sectors and critical infrastructures, such as electricity, water and communications.[3] These guidelines include:
    - remote working for all employees at a company's head office;
    - a reduction of staff in branches where the physical presence is necessary – limited to 40% of usual staff numbers;
    - offices with more than 50 workers to check employee temperatures; and

[1] https://www.arabianbusiness.com/construction/427057-why-saudi-arabia-is-likely-to-lead-gcc-construction-recovery

[2] Saudi Press Agency "Kingdom's government decides to suspend attendance at workplaces in all government agencies for period of (16) days except for health, security, military and electronic security center"16 March 2020.

[3] Announcement made by Ministry of Human Recourses and Social Development dated 18 March 2020.

- 14 days compulsory paid leave for pregnant women, new mothers, people suffering from respiratory diseases, those with immune-system problems or chronic conditions, cancer patients and employees above the age of 55.

These measures are broadly consistent with the approach taken around the world to limit physical social interaction, in order to limit the spread of the virus. Such measures may affect businesses operating in the KSA. In addition, businesses in the KSA are likely to be affected by the measures being imposed around the world and the impacts of the virus on suppliers and sources of labour.

The scale of this pandemic and the response of governments around the world will give rise to novel legal issues. Of primary relevance (in our view) will be: the doctrines of force majeure, frustration, and impossibility in respect of parties' contracts, as well as issues of tortious liability which may arise in the circumstances, delays to construction projects and the unfortunate consequences of parties who may become bankrupt.

While many companies have been doing business in the KSA for some time, others will be relatively new to the market, or the region, and may be unfamiliar with the legal system. This article will analyse the legal position in the KSA in respect of each of these issues, by comparing the Saudi position with the common law jurisdictions of England and New York.

II. KSA Law

A brief introduction to the legal system of the KSA is appropriate. The applicable law of the KSA is Shari'ah., which is simply Islamic law. Shari'ah has four primary sources: the holy Quran, the Sunnah (*the deeds and actions of the Prophet Muhammad*), Ijmah (*consensus of scholars*), and Qiyas (*analogy*). The Hanbali school's interpretation of Shari'ah has predominant recognition in the KSA. To complement Shari'a, the government has also introduced legally binding civil, commercial, real estate and financial laws and respective implementing regulations, by way of Royal Decrees. Furthermore, while the KSA is not a "common law" legal system in the Anglo-Saxon tradition, over the past decade courts have been increasingly urged to follow precedents in justifying decisions.

III. Force Majeure, Frustration and Impossibility under English and New York Law

Force majeure, frustration and impossibility are legal principles that may operate in circumstances where a contracting party, through no fault of its own and due to unforeseeable events outside of its control, can no longer perform its obligations. These principles may operate to provide relief to a party from its obligations or from liability for a failure to perform.

These principles may seem fair and appealing at face value, particularly when viewed in the context of the present crisis. It should be recognised however that, where applied, the principles operate to reallocate risks and losses, possibly contrary to the terms of the parties' agreement. If a supplier can excuse itself from responsibility by operation of law, this is good for the supplier, but has a knock-on effect along contractual chains, where, in the end, somebody else must bear the loss.

Development of Doctrines of Frustration and Impossibility in England. Despite the similarity in focus between the three principles, the common law doctrines of impossibility and frustration are to be distinguished from the concept of force majeure. Historically in common law jurisdictions there was no mechanism for setting aside a contract that had become impossible after its formation. A party who failed to perform in these situations was liable for a claim in damages. However, all of this changed with the 1863

landmark decision of Justice Blackburn in *Taylor v Caldwell*[4]. The decision was in relation to a claim that a lessor ought be excused from their obligations under a rental agreement over a music hall that (and due to no fault of either party) had burnt down . Justice Blackburn found that the lease agreement was *"subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor"*.

The decision in *Taylor v Caldwell* is regarded to be the origin of the doctrines of impossibility and frustration. These doctrines remain narrow in their present application. As stated by Lord Roskill, it is *"not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains."*[5]

The differences between the doctrines of frustration and impossibility are relatively minor.[6] "Impossibility" may be invoked when unexpected events have meant that performance of a party's obligations is no longer possible. "Frustration"[7] may apply where an unexpected event has occurred due to no fault of either party that has 'frustrated' the purpose of the contract.[8] The courts have typically regarded the following (non-exhaustive list) to be frustrating events:

- Destruction of the subject matter of the contract;
- Supervening illegality (i.e when a law subsequent to the contract is passed which renders the fundamental principal of the contract illegal);
- Incapacity or death of one of the parties; or
- Serious delay which affects the intended purpose of the contract.

Frustration or impossibility operate to *"kill the contract"*[9] and if a contract is found to be frustrated or impossible then the parties are discharged from further performance of all of their obligations. For this reason, courts are reluctant to apply the doctrines and have applied them in only limited circumstances. For a party to be able to rely on either doctrine in England, it will need to establish that performance of the contract is genuinely impossible, rather than just more difficult or expensive. 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. The doctrines are notoriously difficult to successfully establish, and the consequences of their application may be harsh and unpredictable.[10]

The Position in New York. The doctrines of impossibility and frustration also apply in American jurisdictions, including New York. The approach is similar to that in England. However, American courts have further developed the doctrines of impossibility and frustration to also extend to events that are deemed to be "impracticable". This doctrine arises in situations where an unexpected event has occurred which means

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4 [1863] EWHC QB J.

5 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, p. 752.

6 Halsbury's Law of England Contract (Volume 22 (2019) – Chapter 8; 321; see also Chase Precast Corp. v. John J. Paonessa Co., Inc. 1991 566 N.E.2d 603, and The Doctrine of Impossibility of Performance and the Foreseeability Test 6 Loy. U. Chi. L. J. 575 (1975): *"A concept closely akin to the doctrine of impossibility is frustration of contract."* .

7 Also referred to as "frustration of purpose".

8 *Krell v Henry* [1903] 2 KB 740.

