THE PRINCIPLE OF FORCE MAJEURE IN SHARIAH: A SPECIAL REFERENCE TO SAUDI CONTRACT

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ABSTRACT

The principle of force majeure is mainly used in commercial and business contracts. According to Loweel (2008), the traditional rationale for force majeure clauses involved unanticipated events and impossibility of performance whilst the more recent practice has been to use force majeure provisions as a broader risk allocation tool. In Shari'ah, impossibility of performance due to changed circumstances is known as, Istihalah al-tanfidi. The principle of Quwa Qahira or Quwat al-Qanun is also observed to be broader than the English doctrine of frustration. It covers both supervening impossibility and circumstances where the performance has become substantially different to that initially agreed, resulting in the alteration of the rights and also the responsibilities under the contract. Special reference also be made to Saudi where in Saudi contract law, a force majeure event does not terminate the contract but merely suspends its applicability until performance becomes possible again. The authors in this paper applied doctrinal analysis as the research methodology of the topic.

Keywords: *Frustration, Contract, Quwat Qahira, Islamic Law*

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Introduction

Discharge of contract normally occurs when a contract is brought to an end, dissolved or terminated. In unilateral discharge of contract, the existence of one party is enough to dissolve the contract. In the case if there is factor which vitiates the free consent of the party in the contract, the victim has the option either to terminate the contract or continue with the contract. Among the factors are coercion, fraud, misrepresentation or undue influence in the contract. Besides that, the contract can also be terminated if there is breach by the party to the contract. In unilateral discharge of contract, consent is the important basis of the agreement. The existence of consent creates contracts, together with the parties' rights and obligation. When the consent is defective, the contract is not valid. Thus, a party who had mistakenly entered into, or who had been unfairly or unwillingly forced or tricked into entering a contract, is provided with remedy against the effects of that contract.

The principle of force majeure is mainly used in commercial and business contracts. According to Lowell¹, the traditional rationale for force majeure clauses involved "unanticipated events" and "impossibility" of performance whilst the more recent practice has been to use force majeure provisions as a broader risk allocation tool. Force majeure clauses may be used to anticipate those risks that are uninsurable, or that render performance merely inconvenient or uneconomical as opposed to impossible. In short, the clauses deal with risks deemed unacceptable by the parties.

Under Shari'ah, impossibility of performance due to changed circumstances is known as, 'Istihalah al-tanfidh'. The principle of 'Quwa Qahira' (or 'Quwat al-Qanun') is observed to be broader than the English doctrine of frustration. Islam accepts that any unforeseen circumstance or 'Act of God' may result in loss and none of the parties were in default. Thus the Shari'a extends the coverage of Qawat al-Qanun to both supervening impossibility and circumstances where the performance has become substantially different to that initially agreed, resulting in the alteration of the rights and responsibilities under the contract.

This paper discusses the principle of force majeure under the Shari'ah with special reference to Saudi law as Shari'ah is the main law which govern the country. This paper applied doctrinal analysis as the research methodology.

1. Principle of Force Majeure under Shari'ah

In Islam, future circumstances are perceived as being neither predictable nor controllable; instead it is only God who knows how things will turn out². However,

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¹Westersund, L.A., (2008). "Force Majeure Clauses in Construction Contracts" in Glaholt, D.W., Kirsh, H. and Reynolds, R.B. (eds.) Journal of the Canadian College of Construction Lawyers. Toronto: Thomson/Carswell.67

² Karl, D. J., (1991). Islamic law in saudi arabia: what foreign attorney's should know.George Washington Journal of International Law And Economic. United Kingdom. 161

Shari'ah recognizes the principle of *pacta sunt servanda* which means promises must be kept. It is an expression signifying that the agreements and stipulations of the parties to a contract must be observed. The Holy Qur'an stipulated in al-Maidah verse 1 that "O ye who believe! Fulfil [your] contracts". This verse highlighted the literal performance of contract without looking at the occurring event after the contract was made which had interfered with the performance of one party, or reduced its value to the other. This is because one of the principal purposes of contract as a legal and commercial institution is to precisely allocate the risks of such events³.

