

## inBrief



### Weathering the April Storms: Where will the burden fall under UAE law?

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25 April 2024

When TS Eliot wrote in 1922 that “April is the cruellest month” he likely never envisaged extreme weather of the proportions experienced in the UAE on the 16th of April 2024. What, then, of the parties to a contract? Ought *they* to have foreseen this and *catered* for it in the terms of their agreement? And how should the inevitable losses caused be allocated between them under UAE law? As the UAE continues its recovery, contracting parties across all commercial sectors will likely be considering these questions very carefully.

The starting point, as always, will be the terms of the contract itself. However, in the absence of the parties reaching an agreement as to what these require, Article 249 of the UAE Civil Code will undoubtedly feature prominently in any dispute. Article 249 provides (in translation) as follows:

*“If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.”*

James Whelan, writing in the Ministry of Justice’s Commentary on the UAE Civil Code, regards this provision as an exception to the general rule that it is not the function of the judge to create or vary contracts on behalf of the parties and states that the UAE legislature has restricted its application to cases of “unforeseen emergencies”.

The application of Article 249 of the UAE Civil Code is conditional upon the occurrence of an “exceptional emergency (or event) of a public nature” that could not have been foreseen at the time the contract was formed, and which renders performance of the obligation in question burdensome or onerous, but not impossible. An event of a “public” nature means that it affects the *entire* industry or economy rather than a particular venture or project. Al Sanhoury offers useful examples of what

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may constitute “exceptional emergencies” such as earthquakes, wars or an epidemic, and floods are specifically included on this list.

In UAE law, “exceptional emergencies of a public nature” for the purposes of Article 249 are to be contrasted with “*force majeure* events” as stated in Article 273 of the UAE Civil Code. Whereas *force majeure* events render the performance of an obligation *impossible* and result in the *termination* of the obligation, “unforeseen emergencies of a public nature” render the performance of contractual obligations “onerous and excessive ... without reaching the level of impossibility” and “result only in the *reduction* of the obligation to a reasonable level and the consequences are thus borne by the obligee and the obligor”.

Article 249 is a mandatory provision which UAE law precludes contracting out of. Parties to contracts governed by UAE law will therefore need to consider, honestly and realistically, the impact of the April Storms on the performance of their own and each other’s obligations to determine whether (and, if so, to what extent) Articles 249 and 273 might apply.

Obligors tempted to argue that Article 249 applies and that the performance of an obligation that has become more onerous should consequently be reduced by the court to a more reasonable level will need to remember that an increased burden of itself is insufficient: performance must carry with it the threat of “grave loss” before the principle bites.

Similarly, it would obviously be tempting for an obligee, seeking to resist an application under Article 249, to attempt to argue that the relevant event was foreseen (or was at least of a *type* that could or *ought to have been* foreseen) and that therefore the judicial discretion is simply not engaged. To contend, for example, that even if this *particular* storm was not foreseen at the time the contract was formed the contract already speaks to what happens in the event of extreme adverse weather in general and therefore the parties can be taken to have envisaged these sorts of circumstances.

However, these arguments would not only be contrary to both the letter and the spirit of the Code itself but are also at odds with the relevant principle of Islamic Shariah law (*Udur*) from which Article 249 is derived.

Article 249 is engaged when, despite the circumstances, the terms of the contract *prima facie* continue to require performance by the obligor but this would cause him grave loss. Even if a contract contains terms specifying how the risk of extreme weather events is to be borne, Article 249 enables the Court to step in and “reduce the oppressive obligation to a reasonable level if justice so requires”, and any agreement to the contrary shall be void.

The dispute resolution team at Afridi & Angell practices in English and Arabic, and is well-equipped to advise on bringing and defending Article 249 applications across the full range of commercial sectors in litigations and arbitrations both onshore and offshore. ■



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