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

10 The Law Reform (Frustrated Contracts) Act 1943 deals with the consequences of frustration and impossibility by bestowing upon the courts a discretion to determine the amount of monies that a contractor is entitled to retain should a contract be terminated due to the application of the doctrines.

that, whilst performance of the contract is still possible, it would now be extremely burdensome for one of the parties to fulfil. Typically, the American courts (including New York courts) will apply the following test:.[11]

- there must be an occurrence of a condition, the non-occurrence of which was a basic assumption of the contract;
- the occurrence must make performance extremely expensive or difficult; and
- this difficulty was not anticipated by the parties to the contract.

The "doctrine of impracticability" has also been recognised by statute in New York. § 2-615 of the Uniform Commercial Code provides as follows:

> *"Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:*
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> *(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.*
>
> *(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.*
>
> *(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."*

Impracticality is also narrowly applied by the courts. Note 4 of § 2-615 relevantly provides that *"increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section."*

Force Majeure in England and New York. The common law doctrines of frustration and impossibility are to be distinguished from the concept of "force majeure" (literally meaning "greater force"). In common law jurisdictions, force majeure exists solely as a creature of contract. Force majeure clauses generally apply where certain specified exceptional events have occurred and allow affected parties to escape liability for non-performance as a result of those events. The scope of a particular force majeure clause, and the relief available, are subject to the wording of the particular contract. Parties can tailor force majeure provisions in their respective contracts, albeit most are 'boilerplate'. Generally speaking force majeure provisions will usually require the following:

- the occurrence of an exceptional event (the relevant "force majeure event");

[11] *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966).

- that the force majeure event has impeded a party's ability to perform to the necessary degree, as provided for in the contract;

- a sufficiently close causal relationship between the force majeure event and the impediment to performance, as provided for in the contract; and

- that the occurrence of the event and its effect on performance were beyond the party's control

A contract can provide an exhaustive or non-exhaustive list of events that constitute force majeure events. Common examples are acts of war, riots, rebellions and natural catastrophes. The usual remedy (which again can be varied by contract) if a force majeure event is proven is that performance of the affected obligation(s) is suspended until such time as the force majeure event ceases to impact performance. The English and New York Courts traditionally interpret force majeure clauses restrictively, and the burden of proof is on the party seeking to rely on the clause. Force majeure provisions will not be implied into contracts by the courts in these jurisidictions.

A party who has the benefit of a contract that contains force majeure provisions is unlikely to seek to rely on the common law doctrines of impossibility or frustration. Force majeure provisions are likely to offer more certainty and the court will seek to apply the terms of the contract. 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 (with the arguable exception of the JCT suite) adopt very general definitions of force majeure events.

IV. Force majeure, frustration and impossibility under the law of the KSA

Whilst there may be some disagreement amongst Shari'ah scholars, there are broadly three legal doctrines which usefully can be compared to the common law doctrines of frustration and impossibility, and force majeure. These are: (i) *Quwa Qahira* "force majeure", (ii) *Al Dhorouf Al Tari'a* "unexpected, exceptional circumstances", and (iii) *Istihala* "impossibility". Each principle is regarded differently by Shari'ah, and each is invoked somewhat differently by legal practitioners. They are separately considered below.[12,13]

***Quwa Qahira* "force majeure"**. This doctrine is typically invoked as a defense in either tort or breach of contract claims. It applies where (i) an event was unforeseeable at the time of contracting, (ii) the event impacted a party in a manner that it was unable to control, and there must also have been (iii) some external force such as a natural disaster or 'Act of God' type event which has been brought to bear to the detriment of the impacted party seeking relief. The doctrine not only applies where an obligation is said to be physically impossible to achieve but also to circumstances in which performance has become substantially different to what initially was agreed.[14]

[12] The doctrines of *Quwa Qahira* and *Al Dhorouf Al Tari'a* derive from a general concept called *Al Ja'iha* (calamity) discussed in various Islamic writings, notably: *Al Moudawana Imam Malek* 586/3; *Bidayat Al Mujtahed* – Ibn Rushd – 156/2; *Shareh Al Moukhtassar* – Khalil Lakharshi – 193/5; *Al Kafi*, Ibn Koudama – 45/2; and *Al Moughni*, Ibn Koudama – 216/4 and 217.

[13] Commentators have also referred to the Shari'ah doctrines of *Hadeth Mufaji'* (sudden event), and *Udhr* (excuse). *Hadeth Mufaji'* and *Udhr* are considered to apply where there are issues that are specific to the parties.

[14] Rayner, S., (1991). Note on force majeure in islamic law. Arab Law Quarterly, 6(1):86.

The primary effects of *Quwa Qahira*, if successfully established, is to protect the party invoking it from liability in damages as a result of its failure to perform as a result of such an event. Furthermore, if any part of a contractual obligation is affected, then the obligation could be suspended in its entirety or a party may be ordered to partially perform.[15] However, in cases where the force majeure event is considered to be temporary, then the event will suspend performance only for as long as the inability to perform exists.[16] The contract will resume and become enforceable once the force majeure event ceases to exist.[17]

***Al Dhorouf al Tari'a* "Unexpected, exceptional circumstances".** This concept is limited to contractual claims and is typically invoked as a defense to claims of breach of contract. It requires (i) that the parties be in an on-going relationship, (ii) that an exceptional change of a public and general nature has occurred, (iii) that that event be entirely unforeseen by all parties, and (iv) that the consequences of the occurrence of the event be overly onerous at least to one of the contracting parties so that it tilts the commercial balance that was intended at the onset of the contract.

The distinction between *Quwa Qahira* and *Al Dhorouf Tari'a* in Shari'ah is that while the first has been typically used to refer to natural events or acts of God (e.g. heavy rain, a volcano, flooding or a disease), the latter concept has been typically used in relation to 'worldly' (as opposed to 'Acts of God') events. For example, this would include the radical increase in the price of a commodity or material that is indispensable for the implementation of a contract, the loss of a commodity from the market, a great increase in the cost of manufacturing or importing of a commodity, the imposition by the state of high taxes on a specific activity on which the contract was held, or labour strikes.

