Reviving old solutions for new problems

Joseph Chedrawe and Patrick O'Grady analyse supply chain dispute risk in the Middle East and how the region may already have tools from its rich history to deal with risks.

As a region that boasts a steady stream of giga-projects, it is unsurprising that recent global events like the COVID-19 pandemic and the war in Ukraine have magnified the risk of supply chain disputes in the Middle East. From the disruption of supply, procurement, goods, and labour, to soaring inflation, fluctuating exchange rates, and sky-high commodity prices, today, contracting parties' circumstances are often far beyond what was contemplated at the start of the contractual relationship. One survey reports that more than 70 per cent of respondents had encountered disputes related to supply chain impacts between 2020 and 2021 (Arcadis 2022 Global Construction Disputes Report). Some may search for novel solutions to tackle these unprecedented problems, but with well-established legal doctrines, international standard model clauses, and a rich history of alternative dispute resolution, the Middle East may already have the necessary tools to address supply chain dispute risk.

WELL-ESTABLISHED LEGAL DOCTRINES

Although the events of recent years are extraordinary, it is not unusual of course for unforeseen events to affect the ability of one or both parties to perform their contractual obligations. Over the centuries, several doctrines have emerged to address unforeseeable circumstances:

» **Force Majeure** (a French term literally translated as "greater force") has its origins in 1800s French civil law, specifically the Napoleonic Code. Its application has the effect of excusing one or both parties from performance following the occurrence of unforeseen events outside a party's control. With the strong influence of the Napoleonic Code on its Middle East-equivalent civil codes, Force Majeure has been well-established in the Arab world since the mid-1900s.

» The **hardship** doctrine also originated (albeit more recently) under French civil law and has since been adopted in the civil codes of other civil law jurisdictions, including in the Middle East. While the doctrine does not exist on its own under English law, the courts of England and Wales recognise hardship clauses in contracts as valid and enforceable. A successful hardship claim allows a contract to be adjusted, or in some cases terminated, where performance of that contract has become onerous (but not impossible), placing an excessive burden on one party.

» The doctrine of **frustration** traces its origins to Roman law more than two thousand years ago. Its application would end the innocent parties' obligations where the subject matter of the contract was effectively destroyed. The frustration doctrine then firmly planted its roots in English common law in the mid-1800s, and has since spread across the globe to other common law jurisdictions. By that doctrine, a contract may be discharged where an event occurs after its formation, which is unexpected and beyond the control of the parties, and which makes performance impossible or transforms the obligation into one that is radically different from that undertaken at the moment of entry into the contract.

» The doctrine of **supervening illegality** is closely related to the frustration doctrine and was founded in English common law in the early-1900s, with some of the early cases related to disease and quarantine restrictions in respect of food and livestock. According to the supervening illegality doctrine, a contract may be discharged if it becomes illegal to perform under the applicable law (for example, due to legislative

change) and that illegality would have rendered the contract void or unenforceable at the time of contracting.

In Islamic law, the longstanding doctrine of ***Jawaih*** ("calamities") under the *Shari'ah* has also been available to excuse contractual performance for a supervening event that is out of the innocent party's control and makes the satisfaction of a contractual obligation impossible or unduly burdensome. The International Islamic Fiqh Academy for the study of Islamic law, which was established in 1983 and has 57 member states, recognises that, in these circumstances, judges have the authority to terminate the contract, rebalance the party's contractual obligations, or suspend performance during the supervening event.

A survey of more than 30 participants at the 11th International Chamber of Commerce (ICC)'s MENA Conference on International Arbitration in Abu Dhabi in February 2023, (marking the centenary of the ICC International Court of Arbitration), asked which, if any, of four doctrines best addresses the supply chain-related disputes caused by the global COVID-19 pandemic under UAE law. The civil law doctrines of Force Majeure (45.16 per cent) and hardship (38.71 per cent) were far and away the most popular choices, with the common law doctrines of frustration (6.45 per cent) and supervening illegality (6.45 per cent) trailing behind. The panel and audience discussion around the survey was unanimous that, in reality, no single doctrine provides a one-size-fits-all solution to the various supply chain issues that parties may face on a project. Rather, parties must consider the applicability of each on a case-by-case basis, with due regard to the applicable law (particularly given the different approaches under civil and common law), the requirements of the relevant doctrine, and the remedies offered by each.