Indeed, the keeping of promises is mandatory (Wajib) and Shari'ah generally regards the breach of promises as a mortal sin (Kabira). However, the position is extended by the provision of relief to the unexpected circumstances which prevent the parties from carrying out their obligations in the contracts, to include divine misadventure (Aft al-Samaviiah)⁴ and also unavoidable disasters (Jayehah)⁵. This is based on the Shariah principle where Allah commands justice and equity as stated in al-Quran⁶.

The idea of change in circumstances which renders further fulfilment of obligations impossible is defined as a right to dissolve a contract when unforeseen changes of circumstance made the contractual obligation more burdensome and difficult than expected at the time of the formation of a contract⁷. Impossibility of performance due to the change of circumstances is known as, *Istihalah al-Tanfidh*. The equivalent concept in Shariah is *Quwa Qahira* (or *Quwat al-Qanun*) which is broader than the English doctrine of frustration. Islam accepts that any kind of unforeseen act of God which may result to any loss to a party, where the party is not at fault. Thus, the Shariah extends the coverage of *Qawat al-Qanun* to both supervening impossibility and circumstances where the performance has become substantially different to that initially agreed, resulting in the alteration of the rights and responsibilities under the contract⁸.

The principle of changed circumstances is termed as *udhr*, which means excuse or just cause, is founded on the notion that an agreement should not be binding where an entirely unforeseen and fundamental change has taken place, or where an agreement has become particularly difficult to perform as a consequence of the unforeseen event or there is a mandatory obligation upon the courts to order a

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³Treitel, G.H., (2011). *Frustration and force majeure*. Sweet & Maxwell: London, 1.

⁴Al-Khatib, M.S., 1958. *Mughni al-muhtaj*. Dar Al-Ehya Al-Torath Al-Arabi. Beirut, 1: 387.

⁵Shafeie, I., 1983. *Ketab al-um*. Dar Al-Fekr. Beirut. 3(2):44.

⁶Islam, M. H., (1998). *Dissolution of contract in islamic law*, Arab Law Quarterly, 13: 340.

⁷Shimizu, H., (1989). *Philosophy of the islamic law of contract: a comparative study of contractual justice* Imes Working Papers Series. I.UJ, 15: 77-78.

⁸Rayner, S., (1991). *Note on force majeure in islamic law*. Arab Law Quarterly, 6(1):86.

just and reasonable solution. Upon fulfilment of these conditions, the contract may be deemed frustrated and the parties will be released from their respective obligations. This doctrine is also applicable when further performance of the contract will be harmful for one of the parties

A similar concept is that of *nazariyyah al-hawadith al-tari'ah* or *nazariyyat al-zuruf al-istithna'iyah*, (intervening contingencies), which substantially alter the equilibrium of the contract and makes performance significantly more onerous. Moreover, the principle of *Al-jawa'ih* (natural disaster) is also recognized in Shariah law as one element for force majeure. Maliki and Hanbali schools recognised that destroyed crops should result in termination of a contract⁹. In the case of impossibility caused by currency fluctuation, the Hanbali School draws a distinction between fluctuations caused by the act of a ruler and market forces. Only in the first situation, a party may claim for the lost value¹⁰. It may thus be seen that the Islamic concept is somewhat wider than the English Law.

The Islamic approach is also influenced by the notion of *gharar*, which means risk. The prohibition of *gharar* seeks to remove uncertainty from contracts, to avoid a weaker party being cheated by a stronger one¹¹. The notion of *gharar* resulted to any agreement, which involves a degree of speculation, or gambling upon events that may not occur, being void. In the contractual sense, it also includes agreement where the benefit due to be obtained under the agreement is not ascertained at the time of the contract. Therefore, any contract that is silent on a price or time the price is due or is indeed tied to any fluctuating standard, such as market values or interest rates, is disallowed because of the uncertainty inherent within it. In fact, Karl¹² suggested that construction of contracts specifying the work intended and the completion date may also be forbidden under the concept, since there is always risk that unforeseen circumstances could arise preventing it from being completed. Furthermore, the traditional Islamic prohibition against *riba*, (usury) prevents any party gaining an unfair advantage in the event of unforeseen circumstances. It may be no surprise to note that Islam recognises rescission in the force majeure events because to do otherwise would constitute unfair loss or damage to the affected party.