***Istihala* "Impossibility"**. The concept of *Istihala* is very similar to the common law concept of impossibility. *Istihala* allows a party to be released from a contract on the grounds that an event that has occurred after the contract has been entered into (for which neither party is at fault for) has rendered performance physically or legally impossible. *Istihala* may be partial or absolute. The concept of absolute *Istihala* is reflected in Article 478 of *Al-Mejelle* (which is the first codification of Islamic principles). Article 478 states that *"If any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be carried out, such contract is cancelled."*[18]

Remedies. None of the three general law KSA law doctrines discussed above result in contract rescission, but each could result in either suspension of performance for the duration of the unexpected event, or termination of future performance of a contract.

A judge will nevertheless always try to alleviate hardship, minimise any changes to the obligations or the positions of the parties, and usually only terminate future performance if such performance is demonstrably fully and permanently impossible. Notably some courts in the KSA have been reluctant to find performance to be fully and permanently impossible, even in such extraordinary circumstances as the Abqaiq attacks in the autumn of 2019. Consideration in the KSA will be given to whether it is possible to segregate obligations that have become impossible from other obligations which remain possible, and a judge is likely to try to reinstate the economic balance between the parties, and it is open to a judge to alter provisions in the parties' agreement in order to do so.[19]

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[15] M.R. Firoozmand, 'Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines' (2007) 8 Bus. L. Int'l 161, 307.
[16] Susan Rayner, *A Note on Force Majeure in Islamic Law* (1991) 6 *Arab L.Q.* 86, 88.
[17] Ibid.
[18] The Principle of Force Majeure in Shariah: A Special Reference to Saudi Contract – Turkish Online Journal of Art and Communication – Volume 8 (2018), page 4.
[19] KSA Administrative Court (Diwan Al Mazalem) Final Decisions: (336/T/2) 1414H; (6/T) 1398H; (7/T) 1398H; (18/32) 1397H; (1/T) 1400H; (941/1/K) 1409H.

The Position of Force Majeure under Statute and Contracts in KSA

Shari'ah may recognise a party's right to avoid liability as a result of unexpected events that have rendered performance of obligations impossible or extremely impracticable. The application of such principles by the KSA courts can however be difficult to predict with confidence. On the other hand, if available, parties are more likely seek to rely on either (a) any relevant statutory provisions enacted by the KSA Government, or (b) any contractual force majeure provisions, which the KSA Courts are more likely to enforce (given they reflect the parties' own bargain). Standard form contracts, such as the FIDIC suite of contracts, are widely used in the KSA, and as such, we suggest the availability (or not) of relief for a party is more likely to be found under the terms of their respective contract.

Statutory Recognition of Force Majeure in the KSA. A form of statutory force majeure applies by law to government agreements. In 2019, Saudi Arabia enacted the Government Tendering & Procurement Law (2019) (**Procurement Law**).[20] Article 74 provides circumstances in which a contractor is exempted from a fine for delay and may be permitted to extend the contract. Article 74 states:

"The contract extension and the fine exemption shall be in the following cases:

1. *If the contractor is entrusted with additional works, provided that the added period is commensurate with the volume, nature and commissioning date of the work.*
2. *If the annual financial appropriations for the project are insufficient to complete the work on time.*
3. *If the delay is because of the government entity or* ***emergency circumstances****.*
4. ***If the contractor delays in executing the contract for reasons beyond his control****.*
5. *If the government entity issues an order to suspend the works or part thereof for reasons that do not belong to the contractor."*

(emphasis added)

The 2019 Procurement Law superseded the 2006 Procurement Law.[21] Article 51 of the 2006 Procurement Law also contained a similar force majeure provision, which provided that *"if the delay is due to unforeseen* (or emergency) *circumstances or for reasons beyond the contractor's control, provided that the period of delay is proportionate to these reasons".*

There is relatively little commentary or precedent in relation to the Procurement Law. Articles 74(3) and 74(4) appear to operate similar to force majeure provisions in granting relief to contractors in circumstances where delay has been caused by emergency circumstances or for reasons beyond their control. A contractor who seeks to rely on Article 74 of the Procurement Law for a failure to comply with its obligations under a government contract would presumably only be permitted to seek to delay their performance under the contract for a period that is proportionate to the period of delay caused by the unforeseen event. The contractor will also need to prove that the delay has been caused by the "emergency circumstances" or "reasons beyond his control", as a matter of fact.

Finally, it is noted that that Article 74 of the KSA's Labour Law[22] (that also applies to private sector empoyees) states that contracts for employment *"shall"* terminate in cases of force majeure *(Quwa Qahira).*

[20] Royal Decree No. M/128 of 1440 H.
[21] Royal Decree No. M58,4.9.1427 AH.
[22] Royal Decree No M/5 on 23/8/1426H.

Article 87 further provides that workers would be entitled to payment of the *"full award if he leaves the work due a force majeure event beyond his control."*

Variations. Another remedy that might be available to those that contract with government agencies who are impacted by the COVID 19 crisis is to seek a variation. Article 68 of the Procurement Law states:

> "*The prices of contracts or framework agreements may not be adjusted by increase or decrease except in the following cases:*
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> 1. *Changing the prices of the main materials or services included in the tender items, and which are specified by the regulations.*
>
> 2. *Amending the customs tariff, fees or taxes.*
>
> 3. ***If there were material difficulties during the execution of the contract that could not be expected***".

(emphasis added)

The Implementing Regulations to the Procurement Law (the **Regulation**s) stipulate the manner in which a contractor can seek a variation in these instances. Article 113 of the Regulations requires a contractor who believes that they are entitled to financial reimbursement for any of the reasons set out in Article 68 of the Procurement Law to submit a request for financial reimbursement/variation. The request must be issued to the government entity or the relevant consultant they engage with by no later than 60 days after the impacting event has occurred. The government entity is required to provide a decision within 54 – 75 days (depending on the nature of the government entity and the project). The maximum that the government entity can increase the contract price by is 20% under these provisions, however the contactor is able to apply to an administrative court if it wishes to request an amount that exceeds 20%.

Furthermore, the Regulations contain special provisions for variations in the event of an increase in government tariffs, taxes or other relevant costs that increase after the date in which a contractor submits their offer. If the contractor can establish that they have paid the increase, that it has not occurred after the set period for completion of the contract and that it has not relied on it as an excuse for delay (except where this occurred for reasons beyond its control), then the contractor may be entitled to the difference. Conversely, however, should there be a reduction in government costs then the KSA government entity would be entitled to be repaid the difference.