ICC FORCE MAJEURE AND HARDSHIP CLAUSES 2020

It is common for contracts in the Middle East to include Force Majeure clauses, which typically list unforeseeable events beyond the parties' control and provide relief. There is also a growing trend in the Middle East, especially since the COVID-19 pandemic, for contracts to include hardship clauses, which provide relief to a party that has suffered as a result of a change in economic circumstances that makes the performance of that party's obligations excessively burdensome.

In March 2020, the ICC released "The ICC Force Majeure and Hardship Clauses". The first standard clause was published in 1985, with updated Force Majeure and Hardship clauses published in 2003. The timing of the release during the rise of the COVID-19

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pandemic was coincidental since the ICC Commission on Commercial Law and Practice had appointed the Working Group in 2017, with the text approved by the ICC Executive Board in late 2019.

The Force Majeure Clause 2020 provides both a list of specified events presumed to be Force Majeure and a general three-limb definition against which unlisted events may be assessed by reference to a reasonableness criterion. The parties may modify the clause to be more restrictive (e.g. by removing the reasonableness criterion) or more flexible (e.g. by excluding the foreseeability criterion).

The main innovation in the Hardship Clause 2020is that it provides three options when parties are unable to agree alternative contractual terms: (1) termination by the party invoking the clause, (2) either party is entitled to request the judge/arbitrator to adapt the contract to restore its equilibrium or terminate the contract, or (3) either party is entitled to request the judge/arbitrator to terminate the contract. The accompanying ICC Introductory Note and Commentary explains that the new wording aims to give parties certainty since the way in which domestic laws would apply to this scenario may differ substantially from country to country.

ALTERNATIVE DISPUTE RESOLUTION IN THE MIDDLE EAST

When urgent supply chain disputes arise, it is important to consider alternative dispute resolution (ADR) options - negotiation, conciliation, mediation, neutral arbiter, among others. Until recently, in the Middle East, ADR was not in fashion, with parties generally preferring to opt for more formal dispute resolution proceedings via litigation or arbitration. Even when ADR was mandated in multi-tier dispute resolution clauses by way of an amicable settlement 'cooling off' period and/or mediation, parties often took a tokenistic or box-ticking approach - or would even agree to waive the pre-steps - in order to commence litigation or arbitration immediately. There are many reasons for this, including concerns about enforceability and futility.

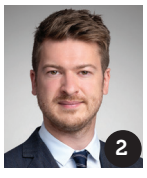
This trend represents a clear departure from the traditional and historic approach in the Middle East where ADR has been an integral part of the regional fabric since even before the start of Islam, when tribes are said to have referred disputes to neutral third parties. The Holy Qur'an states at verse 4:35, "If you fear dissention between a married couple, send forth an arbiter from his family and an arbiter from her family. If they desire reconciliation, God will bring them together". In his early life, the Prophet Muhammad famously helped feuding tribes resolve a dispute over the reconstruction of the Kaba'a by finding common ground between the parties and proposing a solution that worked for both sides.

In more recent times, particularly since the rise of supply chain disputes resulting from the COVID-19 pandemic, more and more parties are seeking to rely on ADR methods. In doing so, they may resolve disputes efficiently, find practical solutions, preserve their commercial relationships, and avoid a potentially lengthy battle over a supply problem that was probably not caused by either party. The ICC International Centre for ADR also provides services in relation to (among others) mediation, experts, and dispute boards.

OLD SOLUTIONS TO NEW PROBLEMS

The recent causes of supply chain disruption in the Middle East may be novel, but these new problems may be resolved by reviving old solutions - be they well-established legal doctrines, international standard model clauses, or methods of alternative dispute resolution - some of which have formed part of the fabric of Middle East traditions for decades and even centuries.

This article builds on topics from a panel session the author, Joseph Chedrawe, moderated at the 11th ICC MENA Conference on International Arbitration in Abu Dhabi in February 2023, organised by the International Chamber of Commerce Dispute Resolution Services (DRS) and its International Court of Arbitration.



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