The attitude against *riba* and *gharar* also applies to the formation of force majeure clauses. Contracts must be drafted in such a way to avoid unfair gain, uncertainty and speculation. Thus, any clause must be drafted in the language that is clear and precise; the use of word 'I have bought' is preferred to be used rather than

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⁹Qudarnah, I., (1972). *Muwaffaq al-din: kitab al-mughni*. Matba'ah Al-Manar: Egypt. 4: 216.

¹⁰Saleh, S. A., 1984. Some aspects of frustrated performance of contracts under middle eastern law. *International And Comparative Law Quarterly*, 33(99): 1048

¹¹Ramadan, H.M., (2006). *Understanding islamic law: from classical to contemporary*. Rowman Altamira, Oxford. 99.

¹²Karl, D. J., (1991). *Islamic law in saudi arabia: what foreign attorney's should know*. George Washington Journal of International Law And Economic. United Kingdom. 161.

'I will buy'. It should also be noted that conditions cannot be used in Islamic contracts.

It is observed that the Al-Mejelle, which is the first codification of Islamic principles, also contains provision related to force majeure. Art. 478 of the Al-Mejelle stated that, "If any event happens whereby the reason for conclusion of the contract disappears, so that the contract cannot be carried out, such contract is cancelled". This is reminiscent of England's approach of frustration. Art. 443 further provided that, "if any events occurred whereby the underlying reason for the conclusion of the contract disappears so that the contract cannot be performed, such contract is rescinded".

2. Force Majeure Event under the Saudi Contract Law

The principle of changed circumstances is termed as 'udhr', meaning 'excuse' or 'just cause' and is founded on the notion that an agreement should not be binding where an entirely unforeseen and fundamental change has taken place, or where an agreement has become particularly difficult to perform as a consequence of the unforeseen event or there is a mandatory obligation upon the courts to order a just and reasonable solution. Upon fulfilment of these conditions, the contract may be deemed frustrated and the parties will be released from their respective obligations". This doctrine may be relied upon when further performance will be harmful for one of the parties.

A similar concept is that of 'nazariyyah al-hawadith al-tari'ah' or 'nazariyyat al-zuruf al-istithna'iyyah', (known as 'intervening contingencies'), which substantially alter the equilibrium of the contract and makes performance significantly more onerous. As with contracts rendered materially different, Saudi courts are able to modify contractual terms to avoid complete termination. It may thus be seen that the Islamic concept is somewhat wider than the English Law.

In addition, the principle of Al-jawa'ih' (natural disaster) is also applied by the courts in Saudi for force majeure although such principle is mainly applied to agricultural contracts. Both the Maliki and Hanbali schools recognise that destroyed crops should result in termination of a contract. In the case of impossibility caused by currency fluctuation, the Hanbali School draws a distinction between fluctuations caused by the act of a ruler and that caused by market forces. Only in the first case may a party claim the lost value.

The Islamic approach is also influenced by the notion of 'gharar', which means 'risk'. The prohibition of gharar seeks to remove uncertainty from contracts, to avoid a weaker party being cheated by a stronger one. The notion of gharar results in any agreement involving a degree of speculation, or gambling upon events that may not occur, being void. In the contractual sense, this includes agreements where the benefit due to be obtained under the agreement is not ascertained at the time of the contract. Therefore, any contract that is silent on a price or time the price is due or is indeed tied to any fluctuating standard, such as market values or interest rates, is disallowed for the uncertainty inherent within it. In fact, Karl suggests that

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construction contracts specifying the work intended and the completion date may also be forbidden under the concept, since there is always a risk that unforeseen circumstances could arise preventing it from being completed. Further, the traditional Islamic prohibition against 'riba', (usury) prevents any party gaining an unfair advantage in the event of unforeseen circumstances. It may be no surprise to note therefore that Islam recognises rescission in the vent of force majeure events, "because to do otherwise would constitute unfair loss or damage to the affected party".

The attitude against riba and gharar also applies to the formation of force majeure clauses. Contracts must be drafted in such a way that avoids unfair gain, uncertainty or speculation. Thus any clause must be drafted in language that is as clear and precise as possible; words such as 'I have bought' are preferred to 'I will buy'. It should be noted that conditions cannot be implied into Islamic contracts.