The Regulations also contain special provisions in circumstances where an increase in the cost of essential supplies (such as cement, iron, asphalt, concrete, wood, pipes, cables or any other items deemed to be essential by the ministry or the contract) will be reimbursed to the contractor. The Regulations require that the:

- increase in price occurred after the contractor submitted its offer;
- increase in price is not due to a delay in a delay to the works that is the fault of the contractor;
- cost of the individual essential items have increased by at least 10% from the amount quoted in the offer; and
- increase to the total price of the contract must increase by at least 3%.

Termination. Finally, it is noted that government entities are entitled by virtue of Article 77 to terminate the contract if it is in the public interest. Article 77 provides that "*[t]he government entity may terminate the contract if the public interest so requires, or if the termination is agreed upon with the contractor, after the approval of the Ministry and in accordance with the conditions and procedures specified in the regulations*." Article 132 of the Regulations, however, prevents the government from terminating a contract in order to retain an alternative contractor or in order to finalise the project itself. The government is required to provide at least 30 days' notice of its intention to terminate in the public interest.

Article 133 of the Regulations further sets out the circumstances in which the government may seek to terminate the contract by agreement with the contractor. This can occur in the following circumstances:

- in the event that the government entity has already failed to deliver the site to the contractor – after the expiry of 30 days after the contractor has issued notice to the government entity of such failure;

- in the event that the government entity has prevented the contractor for a period of more than 180 days from undertaking works for a reason that is unrelated to the contractor – after the expiry of 30 days from the date that the contractor has provided notice to the government entity that is capable of resuming works (and the government entity has failed to undertake reasonable steps to allow the contractor to resume such works); and

- in the event that the undertaking the works becomes impossible due to force majeure *(Quwa Qahira)*.

Accordingly, it would appear seeking to terminate in *"the public interest"* requires a reason that is distinct (and presumably more onerous) than a typical force majeure event. The government is required to agree on termination with the contractor in the event that performance becomes impossible because of a force majeure event but is permitted to unilaterally do so if the public interest so requires.

Should a contract be terminated under Article 77 of the Procurement Law then Article 134 of the Regulations will require the contractor to immediately cease all works (subject to any health and safety requirements) and handover all documents, materials, equipment and relevant information pertaining to the project to the government. The government, on the other hand, will be required by virtue of Article 135 of the Regulations to pay the contractor for all works undertaken up to that point, pay for supplies and fees incurred by the contractor prior to receipt of the termination notice and release any initial and final guarantees that may be held.

Force Majeure in Private Contracts in the KSA. Similar to the position in England and New York there is no restriction on parties in the KSA negotiating and agreeing to force majeure provisions in their contracts. Such provisions have become increasingly common in commercial agreements in the KSA.[23]

The Conditions of Contract for EPC Turnkey Projects published by FIDIC in 1999 (otherwise known as the "Silver Book"), is widely used in construction projects in Saudi Arabia and elsewhere the Middle East. Article 19.1 of the Silver Book defines force majeure as follows:

"Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

[23] By way of example, see clause 19 of Aggreko's standard terms of service: https://www.aggreko.com/en-mideast/terms-and-conditions/saudi-arabia-terms-and-conditions#force

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party."

Clause 19.1 then continues to provide a list of non-exhaustive *"exceptional events or circumstances"* that may constitute force majeure events, which include war and hostilities, rebellion or civil war, riot or lockout, munitions of war or explosive materials and natural catastrophes (but which does not include pandemics, or similar).

A party that is or will be prevented from performing any of its obligations under the Silver Book by force majeure can give notice to the other party under clause 19.2 and will be excused from performing such obligations for so long as the force majeure prevents it from performing them. Force majeure provisions, however, will not apply to obligations of either party to make payments.

Force majeure also entitles the party to an extension of time for any such delay and to recover any costs that it has incurred as a result of such delay (Clause 19.4). Should progress be prevented for a continuous period of 84 days or for multiple periods which total more than 140 days due to the same notified force majeure, then either party would be entitled to terminate the contract by providing 7 days' notice to the other party under Clause 19.6.

Applicability to the Current Crisis

Government Contracts. The response of Governments worldwide to the current crisis will no doubt have an impact on businesses. In relation to construction projects, a very significant part of the economy in the KSA, it seems likely that the supply of labour and materials will be impacted by the actions taken by governments worldwide. This is particularly the case for construction projects in the KSA, where labour and materials are typically supplied from Asia. If materials and labour cannot be supplied in their usual way, this may lead to delays, or claims to recover the additional costs of carrying out the work.

The KSA Government has not mandated the closure of construction projects, as has been the case in other jurisdictions. The present level of restrictions appears to make construction work likely to be more difficult and more expensive, however probably not impossible in many cases. That said, and should further restrictions be introduced to seek to limit the spread of the virus, and it may become impossible, or virtually impossible, for construction work to continue for a period of time. The issue for contractors may however be that supply lines from overseas are impacted by measures taken by other governments.

In terms of claims, it is expected that contractors undertaking work subject to the Procurement Law will seek to rely on Article 74(3) or (4) in seeking to avoid any fines for delays said to be caused by the virus. Whether a contractor is entitled to relief will depend on the actual cause of the delay suffered, and whether it reasonably could have been avoided by the contractor.

In respect of Article 74(3), the virus and governmental responses are likely to be considered "*emergency circumstances*", however the question will be whether the delay was itself caused by those "*circumstances*", or if steps could have been reasonably taken by the contractor to avoid the delay. Similarly, in respect of Article 74(4), the question will be whether the delay was for reasons "*beyond his control*", which implies that some effort must be made to avoid or mitigate the delay. Where delays cannot be excused under Article 74, the contractor may be liable for fines under the Procurement Law (Articles 72 and 73).

Contractors may seek to recover any increased costs of undertaking work under Article 68(3) of the Procurement Law. This will depend on whether there have been "*material difficulties during the execution of the contract that could not be expected*". Contractors are unlikely to have expected the pandemic, and as such a contractor may be entitled to claim under Article 68(3) if it can show "*material difficulties*". Given the

Procurement Law is very new, there is no guidance yet on how the Saudi Courts might approach this requirement. Consideration would need to be given to the terms of the contract, the nature of the work, and the actual difficulties faced by the contractor (again, it will be necessary to show causation). Article 77 also remains available to the Government in the event that contracts are determined to no-longer be in the public interest. Furthermore, the government or the contractor may seek to negotiate termination should either consider that a force majeure event has occurred or should works cease for a period exceeding 180 days.