It is observed that the Al-Mejelle, which is the first codification of Islamic principles, also contains provision related to force majeure. Art. 478 of the Al-Mejelle states, "If any event happens whereby the reason for conclusion of the contract disappears, so that the contract cannot be carried out, such contract is cancelled". This is reminiscent of England's approach of frustration. Art. 443 further provide, "if any events occurred whereby the underlying reason for the conclusion of the contract disappears so that the contract cannot be performed, such contract is rescinded".

Force Majeure Event under the Saudi Contract Law

Modern Arab systems based the contractual liabilities on fault (breach), damage and causation. Thus if an event amounting to force majeure occurs, the event is viewed in terms of the absence of fault on the part of the parties. It is these perspectives that permit unilateral rescission of a contract, should one party consider the situation has changed significantly or requires more effort than that originally contemplated.

Even further, Shari'ah permits exceptions where there has been a change in a contracting party's personal circumstances, not just as a result of external events. For example if a person let to hire a house or shop, and afterwards became poor and involved in debt to a degree which he is unable to discharge but by the price of the house or shop, the Qadhi (judge) must dissolve the contract of hire, and sell the place for payment of the debt; because in the endurance of the contract the lessor sustains a super induced injury not incurred by the contract, which super induced injury, in this instance, is that the Qadhi will otherwise seize and imprison him on account of the debt". Even if a unilateral withdrawal is ultimately deemed to be a breach of contract, damages will still be lower than they would have been under the Common Law. It is for the party seeking to rely on the provision to prove their case falls within it.

Under the Saudi contract law, a force majeure event does not terminate the contract but merely suspends its applicability until performance again becomes possible. Indeed, if the force majeure event only touches part of the contract, it is

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likely that the contract will only be partially extinguished. Partial extinction usually happens where the court considers the part severed does not materially affect the majority of the contract. Any counter-obligations will be modified accordingly.

The Shari'ah does not provide detail as to how loss should be apportioned. Rayner highlight that under the Saudi Law, provisions on remedies are unclear in particular in the case of partial fulfilment or and partial liability¹³. The author speculates, "[i]t is likely that compensation would be awarded in proportion to work carried out or usufruct derived, but the certainty and amount remains unpredictable". Karl notes that ambiguity may be compounded by judges who are not bound by any precedent within the Saudi system¹⁴. Therefore, he concludes that awards may simply rest on the experience and perspective of the judge who presides. This feature of the administration of Saudi Law is in his opinion, typical of the way Shari'ah Law operates in relation to frustration. Whilst Arab contract law generally defers to the principle that the 'loss lies where it falls', there is evidence of Arab courts attempting to spread the loss proportionately between parties.

Shari'ah fosters a different business climate within which Shari'ah compliant provisions are to be interpreted. For example, traditional Islam rejects the notion of insurance as gharar and too uncertain, which may be seen as an essential corollary to force majeure clauses. Such contracts are in fact perceived by Islam as a form of gambling because the policy holder is set to benefit from the premiums in case of a loss.

However the Saudi Government has felt compelled to recognise its role in business and have therefore accepted it, "on the tacit understanding" that such insurance companies plough the proceeds back into land development projects or other business endeavours in the Saudi Kingdom. Moreover, not only are the principles and traditions of Saudi Law different, but one must recognise that they are due to be interpreted in a far different juridical system. For example, contractual provisions that seek to oust the jurisdiction of the Saudi court and thus Shari'ah may not be recognised by Saudi judges. In a similar vein, lawyers who practice Shari'ah Law are not called upon to give legal opinions as such but rather their view as to what would and what would not please God.

The contractual liabilities in modern Arab system are based on fault (breach), damage and causation¹⁵. Thus, if an event amounting to force majeure occurs, the event is viewed in terms of the absence of fault on the part of the parties. This is the situation that permits unilateral rescission of a contract, should one party

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¹³ Rayner, S., (1991). Note on force majeure in islamic law. Arab Law Quarterly, 6(1):86.

¹⁴ Karl, D. J., (1991). Islamic law in saudi arabia: what foreign attorney's should know. George Washington Journal of International Law And Economic. United Kingdom. 161.

¹⁵ Firoozmand, M. R., (2007). Changed circumstances and immutability of contract: a comparative analysis of force majeure and related doctrines, Bus. L. Intl. 6: 161.

consider the situation has changed significantly or requires more effort than that originally contemplated¹⁶.