Employers also should give due consideration to the impact of Articles 74 and 87 of the Labour Law. These provisions may give rise to employee claims that employment contracts could be terminated as a result of force majeure, and should such termination be deemed to be lawful then employers would be required to pay an employee's full award under law. Conversely, however, employers may be able to rely on these provisions should they find the need to reduce their labour costs, especially if the current crisis continues for a long period of time.

Non-Government Contracts. The availability of claims under force majeure or similar provisions will depend on the terms of a particular contract. Claims for additional time or money will largely be addressed by reference to the parties' contract, where available. Using the Silver Book as an example, the parties will need to pay particular attention to whether the virus and Government measures have prevented compliance with their obligations, as opposed to making them more difficult or expensive. Where it is the latter, the force majeure provisions may not entitle the contractor to any relief. If construction work is prevented, and a force majeure clause invoked, the parties should be mindful of the duration of such prevention, given the right to terminate which arises if the event continues for the specified periods.

In cases where the contract does not expressly deal with force majeure, the position is less certain. This is the case whether the contract is governed by Saudi, English or New York law. For Saudi law governed contracts, it is expected that contractors may seek to rely on the doctrines of *Quwa Qahira*, *Al Dhorouf Al Tari'a* or *Istihala* (as discussed above).

V. Tortious Claims

The relationships of owner, contractor, subcontractors and suppliers in construction contracting chains are usually governed by the contract. Duties between parties may however also arise in tort, particularly where there is no contractual 'link' between parties. This may be especially relevant in the COVID-19 context where a party may seek to claim that an employer's actions have exposed individuals to a greater risk of COVID-19 and is in breach of its duty of care to its employees, employees of contractors and potentially the public. This section of the article briefly considers and compares the basic elements of establishing tortious liability under Saudi, English and New York law in that context.

1. KSA Tort Law. The KSA law of torts is based on the broad principles from Shari'ah law. For a tort to be established under Shari'ah, three elements[24] must be proven:

- wrongdoing;
- harm; and
- direct causation.

[24] Talbi, Othman, "Tort Reform in Saudi Arabia: Obstacles and Solutions" (2015).Theses and Dissertations. Paper 20.

These elements must be present in all tort cases regardless of the nature of the tort. With respect to causation, only harm directly flowing from the wrongdoing can be recovered. There must be actual and provable damage (and as such, indirect losses are unlikely to be recoverable).[25]

2. Comparison with England and New York. Similar to the position in KSA, English and New York tort law is also (largely) not codified. Whilst KSA tort law principles are derived from the Shari'ah, the principles of tort in England and New York are derived from case law.

Under English and New York law, the same essential elements under KSA tort law – wrongdoing, harm and causation – will have different requirements depending on the type of tort. The tort of negligence under English[26] and New York law[27] requires four main elements to be satisfied – the existence of the duty of care, the tortfeasor's breach of that duty, the victim suffering from a harm and proximate causation between the tortfeasor's breach and the victim's suffering.

A closer examination of the approach to negligence between the three jurisdictions suggests that the threshold to establishing a negligence claim under KSA law is relatively similar to that in England and New York for the following reasons:

- Firstly, English[28] and New York law[29] both include a requirement for the existence of a duty of care owed by the tortfeasor to the victim, which can be established if there is reasonable foresight of harm, a relationship of proximity and that it is fair, just and reasonable to impose a duty of care. In considering whether there was a duty of care under KSA law the courts will take into consideration the nature of the relationship between the parties. Furthermore, similar to the English and New York jurisdictions, in the KSA, certain laws explicitly establish certain duties of care, for example in a relationship of employment, where an employer has a duty of care towards its employees and in a banking relationship where banks have a duty of care towards their clients.

- Secondly, causation in all three jurisdictions is similar, in that direct causation is required. Under English[30] and New York law[31], indirect causes would be categorised as *novus actus interveniens* ('new intervening act') which may effectively break the causal chain between the tortfeasor's action and his liability under negligence.[32]

- Thirdly, the floodgate principle means losses that are 'purely economic' (pure economic loss) cannot be recovered under English[33] and New York law[34]. Although the definition of 'harm' under Shari'ah includes financial and economic loss, under KSA law, it can only be recovered to the extent it can be proven to be a direct consequence of the harm.

The usual relief for a tort claim for all three jurisdictions is damages in the form of monetary compensation, although Saudi courts appear to be more amenable than English and New York courts to compensate based on the type of loss (which may not be monetary) to the extent that is possible and practicable. For example, if the tort resulted in the destruction of a claimant's car, the court may ask the tortfeasor to

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25 Ibid.
26 *Donoghue v Stevenson* [1932] UKHL 100.
27 § 4.01, Warren's Negligence in the New York Courts.
28 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.
29 § 4.01, Warren's Negligence in the New York Courts.
30 Section 4, Chapter 2, Clerk & Lindsell on Torts (22nd edition).
31 14 N.Y.Prac., New York Law of Torts § 8:1.
32 KSA Court of Cassation Decision (802/G2/B) 1429H.
33 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27.
34 14 N.Y.Prac., New York Law of Torts § 21:13.10.

provide the claimant with another car of the same type. The English[35] and New York[36] courts when assessing damages will apply rules of remoteness, whereby the damage must be foreseeable whereas under KSA law, foreseeability of the damage is not a determining factor.

There is the potential for liability in tort particularly for employers and owners in the KSA in relation to the virus. Most obviously this would seem to arise where an employer has not followed Government advice or directions, and this has led to harm being suffered by another, such as an employee, personnel from other contractors, or members of the public.

VI. Delays

An impact of the COVID-19 crisis is likely to be on the supply chain for labour and materials in construction projects. A consequence of this is likely to be delays and cost overruns. In the following section, this article considers the position under KSA, English and New York law in relation to (1) liquidated damages, (2) extensions of time, and (3) termination.

The starting point is that the contractor will usually be required to complete construction works by a particular date, or within a certain timeframe. There will usually be liquidated damages (or sometimes a 'fine' or 'penalty') payable by the contractor if it is late. The amount of liquidated damages will usually be set out (or calculated) under the terms of the contract.

Construction contracts will usually provide that, in certain circumstances, where the delay was caused by the owner, the contractor is allowed additional time, and sometimes cost, in respect of that delay. In most legal jurisdictions, including England, New York, and the KSA, doctrines will provide that an owner will not be able to benefit from its own wrongdoing. As such, and subject to the terms of a particular contract, an owner will not be able to recover liquidated damages for a delay by the contractor that was caused by the owner.

1. Liquidated damages. Liquidated damages under Saudi law are likely to only be enforceable to the extent damages reflect the actual loss suffered by the owner (even where the contract allows for greater recovery). This is because Shari'ah prohibits liquidated damages where the damages "grossly exceed" actual damages. In practice, KSA courts will usually seek to uphold contract terms, however in order to rely on a liquidated damages clause in a contract, the party seeking to claim for liquidated damages must show that it has suffered loss. This is often seen from a common law standpoint as somewhat defeating the purpose of having liquidated damages in the first place. That said, there are circumstances where the common law will intervene in the operation of liquidated damages provisions, as discussed below.

For public works contracts, Article 72 of the Procurement Law 2019 (previously Article 48 of the Procurement Law 2006) provides a penalty for contractor delay which is capped at 6% for supply contracts and 20% (previously set at 10%) for all other contracts. Similarly, Article 73 of the Procurement Law 2019 (previously Article 49 of the Procurement Law 2006) provides that the failure to complete works within the agreed project deadlines will entitle the public authority to a penalty, up to a maximum of 20% (previously set at 10%) of the contract value.

While parties may include liquidated damages clauses in private contracts (also typically capped at 10% of the total value of the contract), Saudi courts often revise them if they deem the result to be disproportional to the damages actually incurred due to the delay.

The general principles of enforceability of liquidated damages is the same for both public works and private sector contracts under English and New York law, and depend on the terms of the contract. Under

[35] Section 5, Chapter 2, Clerk & Lindsell on Torts (22nd edition).
[36] 16 N.Y.Prac., New York Law of Torts § 21:8.

English law, as long as the liquidated damages clause can be shown to not be penal and impose a detriment all out of proportion to the legitimate interest of the innocent party[37], the clause will be enforced by courts. Similarly, New York law provides that if the liquidated damages clause is "*manifestly disproportionate to the actual*" damage sustained, courts will not enforce the clause on the grounds that it is a penalty.[38]

The test for the enforceability of a liquidated damages clause under English law is not whether the liquidated damages reflects actual loss. The court in *GPP Big Field LLP & Anor v Solar EPC Solutions SL* [2018] EWHC 2866 held that the precise prediction of likely loss for liquidated damages is difficult and ultimately if the sum specified in the clause is not "*extravagant, exorbitant or unconscionable*" in comparison with the employer's legitimate interest in ensuring the project is on time, it will be enforceable. On this matter, it would appear that the position on liquidated damages under New York law[39] holds a closer bearing to KSA law as New York courts are more reluctant to enforce liquidated damages provisions that bear no relation to the actual damages.[40] Unlike in the KSA, New York and English laws do not require the innocent party relying on the enforcement of liquidated damages to provide evidence of actual damages.[41]

On the other hand, in the circumstances where it is the employer that has caused critical delay, the employer will not be entitled to claim for liquidated damages as Shari'ah does not allow a party to benefit from its own wrongdoing. Similar to the KSA position, the 'prevention principle' under English law will not allow the employer under a construction contract to claim for liquidated damages where it caused delay.[42] New York law also takes a similar approach as the primary function of an extension of time provision is to protect the contractor from liquidated damages.[43]

2. Extension of time. A contractor may be excused from liability for liquidated damages if there is an extension of time.

As set out above, Article 74 of the Procurement Law 2019 (previously Article 52 of the Procurement Law 2006) provides a list of circumstances where extensions of time may be granted. These include that the "*delay is due to the government entity or to emergency circumstances*" or is "*beyond the control of the contractor*". It is possible that delay caused by policies arising from government authorities in response to COVID-19 could attract relief under Article 74 of the Procurement Law 2019, subject to the matters discussed earlier, particularly in terms of causation.

In relation to private sector contracts, Saudi courts will likely uphold contract terms, which will usually provide a mechanism for extension of time claims. Extension of time provisions will usually require the contractor to issue a notice (or notices) within specified time limits. For example, the relevant clause which sets out the grounds for an extension of time is contained in Sub-clause 8.5 of the FIDIC standard form contracts (2017 editions of the Red, Yellow and Silver Books). Further, Sub-clause 8.6 of the FIDIC standard forms (2017 editions of the Red, Yellow and Silver Books) also provides that delays caused by authorities would entitle a contractor to an extension of time if the contractor has diligently followed the procedures laid out by the public authorities, these public authorities have delayed the contractor's work and the delay was

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37 *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67.

38 *J.R. Stevenson Corp. v. Westchester Cty.*, 113 A.D.2d 918, 920 (2d Dept. 1985). 33 N.Y.Prac., New York Construction Law Manual § 7:72 (2d ed.).

39 Liquidated damages under New York law are "*an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement*", *Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 41 N.Y.2d 420, 424 (1977).

40 *Perseus Telecom, LTD. v. Indy Research Labs, LLC*, 2018 N.Y. Slip Op. 33083(U), the court held that the liquidated damages clause was unenforceable as the sum was seven times more than the actual damage.

41 *Mathew v. Slocum-Dickson Med. Grp., PLLC*, 160 A.D.3d 1500 (4th Dept. 2018).

42 Section 10-033, Keating on Construction Contracts, 10th edition. The prevention principle provides that the party at fault should not be able to profit from its own wrongdoing.