Even further, Shari'ah permits exceptions where there has been a change in a contracting party's personal circumstances, not just as a result of external events. For example if a person let to hire a house or shop, and afterwards became poor and involved in debt to a degree which he is unable to discharge himself from the contract but by the price of the house or shop, the Qadhi (judge) must dissolve the contract of hire, and sell the place for payment of the debt; because in the endurance of the contract the lessor sustains a super induced injury not incurred by the contract, which super induced injury, in this instance, is that the Qadhi will otherwise seize and imprison him on account of the debt¹⁷. Even if a unilateral withdrawal is ultimately deemed to be a breach of contract, damages will still be lower than they would have been under the Common Law. It is for the party seeking to rely on the provision to prove their case falls within it.

Under the Saudi contract law, a force majeure event does not terminate the contract but merely suspends its applicability until performance becomes possible again¹⁸. Indeed, if the force majeure event only touches part of the contract, it is likely that the contract will only be partially extinguished. Partial extinction usually happens where the court considers the part severed does not materially affect the majority of the contract. In the case of there is any counter-obligations, the contract will be modified accordingly.

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¹⁶Amkhan, A., (1991). Force Majeure and impossibility of performance in Arab contract law. Arab Law Quarterly, 6 (3): 299.

¹⁷Hamilton, C., (1982). The hedaya, Premier Book House, Lahore, 511.

¹⁸Amin, S.H., (1985). Islamic law in the contemporary world. Royston Limited. Glasgow, 51.

¹⁹Rayner, S., (1991). Note on force majeure in islamic law. Arab Law Quarterly, 6(1):86.

²⁰Karl, D. J., (1991). Islamic law in saudi arabia: what foreign attorney's should know. George Washington Journal of International Law And Economic. United Kingdom. 161.

Force Majeure in Islamic Modern Commercial Practice

Shariah fosters a different business climate within which Shariah compliance provisions are to be interpreted. For example, traditional Islam rejects the notion of insurance as *gharar* and too uncertain, which may be seen as an essential corollary to force majeure clauses. Such contract is in fact perceived by Islam as a form of gambling because the policy holder is set to benefit from the premiums in case of a loss²¹.

However the Saudi Government has felt compelled to recognise its role in business and have therefore accepted it, on the tacit understanding that such insurance companies plough the proceeds back into land development projects or other business endeavours in the Saudi Kingdom. Moreover, not only the principles and traditions of Saudi Law are different, but one must recognise that they are due to be interpreted in a far different juridical system. For example, contractual provisions that seek to oust the jurisdiction of the Saudi court and thus Shariah may not be recognised by Saudi judges²². In a similar vein, lawyers who practice Shariah Law are not called upon to give their legal opinions on the matters²³.

3. Conclusion

Under the Saudi Law, future circumstances are perceived as being neither predictable nor controllable; as it is only God who knows how things will turn out. However, the Shari'ah recognizes the principle of *pacta sunt servanda* which emphasized for fulfilment of promises and performance. The provision for relief where unexpected circumstances prevent parties from carrying out their obligations is based upon the principle of divine misadventure (*Aft al-Samaviiah*) or unavoidable disasters (*Jayehah*). The Islamic law also recognized impossibility of performance due to the change of circumstances, which known as, *Istihalah al-tanfidih*. There is also an equivalent concept of frustration in Shariah known as *Quwa Qahira* or *Quwat al-Qanun* which is broader than the English doctrine of frustration.

The principles of *nazariyyah al-hawadith al-tari'ah* or *nazariyyat al-zuruf al-istithna'iyah*, (intervening contingencies) are also applied to recognize the impossibility of performance. In addition, a number of applicable doctrines which existed in Saudi Arabia such as *Al-jawa'ih* (natural disaster) and *gharar* (risk) substantiated the application of force majeure in Saudi law. The Articles in *Al-Mejelle* also clearly provides the application of force majeure under Islamic law with the contention that the provisions vary from the conventional Shariah practices.

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²¹Acker, C.E., (1982). The insurance business. Middle East Executive Reports, 25.

²²Turck, N.B., (1988). Dispute resolution in Saudi Arabia. International Law, 22: 416-418.

²³ Anderson, J.N.D., (1959). Islamic law in the modern world. Stevens & Sons. London, 4.

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