43 33 N.Y.Prac., New York Construction Law Manual § 7:7 (2d ed.).

unforeseeable. In this context, it is possible that contractors that entered into FIDIC form contracts prior to the COVID-19 crisis may be able to rely on this clause if governments put in place measures (ie. lockdowns) which cause delays to the construction project as a response to COVID-19. As grounds will vary between different contracts, it is always important to check to see whether the circumstances for the extension of time is covered under the terms of the contract, and again, close consideration must be given to the actual cause of delay.

The Saudi courts may decide cases (as can occur in common-law jurisdictions based on equitable jurisdiction) by relying on general principles of justice and fairness (*Aladel wal Insaf)*. This is likely to be the case when there is no substantial direct damage to the party insisting on the strict application of the contract (*La darar wa la dirar)*. Therefore, depending on the circumstances, a minor delay that does not cause demonstrable direct damage may not be considered a contractual breach by a Saudi court. Similarly, a mere non-compliance (for example with the notice requirements under a contract), which disentitles a contractor from making an otherwise valid claim may not be enforced by the Saudi courts by application of this equitable jurisdiction.

3. Claim for damages under contract. Where a contract is delayed significantly, or if other issues arise, the parties may prefer to terminate.[44] Where one party terminates, either that party, or the other, will often seek to claim damages for alleged breaches of the contract. If a contract is invalidly terminated, an innocent counterparty may also seek to claim damages for repudiation of the contract.

General damages for breach of contract is likely to be limited by Saudi courts to proven and actual loss. Therefore, it is unlikely that the party will be able to recover interest, consequential losses, loss of profit, economic loss of a chance or any other type of speculative or uncertain losses. Essentially, a claim for damages under Saudi law is likely to be limited to direct, as opposed to indirect, damages.

Damages for breach of contract under English and New York law are awarded to put the innocent party in a position he would have been in if the contract was performed. The English and New York courts apply general principles of causation, remoteness and mitigation in respect of a claim for damages. As set out below, unlike KSA law, English and New York law as a rule do not limit the recoverability of damages to direct losses:

- Consequential losses – Under both English[45] and New York law[46], as a general principle, indirect losses are recoverable if they are losses that were within the contemplation of the parties at the time of contracting.

- Interest – Under English law, a party can claim interest losses including compound interest caused by breach of contract as special damages[47]. Statutory interest is also available under legislation.[48] Similarly under New York law, interest can be recovered, notably, the current position is that a contractual interest provision will supersede the statutory interest rate.[49]

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44 Discussed above in relation to termination for delay in excess of 180 days under Article 77 of the Procurement Law.
45 *Hadley v Baxendale* [1854] EWHC J70.
46 *Kenford Co. v. County of Erie* 73 N.Y.2d 312 (1989).
47 *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34.
48 Section 35A Supreme Court Act 1981; see also Section 69 of the County Courts Act 1984.
49 28A N.Y. Prac., Contract Law § 22:15.

- Loss of chance – Both English[50] and New York[51] courts have shown their willingness to allow damages for loss of chance cases where the party claiming the damage can show that there was a real chance that the loss would have been suffered.

VII. Bankruptcy

During an age of heightened globalisation, the COVID-19 pandemic has unsurprisingly caused a dramatic downturn of economic activity across the globe, impacting all businesses, irrespective of geography or industry. For the construction industry, COVID-19's impact has since caused greater strain on supply chains and will likely cause future delays to projects and make it more difficult for contractors to seek funding and insurance. This section of the article is split into three parts - it will give an overview of the new KSA bankruptcy regime, provide key comparisons between the US, UK and KSA bankruptcy frameworks, and discuss the particular issues which may arise due to the bankruptcy of a contractor in a construction contract due to the COVID 19 crisis.

1. Current Saudi bankruptcy regime. The KSA bankruptcy regime was recently updated by the new Insolvency Law of 2018 ("**KSA Insolvency Law 2018**")[52]. The new law will generally apply to any natural person practicing profitable, commercial, professional activities in Saudi Arabia, Saudi-registered companies as well as foreign investors (which will include foreign nationals) owning assets or operating through a licensed entity in Saudi (Article 3 of the KSA Insolvency Law 2018). The law will not apply to Saudi public bodies, however it is thought that entities which are set up as private entities, but beneficially owned by the KSA government would be subject to the KSA Insolvency Law 2018.

- The new regime provides four restructuring and liquidation procedures which are briefly summarised below:

    - ***Small debtor's procedures (Chapters 6-8, KSA Insolvency Law 2018)*** – This process has very limited involvement from the court and is a simplified version of the Protective Settlement, Financial Restructuring and Liquidation procedures (which are outlined below) with the aim of enabling small debtors to be rescued in a time effective and cost efficient way.

    - ***Liquidation (Chapter 5, KSA Insolvency Law 2018)*** – This is a liquidator driven process and has very limited involvement from the court. The liquidator will be chosen by the debtor or the court from the list of individuals (independent 'Officeholders'[53]) set out by the Insolvency Commission. The liquidator will determine claims and make distributions as necessary.

    - ***Protective Settlement (Chapter 6, KSA Insolvency Law 2018)***– This is a process that allows a debtor to seek a settlement with creditors whilst managing its own affairs. This is a court process and is commenced once the debtor has established its settlement proposal and the class of creditors. If two thirds of the creditors vote in favour of the proposal, the court will be invited to approve the proposal. Once court approval is obtained, the proposal will be binding on all creditors.

    - ***Financial Restructuring (Chapter 4, KSA Insolvency Law 2018)*** – This is a court process similar to Protective Settlement. This procedure gives a debtor the opportunity to restructure

50 Section 10-51, McGregor on Damages, 20th ed.
51 *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 260 (1986).
52 Um Al-Quraa (Official Gazette) on 23rd February 2018, edition No. 4712.
53 Defined as "*whoever is appointed by the Court or applicant to perform tasks and duties entrusted to him in accordance with the type of insolvency procedures*" (Article 1 of KSA Insolvency Law 2018).

its business and is overseen by an independent officeholder. An aim of this process is to avoid triggering termination provisions under the debtor's contracts. This procedure is a tool that may help a distressed company in the context of COVID-19 as it will provide the company with various legal protections during the distressed period. A comparison will be made below between the Financial Restructuring process with its UK and US counterparts.

Similar to the new KSA framework on bankruptcy and insolvency, England and New York also have codified bankruptcy frameworks. The English regime is governed by the Insolvency Act 1986 ("IA 1986") and the New York regime is governed by federal 'U.S. Code Title 11 – Bankruptcy' as bankruptcy is a matter of federal jurisdiction. Unlike KSA and US law, the terms 'bankruptcy' and 'insolvency' are distinct under English law – the former process refers to the insolvency of individuals and partnerships and is governed by Part IX of IA 1986 whereas the latter process is for companies and legal individuals[54].

The English and US regimes provide public insolvency registers. The new KSA insolvency law also establishes the Insolvency Register (Article 1, KSA Insolvency Law 2018), which is available publicly and accessible online. This may be an important feature that parties are likely to use in the COVID-19 context, as a party can check the solvency status of the counterparty. This solvency status may be a helpful factor in informing the next steps regarding a potentially insolvent counterparty, whether it be an exercise of a termination right, or renegotiation of contractual terms.

2. Key comparisons between the 'restructuring' frameworks. This section will focus on some of the key comparisons between the US Chapter 11 Bankruptcy Code ("**Chapter 11**"), UK administration process set out in Schedule B1 of the IA 1986 and the KSA Financial Restructuring Procedure. The differences between the frameworks are briefly summarised below:

- Who may apply - Although both individuals and companies may apply for Chapter 11 and the KSA Financial Restructuring, the UK administration process is limited to companies only.

- Goal - These three processes have a common goal, which is to preserve the survival of the company whilst allowing the company to restructure its business.

- How to commence the relevant proceeding - To commence any of the three processes, applications must be filed with the court. Article 42 of KSA Insolvency Law 2018 allows a Competent Authority55 to file for Financial Restructuring in addition to the debtor and creditor, whereas in the UK and US, this is broadly limited to the debtor and creditor[56].

- Moratorium – Unlike the UK[57] and US[58] procedure which contain provisions for an automatic moratorium once an application has been made which stays all litigation and prevents the enforcement of judgments, a debtor in Saudi must request the court to order the moratorium at the time of its application for financial restructuring.[59]

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[54] Compare that against US bankruptcy law, where the term 'bankruptcy' can apply to both individuals and companies under US bankruptcy code.

[55] Defined as "The Authority in charge of regulating, controlling and supervising the activities of the Regulated Entities".

[56] 11 U.S. Code § 1121; paragraph 12 of Schedule B1 IA 1986.

[57] Paragraphs 42-44 of Schedule B1 IA 198.

[58] Chapter 11 § 362.

[59] Article 18, KSA Insolvency Law 2018, the court has discretion to grant this moratorium. A period of stay under the Saudi regime is initially for ninety days, however this may be renewed at the request of the Debtor. The maximum duration of a Moratorium will not exceed one 180 days.

For a party to a construction contract, an automatic stay is important in giving the party breathing space. An insolvency event from COVID-19 may trigger an event of default in the project agreement which entitles the counterparty the right to terminate, or trigger a material adverse change (MAC) clause in a lender agreement, as well as cross-defaults in project finance agreements.

- Contracts – The approach to termination of contracts varies between the three processes. Chapter 11[60] gives the power to the debtor to terminate or assign its contracts, and in general offers the debtor wide-ranging powers to address its business concerns. Under Schedule B1, a UK administrator will not have the power to terminate contracts, whether or not the contract will be terminated will depend on the contract terms. The position under KSA Insolvency Law 2018 is that the "Officeholder" may choose to terminate any contract entered by the debtor if termination is necessary to implement the proposal[61].

  Allowing the debtor to exercise the right to terminate contracts is significant especially in the COVID-19 context as it may allow debtors to cherry pick which contracts they want to survive and burdensome contracts to reject.

- Proposals to creditors – All three processes require some level of creditor consent to the proposal. The Saudi process is similar to the US process which requires two thirds approval from the creditors in each class[62], whereas the UK process only requires a majority approval.

- Lenders – The Saudi and UK processes do not offer any special incentives to lenders that provide finance to the debtor during the administration / financial restructuring process. Therefore in practice, it is likely that the company will have to rely on its existing lenders for financial support as post-administration lenders will not be given special priority. This serves as a stark contrast to the US procedure where Chapter 11 has specific provisions like 'DIP financing' which gives courts the discretion to give liens to new lenders assets that have not already been pledged by other lenders.

  This ability to receive lending is particularly relevant to a distressed party to a construction contract amidst a COVID-19 crisis, given the importance of cash flow in the construction industry.

3. Insolvency in the construction industry during the COVID 19 crisis. The financial impact of the COVID-19 crisis on distressed companies may trigger bankruptcy provisions in construction contracts which could entitle a counterparty to terminate.

In relation to public works contracts in the KSA, pursuant to Article 76(b) of the Procurement Law 2019 (previously Article 53 of the Procurement Law 2006), where a contractor for public works becomes bankrupt or proven insolvent, the government agency party to the contract will be entitled to withdraw the work from the contractor immediately and terminate the contract. The public body is also able to claim any increase in the contract price from the terminated contractor.

With regards to private sector clients and funders to projects, Saudi law is silent as to whether a contracting party's insolvency or bankruptcy will render the contract immediately void or voidable. However, Saudi courts generally uphold termination provisions in private party contracts, which will often provide that bankruptcy is a ground for termination. Whether parties seek to invoke termination rights given the current crisis, or whether parties seek to negotiate solutions where possible, remains to be seen. Issues with the supply of labour and materials are likely to be felt throughout the market, and as such issues may be more likely to be market-wide, rather than affecting a particular contractor. In these circumstances, it is suggested that parties

[60] 11 U.S. Code Chapter 11 § 362.
[61] Article 61 , KSA Insolvency Law 2018.
[62] Article 79, KSA Insolvency Law 2018.

may be more inclined to seek to negotiate a solution where possible, rather than to terminate and seek to replace the contractor.

The full impact of the COVID 19 crisis is unlikely to have been felt by most companies yet. Construction professionals will naturally be turning their minds to the possible impact of bankruptcy in their supply chain. In the face of industry-wide issues, the KSA Insolvency Law 2018 provides the framework for the potential restructuring of companies in distress.

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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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